

COMMENTS

CRIMMIGRATION ON PUBLIC LANDS: INTERAGENCY CONFLICTS OVER PRIORITIZING BORDER ENFORCEMENT AND ENVIRONMENTAL PROTECTION

BY
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Federal public lands along the United States southwestern border are a platform for regulatory disputes concerning the proper management of natural resources, infrastructure, human activity, and border security. U.S. border policy in recent decades has been characterized by the criminalization of the immigration system, which has led to increased border enforcement on public lands. This increased enforcement activity impacts both the livelihoods of refugees and migrants coming to the U.S. across the border, as well as environmentally sensitive ecosystems. This Comment explores how U.S. border policy interacts with public land protection and examines the conflicting interests and mandated responsibilities of relevant agencies. It argues that the mission conflict between U.S. Customs and Border Patrol and federal land management agencies results in a systematic prioritization of border enforcement over the protection of public lands. This Comment also discusses the legal implications of a systematic prioritization of border enforcement, suggesting that the ultimate consequence of interagency mission conflict is the formation of a “monster crimmigrator,” exacerbating the crimmigration system.

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I. INTRODUCTION

As the political climate of the United States increasingly frames immigration as a pressing national security concern, the scope of governmental border enforcement and regulation of unauthorized border crossings on federal public lands has become an important facet of a contentious topic.¹ Conflicting public values over federal public land

¹ See Erik Ortiz, *Influx of Migrants at Border Gains Renewed Attention as ‘Crisis’ Rhetoric Spreads*, NBC NEWS (Oct. 4, 2023), <https://perma.cc/A3GC-7873> (noting the “crisis” rhetoric coming from politicians that directs national attention and frustrations to the border); *Statement from President Joe Biden on the Bipartisan Senate Border Security Negotiations*, THE WHITE HOUSE (Jan. 26, 2024), <https://perma.cc/2YQC-23UH>.

management have posed questions to Congress for decades.² Generations of lawmakers have grappled with the extent to which the federal government should own land, whether to focus resources on maintenance of existing infrastructure and lands or acquisition of new areas, and how to balance public use with protection.³ Additionally, the U.S. government is concerned with ensuring the security of international borders along federal lands, particularly along and near the southwest border.⁴ Yet “securing” the border raises numerous challenges due to the patchwork of regulatory jurisdiction over the border, leading to conflicting agency missions and divergent views on how to enforce environmental regulations that inhibit enforcement.⁵ Simultaneously, increased human migration across environmentally sensitive spaces and consequent U.S. Customs and Border Protection (Border Patrol) responses threaten the public interests that shape public land law and policy.

This Comment demonstrates how the conflicting missions of Border Patrol and land management agencies result in a systematic prioritization of border enforcement over the protection of public lands. Part II begins by explaining how the criminalization of the immigration system in the United States has changed border management throughout recent decades. It then tees up the mission conflict by explaining how U.S. border policy directly implicates public lands, along with the various enforcement mechanisms afforded to both Border Patrol and federal land managers. This Comment will then explore the conflicting interests between relevant executive departments and their constituent agencies when prioritizing national security interests over the protection of public lands. Part III analogizes this dynamic to interagency conflict that exists in other areas of immigration law—informed by the research of legal scholar Stephen Lee⁶—and discusses the legal implications of a systematic prioritization of border enforcement. Finally, Part III calls on legal scholar Juliet Stumpf’s concept of the “crimmigrator”⁷ to suggest

² CAROL H. VINCENT & LAURA A. HANSON, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 17–18 (2020) [hereinafter CRS REPORT ON FEDERAL LAND OWNERSHIP].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1092–93 (2011).

⁷ Crimmigration law is the convergence of immigration and criminal law. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006) [hereinafter Stumpf, *Crimmigration Crisis*]. “Crimmigrator” is a term coined by Professor Stumpf and refers to decision makers within the crimmigration system or those empowered to move individuals into the crimmigration system. Juliet P. Stumpf, *The Crimmigrators: How Deciding Who Decides Can Determine the Decision* (2023) (unpublished manuscript) (on file with author) [hereinafter Stumpf, *Crimmigrators Deciding*] (“What calls for study now is not just what crimmigration is, but who wields crimmigration powers, that is, who the crimmigrators are. More, it is critical to understand how the decision to assign a crimmigrator rather than another decisionmaker, can affect the outcome of the decision. Deciding who the decisionmaker is can even shape the question that is up for

that the ultimate consequence of the interagency mission conflict is the creation of a “monster crimmigrator.”

This Comment identifies the interagency conflict that exists in the crossover of the crimmigration and environmental protection systems, and crimmigration that results from a manufactured conflict between two U.S. policies.⁸ While this Comment highlights the ways that environmental protections have taken a backseat due to increased border security, this phenomenon does not diminish the fact that increased border security also has catastrophic ramifications on people’s lives. Millions of refugees, asylum seekers, and migrants cross the southwestern border every year for important reasons and are also implicated by the monster crimmigrator and interagency conflict brewing over the management of public lands along the border.⁹ Those stories are necessary, but are best told by those who have experienced crossing the border within this system.¹⁰

II. THE MISSION CONFLICT

To contextualize the root of interagency conflict, this Part explains how recent changes in border management—a product of the crimmigration system—influence migration patterns. The fact that migration is occurring through environmentally sensitive spaces is not because people prefer to move through those spaces. Criminalized and securitized U.S. border enforcement policies are pushing people coming north out of more traditional, direct, and safer pathways and into dangerous and environmentally sensitive areas. Global north-south dynamics wrest people from their homes and divide families, leading to the need to migrate.¹¹ U.S. immigration policies, historic and current, mean that immigrants of color have a harder time accessing authorized means of entry, while those of European descent typically have an easier time.¹² The result is more human traffic through rural areas that overlap with federal public lands, and more use of natural resources that would not occur if people on the move had better options.

Three contemporary border security strategies paint the existing policy picture: Prevention Through Deterrence, Consequence Delivery

decision. Ultimately, determining the decisionmaker can determine whether an issue falls within or outside of the boundaries of crimmigration itself.”)

⁸ *Id.*

⁹ *Southwest Land Border Encounters*, U.S. CUSTOMS AND BORDER PROTECTION (Feb. 13, 2024), <https://perma.cc/CQ86-Q86K>; *Refugees, Asylum Seekers and Migrants*, AMNESTY INTERNATIONAL, <https://perma.cc/C9G9-CLAG> (last visited Feb. 29, 2024).

¹⁰ See, e.g., *Crossing the Border: A Young Central American Mother’s Story*, INT’L RESCUE COMM. (June 27, 2019), <https://perma.cc/3R9G-2XS7>; Haley Sweetland Edwards, *The Stories of Migrants Risking Everything for a Better Life*, TIME (Jan. 24, 2019), <https://perma.cc/3Z3B-JTQP>.

¹¹ Iván González Alvarado & Hilda Sánchez Martínez, *Migration in Latin America and the Caribbean: A View From the ICFTU/ORIT*, INT’L LAB. ORG. (2002).

¹² Stumpf, *Crimmigration Crisis*, *supra* note 7, at 416.

System, and Remain in Mexico. This Part will focus on the specific implications and consequences of these policies and current state of border management on sections of the border that overlap with federal public lands. This report lays out the complex patchwork of federal land management agencies that oversee public lands along the southwestern border. The environmental impacts of migration, as well as the environmental impacts of Border Patrol's response to migration, highlight the interagency conflict that exists when confronted with the crimmigration system.

Building from there, this Part will describe the statutorily delegated authority afforded to Border Patrol and federal land managers in response to immigration-related activity on public lands. More specifically, this Part will show how Border Patrol actions are, in theory, limited by environmental regulations but come with significant statutory workarounds. Additionally, federal land management agencies have law enforcement authority that is limited to their respective agency missions and goals. Finally, this Part introduces the 2006 Memorandum of Understanding among U.S. Department of Homeland Security (DHS), the U.S. Department of Interior (DOI), and the U.S. Department of Agriculture (USDA), a formal agreement to promote cooperation and coordination in carrying out each agency's mission.¹³

A. Changes in Border Management

United States border policy that emphasizes prevention of immigration through deterrence strategies fuels the crimmigration system on public lands. As a result of an increasingly criminalized response to immigration, DHS has implemented significant changes in its approach to border management.¹⁴ The crimmigration system—the merger of criminal law and immigration law—has not only informed the public's perception of individuals attempting to enter into the United States by equating them to criminals subject to punishment, but has also shaped U.S. policy on monitoring and patrolling borders and ports of entry.¹⁵ The crimmigration system, just like the criminal law system, functions as a gatekeeper and leaves the government with discretion to use persuasion or force to remove an individual.¹⁶ Policymakers use membership theory as a justification for exclusion: where “members” of society, citizens in this circumstance, exclude noncitizens to ensure

¹³ Memorandum of Understanding Among U.S. Dep't of Homeland Sec. and U.S. Dep't of the Interior and U.S. Dep't of Agric. Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States' Borders 1 (2006) (on file with author) [hereinafter MOU]; see also *U.S. Customs and Border Protection, before the House Comm. on Nat. Res., Subcomm. on Nat'l Parks, Forests, and Pub. Lands, “National Security and Federal Lands Protection Act”* (Aug. 1, 2011), <https://perma.cc/HH9R-ADKM> (statement for the record) (describing the MOU's guidance).

¹⁴ See Stumpf, *Crimmigration Crisis*, *supra* note 7, at 385.

¹⁵ *Id.* at 412–13.

¹⁶ *Id.* at 396–97.

members receive their fair share of public benefits and citizenship privileges.¹⁷ Such stratified conceptions of “membership” manifest by casting out nonmembers from obtaining citizenship through means of borders, walls, rules, and public condemnation.¹⁸ This section lays out some of the specific crimmigration strategies the U.S. government has employed over recent decades and concludes by noting the legacy of these strategies on public lands.¹⁹

1. *Prevention Through Deterrence*

In 1994, the U.S. government implemented a “Prevention Through Deterrence” approach to immigration enforcement that still lingers as a primary border control strategy.²⁰ The Prevention Through Deterrence policy attempts to discourage refugees and migrants²¹ from crossing the United States and Mexico border near urban ports of entry with the intention of funneling individuals through more remote and depopulated regions where the natural environment would act as a deterrent to movement.²² DHS’s Strategic Plan indicates Border Patrol seeks to achieve its goals in deterrence by increasing the number of agents, making effective use of surveillance technology, and raising the risk of apprehension.²³ The Plan is explicit: the agency aims to “raise the risk of

¹⁷ *Id.* at 377.

¹⁸ *Id.* at 419.

¹⁹ The policies discussed in this section have very real and harmful implications for individuals migrating across the border. This paper engages in a descriptive project with limited scope, explaining U.S. goals, how U.S. policies fail to achieve those goals, and how this has negatively impacted the administration of public lands. The paradox of these harmful policies is that they are both ineffective *and* inhumane: they have had extraordinarily devastating effects on the livelihoods of many asylum seekers, refugees, and migrants crossing the border. This aspect of the legacy of crimmigration strategies should not be overlooked. See *Refugees and Migrants*, HUM. RTS. WATCH (2024), <https://perma.cc/L5V7-XRKH>; *Exposing Human Rights Violations Behind Laws That Criminalize Migration: Transparency Project*, NAT’L IMMIGRANT JUST. CTR., <https://perma.cc/P585-Z65C> (last visited Mar. 23, 2024).

²⁰ *Hostile Terrain 94: Background*, UNDOCUMENTED MIGRATION PROJ., <https://perma.cc/Q3DN-EBM5> (last visited Mar. 23, 2023).

²¹ People cross borders for numerous important reasons. “Refugee”, “asylum seeker,” and “migrant” are a few temporary terms and labels used to describe people based on their individual experiences. However, they do not reflect the whole identity of women, children, and men who have left their homes behind to start a new life in a new country. *Refugees, Asylum Seekers and Migrants*, AMNESTY INT’L, <https://perma.cc/7XNU-S2SS> (last visited Feb. 29, 2024). Because this paper focuses on the administrative management of the border in general, the terms “refugees” and “migrants” will be used together to describe mixed groups of people on the move. For more discussion on this choice of terminology, see *‘Refugees’ and ‘Migrants’ Frequently Asked Questions*, U.N. HIGH COMM’R FOR REFUGEES (Aug. 30, 2018), <https://perma.cc/2BZ3-W353>; CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 18–19 (2015).

²² *Id.*

²³ U.S. BORDER PATROL, BORDER PATROL STRATEGIC PLAN 1994 AND BEYOND: NATIONAL STRATEGY 1, 6 (1994). Border Patrol has been managed by DHS since DHS was formed in 2002. Homeland Security Act of 2002, Pub. L. No. 107-296, Sec. 441, 116 Stat. 2135, 2192 (2002) (codified at 6 U.S.C. § 251).

apprehension to the point that many will consider it futile to continue to attempt illegal entry.”²⁴ With increased funding, personnel, and equipment, Border Patrol closed off and tightened security at crossing points in the more populated and urban ports of entry such as San Diego-Tijuana, Nogales-Nogales, and Brownsville-Matamoros.²⁵ However, contrary to DHS’s goal of reducing unauthorized entries, the number of individuals seeking entry into the United States did not decline under the Prevention Through Deterrence strategy.²⁶ Rather, the policy redistributed migration flows into remote, dangerous, and less frequently patrolled areas along the border.²⁷ The University of Arizona’s Binational Migration Institute morbidly confirmed Prevention Through Deterrence’s “funnel effect” by measuring an exponential increase in the number of recovered bodies and reported deaths along southern Arizona’s border.²⁸

2. Consequence Delivery System

In the aftermath of the September 11, 2001 attacks, the U.S. government touted political discourse that conflated border enforcement with national security, relating increased securitization with counterterrorism efforts.²⁹ Congress adopted legislation that transferred authority of Border Patrol to U.S. Customs and Border Protection within DHS, away from the now-dissolved Immigration and Naturalization Service.³⁰ In 2011, DHS increased Border Patrol’s budget and implemented the Consequence Delivery System (CDS) initiative with the aim of alleviating the shortcomings of the existing Prevention Through Deterrence strategies.³¹ In practice, CDS “assigns escalating punishments tailored to categories of individual unauthorized border-crossers with the end goal of reducing recidivism or repeat migration attempts.”³² Programs developed under CDS increased criminal prosecutions and imprisonment for unlawful entry and re-entry as well as fast-tracked proceedings.³³ Despite the intent to fill in the gaps where Prevention Through Deterrence failed, CDS programs similarly did not achieve their long-term deterrent goals, especially as to refugees and

²⁴ *Id.* at 6.

²⁵ DANIEL E. MARTÍNEZ ET AL., *CTR. FOR MIGRATION STUD., BORDER ENFORCEMENT DEVELOPMENTS SINCE 1993 AND HOW TO CHANGE CBP 2* (2020), <https://perma.cc/HSX8-5LN3>. Border Patrol’s enforcement efforts in specific areas went by operation names: San Diego-Tijuana (1994 Operation Gatekeeper), Nogales-Nogales (1995 Operation Safeguard), and Brownsville-Matamoros (1997 Operation Rio Grande). *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ RAQUEL RUBIO-GOLDSMITH, ET AL., *IMMIGR. POL’Y CTR., A HUMANITARIAN CRISIS AT THE BORDER: NEW ESTIMATES OF DEATHS AMON UNAUTHORIZED IMMIGRANTS 2* (Feb. 2007).

²⁹ MARTÍNEZ ET AL., *supra* note 25, at 1–2.

³⁰ *Id.* at 2–3; Homeland Security Act of 2002, Pub. L. No. 107-296, Sec. 441, 116 Stat. 2135, 2192 (2002) (codified at 6 U.S.C. § 251).

³¹ MARTÍNEZ ET AL., *supra* note 25, at 3.

³² *Id.*

³³ *Id.*

migrants who already had strong and established connections pulling them to the United States.³⁴ As such, migration across the remote portions of the border persisted under CDS.³⁵

3. *President Trump's Remain in Mexico Policy*

The Trump Administration implemented Migrant Protection Protocols, or the “Remain in Mexico” policy, with a similar goal as that of previous enforcement modalities: make the immigration process more arduous, dangerous, and expensive to encourage people to abandon their claims and/or refrain from attempting to migrate to the United States in the first place.³⁶ The Trump Administration sought to prevent people who crossed between ports of entry from applying for asylum by banning applications from those asylum-seekers who had not first applied in a third country, metering the amount of individuals who could cross the border, and conducting rapid asylum trials without opportunity for legal representation.³⁷ In doing so, the Remain in Mexico policy effectively equated asylum-seekers with criminals and eroded the value of asylum-seeking programs in the United States.³⁸ By making asylum less attainable, the Trump Administration aimed to deter people from attempting to follow through with or bring asylum claims. Yet the opposite has proven to be true, especially since the COVID-19 pandemic, as refugees and migrants now seem to have shifted from the open process of asylum claims in favor of more sophisticated or dangerous modes of entry via public lands.³⁹

4. *Looking Ahead*

The Biden Administration has indicated its intent to mirror the prior administration's tactic of preventing and discouraging illegal immigration by harshening the requirements and process through which individuals can seek asylum in the United States.⁴⁰ President Biden's most recently proposed rule seeks to reduce the number of refugees and migrants seeking to cross the border by “introducing a rebuttable presumption of asylum ineligibility for certain noncitizens who neither avail themselves of a lawful, safe, and orderly pathway to the United States nor seek asylum or other protection in a country through which

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.* at 7.

³⁷ *Id.* at 9.

³⁸ *See id.* at 7–8 (describing the impacts of the “Remain in Mexico” policy, including returning “apprehended immigrants” to the country the immigrant arrived from and limiting and limiting asylum seekers' access to asylum proceedings).

³⁹ *Id.* at 2, 10.

⁴⁰ *See* Miriam Jordan, *Biden Administration Announces New Border Crackdown*, N.Y. TIMES (Feb. 21, 2023), <https://perma.cc/5V69-AAF2> (describing the Biden Administration's “toughest policy yet to crack down on unlawful entries”).

they travel.”⁴¹ This new rule is in response to the Biden administration’s plan to repeal Title 42,⁴² a pandemic-specific policy that allowed border authorities to rapidly remove refugees and migrants back to Mexico.⁴³ But by limiting the likelihood that individuals can claim asylum at ports of entry, more refugees and migrants are likely to attempt to enter the country through other means and in more remote locations along the border.⁴⁴

Evidently, the legacy of Prevention Through Deterrence strategy to border management remains. Rather than deter people from entering the United States in the first place, current border policies perpetuate a membership theory of exclusion by creating stricter and increasingly criminalized immigration rules that dictate who is allowed into this country or who “belongs” in this country. As a result, the government is inadvertently pushing migration avenues to more remote, rural, and dangerous border zones where individuals may perceive a higher likelihood of successful entry into the United States.

B. Implications of U.S. Border Policy on Public Lands

More than 40% of the southwestern border of the United States abuts federal and tribal lands.⁴⁵ These lands are directly impacted by the crimmigration system’s influence on U.S. border policy and management. Rather than prevent illegal border crossings (as recent policy intends) management efforts divert migration flows away from urban ports of entry and towards rural areas, resulting in increased traffic on public lands.⁴⁶ As such, federal lands along the southwestern border have seen increased immigration since the mid-1990s.⁴⁷ Generally, these federal border lands are remote and inhospitable terrain with limited enforcement coverage.⁴⁸ In response to this traffic, “Border Patrol has nearly doubled the number of its agents on patrol, constructed hundreds

⁴¹ Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. pt. 208).

⁴² Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 16559 (proposed Mar. 24, 2020) (codified at 42 C.F.R. pt. 71); see also Jordan, *supra*, note 40 (describing this rule as Title 42).

⁴³ Jordan, *supra* note 40.

⁴⁴ *Id.*; Jesse Franzblau, *Restricting Asylum Is Not A Humane Or Logical Solution: The Flimsy Reasoning Behind The Asylum Ban*, NAT’L IMMIGRANT JUST. CTR. (Mar. 15, 2023), <https://perma.cc/UZ2R-K6E4>.

⁴⁵ CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 23.

⁴⁶ UNDOCUMENTED MIGRATION PROJ., *supra* note 20.

⁴⁷ *The Border: Are Environmental Laws and Regulations Impeding Security and Harming the Environment?: Joint Hearing Before the Subcomm. on Nat’l Sec., Homeland Defense and Foreign Operations of the Comm. on Oversight and Gov’t Reform and the Subcomm. on Nat’l Parks, Forests, and Public Lands of the Comm. on Nat’l Resources*, 112th Cong. 2–3 (2011) [hereinafter *Hearing on the Border*].

⁴⁸ Kevin Cooney, *Weaponizing the Desert at the U.S.-Mexico Border*, EDGE EFFECTS, <https://perma.cc/RTE7-3CJM> (Feb. 18, 2020).

of miles of pedestrian fences and vehicle barriers, and installed surveillance equipment on and near [federal] lands[.]”⁴⁹

Public lands are held in trust by the federal government, which has delegated authority to federal agencies to manage those lands for the public benefit and interest of U.S. citizens.⁵⁰ Under this regime, competing interests inevitably provoke disputes regarding management of public resources and proper land use.⁵¹ Public lands law was once a system concerned with divesting federal lands and resources into state and private uses but is now an area of law that uses statutes, rules, practices, and common law doctrines to define who has a right to use a parcel of federal land or its resources.⁵² Many see access to the use of public lands as a privileged right inherent in citizenship, whether for recreating, generating energy, grazing, logging, or benefitting from other biodiversity services.⁵³ For others, the primary goal of managing public lands is long-term preservation and wildlife conservation.⁵⁴

Determining who has authority to regulate enforcement activity on federal lands is complicated. Although DHS oversees Border Patrol and takes the lead role in securing international borders, a patchwork of various federal agencies manage the federal and tribal land sections of the border, such as the U.S. Forest Service (USFS) under USDA and other DOI constituent agencies.⁵⁵ Under “one estimate, six different agencies manage 621.5 (linear) miles of federal lands along the southwestern border.”⁵⁶ According to the House Committee on Natural Resources, about 26.7 million acres of federal lands exist within 100 miles of the border.⁵⁷ As illustrated by Figure 1 below, nearly half of the federal lands adjacent to the border (12.3 million acres) are managed by the Bureau of Land Management (BLM), 3.8 million acres by USFS, 2.4 million acres by the National Park Service (NPS), 2.2 million acres by the Fish and Wildlife Service (FWS), and the remaining 6 million acres are managed by Department of Defense and other federal agencies.⁵⁸ Differences in departmental and agency missions, statutory mandates, and regulatory

⁴⁹ See Border Security and Responsibility Act of 2013, H.R. 547, 113th Cong. § 3(2) (2013) (legislative findings).

⁵⁰ CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 1, 4–6; see also *id.* at 21–22 (describing the debate over local versus national beneficiaries to public lands but within a general consensus that public lands should be managed for public benefit of U.S. citizens).

⁵¹ See *id.* at 1 (characterizing the debate surrounding federal land use).

⁵² JOHN D. LESHY ET AL., COGGINS & WILKINSON’S FEDERAL PUBLIC LAND AND RESOURCES LAW 3 (8th ed. 2022).

⁵³ *Id.* at 22–23.

⁵⁴ *Id.* at 23.

⁵⁵ *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> (Jan. 23, 2024); CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 24 fig.4.

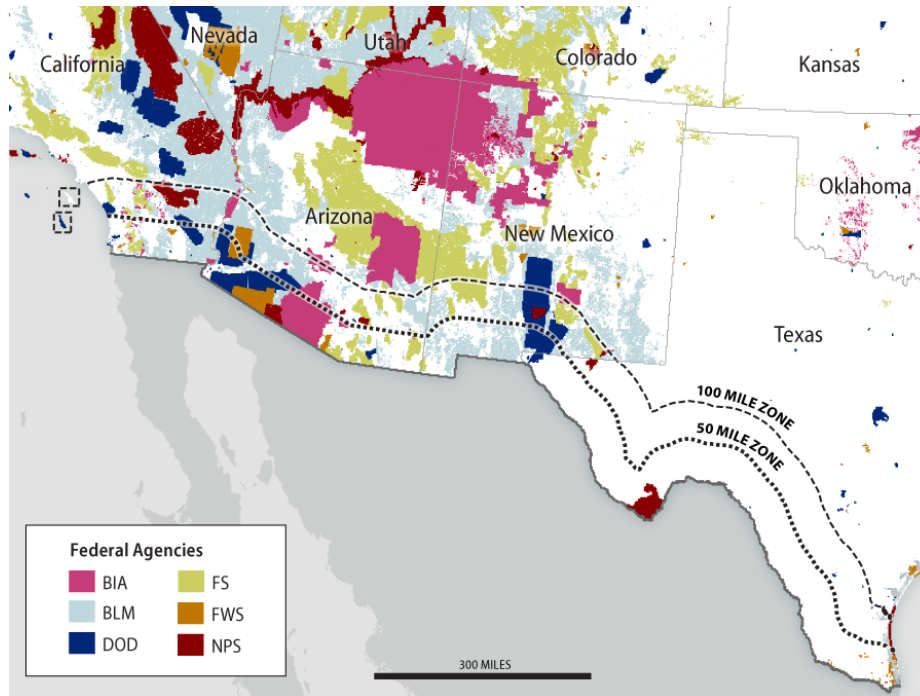
⁵⁶ CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 22.

⁵⁷ *Id.*

⁵⁸ *Id.*

authority create jurisdictional complexities that have potential to hinder border control and detract from effective land management.⁵⁹

Figure 1. Federal and Indian Lands Near the Southwestern Border⁶⁰



The tension between the goals of federal land management agencies and Border Patrol is acutely present in discourse surrounding natural resource protection and preservation of public lands. Land management agencies, on the one hand, are tasked with minimizing and mitigating environmental harms on public lands.⁶¹ Environmental impact as a result of increased migration is widely accepted as fact; however, the primary

⁵⁹ See LESHY ET AL., *supra* note 52, at 432 (detailing first the Trump Administration proclamation of a border emergency, precluding BLM from a FLPMA withdrawal of sage grouse habitat); *id.* at 648 (describing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), where an agency had no statutory authority to exclude Mexican trucks from entering the United States and so had no obligation to gather data on associated environmental harms); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-590, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LAND 4, 7–8, 10 (2004) (noting lack of cooperation between border patrol and land management agencies along the border, the disparate missions for agencies along the border, and the legislative dampening of border control functions).

⁶⁰ CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 24 fig.4.

⁶¹ See LESHY ET AL., *supra* note 52, at 24–27 (describing the roles of various federal agencies in managing federal lands for conservation).

underlying drivers of this degradation are subject to controversy.⁶² It is convenient for proponents of public land protection to point to the ecological footprint of migration as a root cause of environmental harms, who then have vocalized a need for greater regulation and border enforcement to curb the degradation of particularly sensitive and resource-rich public lands.⁶³

However, attributing environmental degradation to human migration glosses over the critical point that such impact is a byproduct of the crimmigration-informed policies forcing people to migrate across public lands in the first place. Again, migration through remote and environmentally sensitive places does not occur because of preference or choice. Additionally, federal land management agencies and proponents of public land protection have expressed concern for the impacts that DHS's operational and regulatory activities have on the environment, calling for limited authorization and stricter rules around when and where DHS can access and utilize these lands.⁶⁴ Ultimately, increased migration across public lands as a result of crimmigration policy and the consequent Border Patrol responses threaten the public interests that shape public land law and policy.

The agenda to protect and conserve public lands somewhat paradoxically calls for more border enforcement to curtail the environmental impacts of increased migration.⁶⁵ On the one hand, some environmental activists have expressed that unauthorized immigration is directly harming the environment, and advocate for stricter border enforcement.⁶⁶ However, increased border enforcement means increased access and infrastructure development by Border Patrol, such as surveillance centers and barrier construction.⁶⁷ These Border Patrol activities are a significant burden on public lands, potentially frustrating the mission and goals of land managers.

As a result of recent policy changes, immigration patterns have shifted to more remote areas along the U.S. and Mexico border. Many of these lands are wilderness areas and wildlife refuges recognized by the

⁶² Lisa M. Meierotto, *The Blame Game on the Border: Perceptions of Environmental Degradation on the United States-Mexico Border*, 71 HUMAN ORG. 11, 14 (2012).

⁶³ *Id.*

⁶⁴ *See id.* at 15–16 (describing interviews conducted along the border with respondents including locals, visitors, and federal employees expressing concerns over Border Patrol's impacts and authority).

⁶⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-573T, SOUTHWEST BORDER: BORDER PATROL OPERATIONS ON FEDERAL LANDS 138 (2011) (statement of Anu Mittal, Director Nat. Res. and Env't.).

⁶⁶ *See* Ruxandra Guidi, *Immigrants Aren't the Real Threat to Public Lands*, HIGH COUNTRY NEWS (Aug. 20, 2018), <https://perma.cc/CG3U-MFYR> (“This is an argument that has been made for years by people ranging from the environmental activist and author Edward Abbey to Jim Gilchrist, the California-based founder of the Minutemen Project. ‘It’s a network of ground-pounded vegetation,’ Gilchrist told an interviewer back in 2007. ‘If we were to cure the literal lack of immigration law enforcement, we would cure the environmental problem.’”).

⁶⁷ *Id.*

federal government for their unique landscapes, fragile ecosystems, and biodiverse nature.⁶⁸ Previously isolated and secluded, these landscapes now face frequent human travel.⁶⁹ Each year, thousands of people cross through the Cabeza Prieta National Wildlife Refuge on their way through Mexico to the United States, creating hundreds of miles of newly paved trails and roads by foot and vehicle traffic.⁷⁰ This proliferation of trails and roads has environmental consequences including disrupting sensitive vegetation, disturbing wildlife and wildlife corridors, causing soil compaction and erosion, and impacting stream bank stability.⁷¹ Increased migration through wilderness areas has also resulted in sprawled campsites, campfires, wildfires, and litter.⁷²

Others argue that Border Patrol's impact on the environment is at least as significant as, if not greater than, the impact of border crossers.⁷³ Increased regulation inevitably comes at the cost of more infrastructure and environmental impact by Border Patrol. The border wall provides a useful example. By the close of the Obama administration in 2016, DHS had installed 353 miles of primary border wall ("pedestrian fencing"), thirty-six miles of secondary border walls that stand behind the primary wall, and a further fourteen miles of tertiary border walls behind the secondary border walls.⁷⁴ Although intended to prevent human travel, these existing sections of border wall also impede the movement of numerous species.⁷⁵

Immediately upon entering office in January of 2017, then-President Trump issued an executive order to secure the border with Mexico by building a wall, which received notable backlash from environmental activists.⁷⁶ President Trump's wall, as proposed, would have been constructed in "one of the most biologically rich areas in North America," with more than 700 migratory species that pass through during their

⁶⁸ Meierotto, *supra* note 62, at 12.

⁶⁹ *Id.* at 11, 13.

⁷⁰ *Id.* at 13, 17.

⁷¹ *Effects of Illegal Border Activities on the Federal Land Management Agencies: Hearing Before the Subcomm. on Interior, Env't and Related Agencies of the H. Comm. on Appropriations*, 109th Cong. (2006) (testimony of Tina J. Terrell, Forest Supervisor, Cleveland Nat'l Forest, Forest Serv., U.S. Dept. of Agric.), <https://perma.cc/G5QH-K6MQ>.

⁷² Meierotto, *supra* note 62, at 14.

⁷³ See Meierotto, *supra* note 62, at 15 (noting that many people familiar with the issue "attribute much of the environmental damage occurring on the border to Border Patrol").

⁷⁴ NOAH GREENWALD ET AL., CTR. FOR BIOLOGICAL DIVERSITY, A WALL IN THE WILD: THE DISASTROUS IMPACTS OF TRUMP'S BORDER WALL ON WILDLIFE 3 (2017).

⁷⁵ *Id.* at 1 ("Studies on portions of the border wall that have already been constructed demonstrate that the wall precludes movement of some wildlife. For example, the cactus ferruginous pygmy owl tends to fly low over the ground and avoids open areas, so the border wall will isolate U.S. birds from those in Mexico. This is true for many other species as well.")

⁷⁶ See *id.* at 2, 5 (describing Trump's executive order directing border wall construction); *id.* at 1 (noting efforts from environmental groups to challenge the border wall construction); see also Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

annual migrations.⁷⁷ Inserting a wall along this arbitrary sociopolitical border would have divided natural areas that provide important habitat and movement corridors for wildlife, resulting in thousands of acres of direct habitat destruction in addition to myriad indirect disturbances that serve as barriers to movement for many plants and animals.⁷⁸

Aside from border wall construction, security infrastructure such as fences, Border Patrol roads, vehicle roadblocks, sensor networks, communication networks, and lighting and video installations also contribute to habitat fragmentation, flooding, sedimentation, and other disruptive ecological phenomena.⁷⁹ With increased enforcement efforts deployed to follow unauthorized entries in rural zones along the border, DHS activity parallels the movement of border crossing activity, causing “habitat fragmentation, water pollution, soil damage and compaction, destruction of vegetation, and wildlife disturbance.”⁸⁰

Large scale infrastructure projects along the border also infringe on preexisting conservation efforts. For example, Congress established the Santa Ana National Wildlife Refuge to protect over 2,000 acres of especially biologically diverse land in the Rio Grande Valley in South Texas that is home to endangered species and numerous migratory birds.⁸¹ According to maps of planned border security development, prior to the revocation of President Trump’s executive order the U.S. Army Corps of Engineers intended to build a levee wall that would have cut across the Santa Ana Wildlife Refuge—a project that would have required a 150-foot enforcement zone and vegetation clearance, along with 120-foot-tall video surveillance towers and lights to illuminate the enforcement zone.⁸² These plans, if constructed, would have severely threatened the Refuge’s viability, let alone the Department of Fish & Wildlife’s existing conservation efforts for the already at-risk migratory birds.⁸³ While plans for the levee wall quieted, the Biden Administration has continued to build sections of the border wall along Texas’ border with

⁷⁷ GREENWALD ET AL., *supra* note 74, at 2. President Biden unsurprisingly revoked his predecessor’s executive order on border security within two weeks of his January 2021 inauguration. Exec. Order No. 14010, 86 Fed. Reg. 8267, 8270 (Feb. 2, 2021).

⁷⁸ *Id.*

⁷⁹ Marshal Garbus, *Environmental Impact of Border Security Infrastructure: How Department of Homeland Security’s Waiver of Environmental Regulations Threatens Environmental Interests Along the U.S.-Mexico Border*, 31 TUL. ENV’T L.J. 327, 330 (2018).

⁸⁰ *Id.* at 330–31 (quoting Brian P. Segee & Ana Córdova, *A Fence Runs Through It: Conservation Implications of Recent U.S. Border Security Legislation*, in CONSERVATION OF SHARED ENVIRONMENTS: LEARNING FROM THE UNITED STATES AND MEXICO 241, 248 (Laura López-Hoffman et al. eds., 2009)).

⁸¹ *Santa Ana National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/E2TA-KNKD> (last visited Feb. 7, 2024).

⁸² Garbus, *supra* note 79, at 333.

⁸³ *Id.*

Mexico, including a “levee improvement project” near Bentsen-Rio Grande Valley State Park, approximately 20 miles from the Refuge.⁸⁴

Border Patrol’s increased presence on public lands presents a dilemma for the land management agencies tasked with protecting the public’s interest in those lands: cooperate with Border Patrol’s enforcement operations or assert jurisdiction and keep Border Patrol at arm’s length? Determining who has proper regulatory authority on public lands under the crimmigration system is a contentious topic among the various agencies and stakeholders wanting to ensure that both the border and public lands are managed in ways that effectuate their independent agency missions. Differences in agency statutory mandates and regulatory authority pose jurisdictional dilemmas that only exacerbate the conflict. The following section will lay out the relevant legal frameworks that designate how DHS, DOI, and USDA are able to effectuate their agency missions on public lands along the border.

C. Legal Framework of Delegated Authority

Conflicting agency missions come to a head over when and where agencies have authority to act and regulate. Environmental laws and regulations, like the National Environmental Policy Act (NEPA),⁸⁵ the Endangered Species Act (ESA),⁸⁶ and the Wilderness Act⁸⁷ impose restrictions that may limit Border Patrol-related activity on public lands. However, as this section discusses, most environmental statutes contain exemptions and waiver workarounds. Simultaneously, land management agencies also have enforcement programs that empower them with independent law enforcement authority. This legal framework functions both to highlight regulatory overlap and tension and to provide a baseline for my proceeding analysis of whether the crimmigration system has stretched agency authority beyond its intended scope.

1. Statutory Exemptions and Discretionary Waiver Authority under DHS

Federal projects and efforts to secure the border on public lands by DHS are subject to various environmental laws that place limitations on Border Patrol activity. Most notably, DHS actions are subject to NEPA, which compels agencies planning “major federal actions significantly affecting the quality of the human environment” to evaluate potential environmental impacts of the proposed action, with opportunity for public review and comment, before it takes any actions.⁸⁸ Along with NEPA,

⁸⁴ Sergio Mendoza Reyes et al., *Biden Administration Presses Forward with Border Wall Plans in Texas, Angering Allies*, TEX. TRIB., (Oct. 5, 2023), <https://perma.cc/8JMP-XW4Y>.

⁸⁵ National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4370j (2018).

⁸⁶ Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544 (2018).

⁸⁷ Wilderness Act, 16 U.S.C. §§ 1131–1136 (2018).

⁸⁸ NEPA, 42 U.S.C. § 4332(2)(C).

DHS must comply with the ESA to preserve and protect wildlife, which requires an agency to consult with FWS before taking actions that may affect a listed threatened or endangered species.⁸⁹ Next, Border Patrol is also subject to the Wilderness Act, which serves to preserve lands in their natural condition and provides that there shall be no “permanent road, . . . no temporary road, no use of motor vehicles, motorized equipment . . . and no structure or installation within any such area” designated as a wilderness area.⁹⁰

Despite limitations on the scope of DHS’s authorization on public lands, most major federal environmental laws contain exemptions to prevent environmental procedures from interfering with emergency response and national security demands.⁹¹ For example, the Wilderness Act’s road-development prohibition provision makes an exception for “measures required in emergencies involving the health and safety of persons within the area.”⁹² These exemptions can be and have been interpreted broadly to encompass national security needs and justify day-to-day operations that purportedly impede Border Patrol’s ability to effectively secure the border.⁹³ This discretionary authorization strips away certain protections for sensitive and critical habitats and is therefore subject to skepticism by environmentalists.⁹⁴

Under NEPA, Council of Environmental Quality (CEQ)⁹⁵ regulations provide for “alternative arrangements” where emergency circumstances warrant taking an action with significant environmental impacts without satisfying certain regulatory requirements.⁹⁶ The CEQ exemption most often applies in the context of natural and environmental emergencies,⁹⁷

⁸⁹ ESA, 16 U.S.C. §§ 1536(a), 1537a.

⁹⁰ Wilderness Act, 16 U.S.C. §§ 1133(b)–(c); *see also* 16 U.S.C. §1131(c) (defining wilderness areas as “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 . . .”).

⁹¹ *See, e.g.,* E.G. Willard et al., *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DOD Training and Operational Prerogatives Without New Legislation?*, 54 AIR FORCE L. REV. 65, 66–68, 71, 73, 80, 82, 85–86 (2004) (describing national security-related exemptions in federal environmental laws, as well as exemptions established through common law).

⁹² Wilderness Act, 16 U.S.C. §1133(c).

⁹³ *See* discussion *infra* Part III(A)(1).

⁹⁴ CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 23.

⁹⁵ CEQ is the entity that oversees NEPA implementation. NEPA, 42 U.S.C. §§ 4321–4347 (2018).

⁹⁶ 40 C.F.R. § 1506.12 (2023); *see also* Emergencies and the National Environmental Policy Act Guidance, 85 Fed. Reg. 60137, 60137, 60139 (Sept. 24, 2020) (providing guidance to agencies on how to navigate the alternative arrangements exception of NEPA for emergency circumstances); Skye Walker, *Wars, Walls, and Wrecked Ecosystems: The Case for Prioritizing Environmental Conservation in a National Security-centric Legal System*, 51 ENV’T L. 913, 918–19 (2021) (describing military compliance with NEPA procedural requirements).

⁹⁷ Alternative Arrangements Pursuant to 40 CFR Section 1506.11—Emergencies, COUNCIL ON ENV’T QUALITY, <https://perma.cc/6ZPG-3DEV> (last updated May 2019)

yet executive departments have also relied on the alternative arrangements exemption to expedite various military and national security actions.⁹⁸ Additionally, the language of NEPA offers federal agencies like Border Patrol ample flexibility to circumvent its requirements for national security purposes.⁹⁹ For example, section 4331(b) provides that the government shall “use all practicable means, consistent with other essential considerations of national policy” and agencies are only required to conduct environmental reviews “to the fullest extent possible.”¹⁰⁰

The ubiquitous national security exemption is also present in the Freedom of Information Act (FOIA), where, in the environmental context, it serves to restrict the information that is available for an Environmental Impact Statement (EIS).¹⁰¹ The CEQ can also authorize exceptions to EIS requirements for emergency circumstances.¹⁰² Withholding land use information from an EIS for national security reasons means the public does not get a comprehensive rendering of potential environmental impacts necessary for mitigation or more protective alternatives analyses. Given the leeway for a work-around, emergency exemptions, particularly when invoked in the national security context, “have eroded NEPA’s efficacy as an environmental protection tool.”¹⁰³

The consultation requirement in section 7(a)(2) of the ESA also has a broad exemption for national security purposes.¹⁰⁴ This exception allows the Secretary of Defense to apply for an ESA exemption for activities that are likely to jeopardize species or habitat if the Secretary finds that the “exemption is necessary for reasons of national security.”¹⁰⁵ While CEQ and ESA exemptions specifically target the Secretary of Defense, this example nevertheless highlights Congress’s willingness to allow for national security-related exemptions at the expense of wildlife and habitat protection.

(providing guidance on alternative arrangements under 40 CFR Section 1506.11 for emergency situations).

⁹⁸ See, e.g., Walker, *supra* note 96, at 919 n.35 (describing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 18–19 (2008), which allowed the Navy to conduct sonar training activities while remaining exempt from the relevant environmental regulations).

⁹⁹ Hope M. Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENV’T L.J. 105, 115 (2007).

¹⁰⁰ *Id.*; NEPA, 42 U.S.C. §§ 4331–4332 (2018).

¹⁰¹ 5 U.S.C. § 552b(b)(1)(A) (2018); see also Babcock, *supra* note 99, at 115 (stating the same).

¹⁰² 5 U.S.C. § 552b(b)(1)(A); 40 C.F.R. § 1506.11 (2005).

¹⁰³ Walker, *supra* note 96, at 918.

¹⁰⁴ ESA, 16 U.S.C. § 1536(j) (2018) (“Notwithstanding any other provision of the Act, the Committee shall grant an exemption for an agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.”). This provision has never actually been used. Jason C. Wells, *National Security and the Endangered Species Act: A Fresh Look at the Exemption Process and the Evolution of Army Environmental Policy*, 31 WM. & MARY ENV’T L. & POL’Y REV. 255, 255 (2006).

¹⁰⁵ ESA, 16 U.S.C. § 1536(j).

Along with the broad discretion that exemption clauses afford DHS, other statutory permissions give DHS the ability to waive compliance with environmental regulations. In passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹⁰⁶ Congress described its overarching goal to “improve deterrence of illegal immigration to the United States by increasing border patrol” and implementing other measures to improve removal procedures and verification systems.¹⁰⁷ DHS Secretaries have relied on national security justifications and their section 102(c) waiver authority under the IIRIRA to construct hundreds of miles of border security infrastructure.¹⁰⁸

The passage of the REAL ID Act of 2005¹⁰⁹ gave the Secretary of DHS power to waive environmental laws, among others, and to expedite construction of barriers and roads at the U.S. border with the primary goal of enhancing national security against terrorism.¹¹⁰ DHS interpreted this broad discretionary waiver to apply within “the vicinity of the United States border,” which expanded the waiver’s geographic scope and also expanded the scope of its application to other federal regulations that typically provide oversight over the agency’s actions.¹¹¹ Furthermore, section 102(c)(2) of the REAL ID Act limits judicial review for challenges to the discretionary waiver, since federal courts have exclusive jurisdiction and claims must be brought on the grounds of a constitutional violation.¹¹² The Secretary of Homeland Security in President George W. Bush’s administration utilized this authority five times to waive NEPA, the ESA, and other statutes to build nearly 700 miles of the border wall.¹¹³ Additionally, the Secure Fence Act of 2006¹¹⁴ provided the ability for DHS to apply the discretionary waiver to new border projects.¹¹⁵ Overall, the REAL ID Act and the Secure Fence Act have substantially augmented the waiver authority of DHS: between 2005 and 2015, DHS used its waiver authority to expand border fencing from 119 miles to 654 miles.¹¹⁶

While environmental laws, in theory, place limits on the extent of government action and disturbances on federal lands, DHS is increasingly able to circumvent these laws. By invoking discretionary waiver authority and justifying its actions through exemption clauses,

¹⁰⁶ Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of the U.S.C.).

¹⁰⁷ H.R. Rep. No. 104-828, at 1 (1996); *see also* Garbus, *supra* note 79, at 334 (noting IIRIRA legislative history); IIRIRA, 110 Stat. 3009-546.

¹⁰⁸ Walker, *supra* note 96, at 935; IIRIRA, sec. 102(c), 110 Stat. 3009-546, 555 (codified as amended at 8 U.S.C. § 1103 note).

¹⁰⁹ REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231 (2005) (codified at scattered sections of the U.S.C.).

¹¹⁰ GREENWALD ET AL., *supra* note 74, at 1; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B § 102(c), 119 Stat. 231, 306.

¹¹¹ Garbus, *supra* note 79, at 336.

¹¹² *Id.*; REAL ID Act of 2005, § 102(c), 119 Stat. 231, 306.

¹¹³ GREENWALD ET AL., *supra* note 74, at 1.

¹¹⁴ Secure Fence Act of 2006, Pub. L. No. 109-367, § 1, 120 Stat. 2638, 2638 (2006).

¹¹⁵ Garbus, *supra* note 79, at 336.

¹¹⁶ *Id.* at 337.

DHS can waive compliance on the grounds that these laws inhibit its ability to secure the border on federal lands.¹¹⁷

2. Federal Land Managers' Limited Law Enforcement Capacity

Federal land management agencies within DOI have limited criminal law enforcement authority that is confined to specific contexts that serve to effectuate their respective agency missions and goals. NPS, FWS, and BLM—the relevant agencies housed under DOI that have field offices and manage lands along the border—all have their own respective law enforcement programs.¹¹⁸ NPS, for example, has law enforcement rangers whose primary duties are to protect the parks' natural and cultural resources and to respond to emergencies.¹¹⁹ NPS rangers are trained in structural and wildland firefighting, emergency medical services, and search and rescue.¹²⁰ The Office of Law Enforcement of FWS primarily addresses threats to wildlife and plant resources and enforces wildlife protection laws.¹²¹ Federal wildlife officers under the agency's National Wildlife Refuge System Law Enforcement program are charged with safeguarding wildlife and federal lands and waters and ensuring public safety by searching for lost or missing visitors, arresting violent offenders, conducting drug enforcement activities, or aiding in border security.¹²²

Additionally, the BLM enforcement program is authorized under the Federal Land Policy and Management Act (FLPMA)¹²³—the primary statute that governs BLM's management of public lands—which allows the Secretary of the Interior to contract with local law enforcement officials if the Secretary determines “assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources....”¹²⁴ Contracted law enforcement officials and their agents are qualified to carry firearms, execute and serve warrants, and make arrests

¹¹⁷ CRS REPORT ON FEDERAL LAND OWNERSHIP, *supra* note 2, at 23 (explaining that “the Secretary of DHS may waive application of NEPA and other laws that the Secretary determines may impede the expeditious construction of” barriers and roads that deter unauthorized crossing of US borders); *see also supra* Part II(C)(1).

¹¹⁸ *See DOI Law Enforcement Task Force*, U.S. DEPT OF THE INTERIOR, <https://perma.cc/9M73-GD48> (last visited Feb. 12, 2024) (describing a working group “comprised of law enforcement representatives” from DOI agencies including NPS, FWS and BLM); *see also* text accompany note 58 (listing agencies responsible for management of land along the U.S.-Mexico border).

¹¹⁹ 54 U.S.C. § 102701 (2018); *see also, National Park Service Law Enforcement Ranger Program*, U.S. DEPT OF THE INTERIOR, <https://perma.cc/X6ZG-SZUM> (last visited Feb. 12, 2024) [hereinafter *NPS Law Enforcement*].

¹²⁰ *NPS Law Enforcement*, *supra* note 119.

¹²¹ 16 U.S.C. § 742l (a)(1) (2018); *US Fish and Wildlife Service, Office of Law Enforcement*, U.S. DEPT OF THE INTERIOR, <https://perma.cc/HW7K-FVTU> (last visited Feb. 12, 2024).

¹²² 16 U.S.C. § 668dd (2018); *Refuge Law Enforcement*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/5GUU-NLQF> (last visited Feb. 11, 2024).

¹²³ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2018).

¹²⁴ *Id.* § 1733(c)(1).

on reasonable grounds.¹²⁵ The Secretary can also designate federal personnel or officials to carry out law enforcement responsibilities with respect to the public lands and the natural resources contained within.¹²⁶ USFS—separate from DOI and housed under USDA¹²⁷—also has its own Uniformed Law Enforcement Officers (LEOs). The primary focus of LEOs is protecting natural resources, and to do so, they are authorized to carry firearms and other defensive equipment, issue citations, make arrests, and execute search warrants.¹²⁸

In 2022, Secretary of the Interior Deb Haaland established a Departmental Law Enforcement Task Force and announced new policies to provide guidance on use of force standards and certain arrest powers.¹²⁹ The Task Force is composed of law enforcement representatives from DOI's various bureaus and law enforcement programs and serves to implement President Biden's May 2022 Executive Order to "Advance Effective, Accountable Policing and Strengthen Public Safety."¹³⁰ The intention of creating a more unified law enforcement entity via the Task Force is to further federal land management agencies' interests in "protecting the nation's most cherished resources, their visitors, Tribal communities, and global biodiversity."¹³¹

3. A Joint Memorandum of Understanding

In 2006, the Secretaries of DHS, DOI, and USDA signed a Memorandum of Understanding (MOU) regarding the Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States' Borders.¹³² The MOU serves as a formal recognition among agencies that each will aid the others in furthering their national security and environmental protection interests.¹³³ More specifically, as signatories of the MOU, the parties recognized the national security and counterterrorism significance of preventing illegal entry into the United States and that giving Border Patrol access to federal lands is helpful in "rescuing" unauthorized border crossings, protecting lands from environmental damage, and securing the borders of the United States.¹³⁴

Under the MOU, land management agencies recognize that, pursuant to applicable law, Border Patrol can access federal lands under

¹²⁵ *Id.*

¹²⁶ *Id.* § 1733(c)(2).

¹²⁷ The Transfer Act of 1905, Pub L. No. 58-34, 33 Stat. 628 (1905).

¹²⁸ 16 U.S.C. § 559 (2018); *USDA Forest Service Law Enforcement and Investigations*, U.S. FOREST SERV., <https://perma.cc/D6ZA-9PXB> (last visited Feb. 12, 2024).

¹²⁹ *Interior Department Announces New Law Enforcement Policies to Advance Transparent and Accountable Policing Practices*, U.S. DEPT OF THE INTERIOR (Oct. 3, 2022), <https://perma.cc/KLR6-YP88> [hereinafter *Interior Department Announces New Law Enforcement Policies*].

¹³⁰ *Id.*; 3 C.F.R. § 371 (2023).

¹³¹ *Interior Department Announces New Law Enforcement Policies*, *supra* note 129.

¹³² MOU, *supra* note 13, at 1.

¹³³ *Id.* at 1–2.

¹³⁴ *Id.* at 3.

DOI and USDA administrative jurisdiction, including areas designated by Congress as wilderness areas.¹³⁵ Further, the parties recognize that DOI and USDA “will assist” Border Patrol in search and rescue operations and “may cross-deputize their agents” with Patrol.¹³⁶ The MOU functions as a mutual agreement that the relevant agencies can extend their powers beyond what Congress originally authorized, in light of a purported national security crisis.¹³⁷ The need for an MOU at all represents the crux of interagency conflicts of interest and differing agency objectives over the proper role of public land management as it pertains to immigration activity.¹³⁸

III. SYSTEMATIC PRIORITIZATION OF BORDER ENFORCEMENT

When faced with the crimmigration system, the mission conflict between Border Patrol and land management agencies results in a systematic prioritization of border enforcement over the protection of public lands. Professor Stephen Lee’s research highlights the consequences of interagency mission conflict when multiple agencies have regulatory authority. This analysis discusses the legal implications that result from a systematic prioritization of border enforcement. First, Border Patrol’s invocation of exemption clauses and waivers of environmental statutes on public lands is an overreach of its discretionary power and threatens the public trust obligations of land management agencies.¹³⁹ Second, the immigration enforcement powers of federal land management agencies extend beyond the apparent scope of the agencies’ originally intended purposes.¹⁴⁰ Finally, the convergence of agency enforcement responsibility on public lands perpetuates the crimmigration system by fueling the apparatus of law enforcement and creating one “monster crimmigrator.”¹⁴¹

A. Consequences of Interagency Mission Conflict

Although Lee collected his research on interagency mission conflict in the context of workplace enforcement and unauthorized labor, his

¹³⁵ *Id.* at 4. The MOU directive is binding given that DHS may, at the discretion of the Secretary, “confer or impose upon any employee of the United States . . . any of the powers, privileges, or duties conferred or imposed [upon the Secretary].” 8 U.S.C. § 1103(a)(6) (2018). Such delegation may be made by regulation or by “other acts as [the Secretary] deems necessary for carrying out his authority.” *Id.* § 1103(a)(3).

¹³⁶ MOU, *supra* note 13, at 7.

¹³⁷ See discussion *infra* Part III.B (describing expanding agency authority).

¹³⁸ The effectiveness of the MOU is discussed later in my analysis of the consequences of interagency mission conflict. See discussion *infra* Part III(A).

¹³⁹ See discussion *infra* Part III(B)(2) (Border Patrol Overreach via Exemptions and Discretionary Waivers).

¹⁴⁰ See discussion *infra* Part III(B)(1) (Land Managers’ Authority Exceeds Congressional Intent).

¹⁴¹ See discussion *infra* Part III(C) (The Monster Crimmigrator).

analysis can be analogized to the tension between border enforcement and protection of public lands.¹⁴² Lee argues that drawing a line between where immigration law ends and where labor law begins, or vice versa, can be difficult.¹⁴³ As a result, multiple agencies may end up with regulatory jurisdiction¹⁴⁴—a significant outcome when “agencies increasingly have the final word within an immigration system characterized by legislative stasis,” raising the stakes of coinciding power.¹⁴⁵ Lee also explains how in addition to this complicated power dynamic, conflict among agency missions creates a regulatory “turf battle[]” where “agencies wrangle for supremacy and ... even impersonate one another from time to time.”¹⁴⁶ The result is a disruption in agency coordination that enables exploitation to persist.¹⁴⁷

Similarly, Border Patrol’s encroachment onto public lands in the name of national security threatens the ability of federal land management agencies to genuinely adhere to their agency missions.¹⁴⁸ This relationship presents a “peculiar dynamic” similar to that described by Lee between ICE and the department of labor over labor enforcement.¹⁴⁹ This dynamic tends to foster interagency conflict that ultimately enables the problem of land use exploitation to persist: DHS, whose primary mission is to secure the U.S. border, has relatively little interest in regulating land use for conservation and preservation purposes, while land management agencies have a relatively high interest but lack the autonomy and power to effectively do so based on the exemptions and waiver authority so often invoked by Border Patrol. Simultaneously, land management agencies have relatively less interest in immigration policy (broadly speaking, although interest increases once border policy starts pushing immigration onto public lands), while DHS has a high interest in securing the border for national security reasons but faces limitations in light of environmental regulations and barriers to entry on public lands.

Border Patrol and land management agencies have increasingly overlapped regulatory authority in response to the influx of immigration on federal public lands. Lee’s article shows how this kind of regulatory overlap plays out differently between theory and practice. In theory,

¹⁴² Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1092–93 (2011).

¹⁴³ *Id.* at 1091.

¹⁴⁴ *Id.* at 1091–92.

¹⁴⁵ *Id.* at 1091.

¹⁴⁶ *Id.* at 1091–92.

¹⁴⁷ Lee notes that Immigration and Customs Enforcement (ICE) has stepped in within this power struggle to “effectively dictate” workplace labor enforcement, helping “disrupt agency coordination and enable labor exploitation to persist.” *Id.* at 1093 (“ICE has been able to effectively dictate the terms of our nation’s workplace enforcement strategy and has largely been resistant or indifferent to the labor consequences of its decisions.”).

¹⁴⁸ See discussion *infra* Part III(A)(1) (describing Border Patrol’s use of land managed by other agencies); see also MOU, *supra* note 13, at 4 (describing inter-agency agreement to increase Border Patrol’s access to federal-managed lands).

¹⁴⁹ Lee, *supra* note 142, at 1093.

shared responsibilities should create “conditions amenable to the joint, robust, and balanced policing” of public lands.¹⁵⁰ In practice, however, regulation inconsistently fluctuates from skewing in favor of one agency to another.¹⁵¹ In the “regulatory turf battle” occurring on public lands, regulation has skewed to favor DHS and border enforcement activity. DHS takes advantage of the loopholes available to them in statutory exemptions and environmental laws, discretionary waiver power, and widespread MOU jurisdiction.¹⁵² Meanwhile, federal land management agencies are empowered with non-traditional immigration enforcement responsibilities to assist DHS in search and rescue operations.¹⁵³

1. Border Patrol’s Overreach

The broad authority granted to Border Patrol for the purposes of “protect[ing] national security, respond[ing] to terrorist threats, [and] safeguard[ing] human life . . .”¹⁵⁴ effectively weakens the integrity of environmental statutes such as NEPA, the ESA, and the Wilderness Act. By agreement among the relevant parties in the MOU, Border Patrol can access federal lands in DOI and USDA administrative jurisdictions, including wilderness areas, under a wide range of circumstances.¹⁵⁵ To start, Border Patrol agents on foot or horseback may patrol land and pursue or apprehend suspected unauthorized border crossers off-road at any time.¹⁵⁶ When using motor operated vehicles, agents must limit their activity to pre-existing and agency-established roads.¹⁵⁷ Border Patrol can also request access to secured roads or trails or to federal lands, and “[n]othing . . . [shall] prevent” Border Patrol agents from conducting “motorized off-road pursuit of suspected [cross border violations] at any time,” including in designated wilderness areas.¹⁵⁸ Additionally, Border Patrol can request authorization for installing or constructing tactical infrastructure to help detect unauthorized entries, and in all areas not formally designated as wilderness, the land manager “will expeditiously authorize Border Patrol to install such infrastructure.”¹⁵⁹ The parties agree that they will cooperate with each other to comply with all applicable federal laws that are “not otherwise waived in furtherance of

¹⁵⁰ See *id.* at 1100 (describing this dynamic in workplace regulation).

¹⁵¹ See, e.g., *id.* (noting how workplace regulation has skewed in favor of immigration enforcement over labor enforcement goals).

¹⁵² See *supra* Part II(C)(3).

¹⁵³ See discussion *infra* Part III(A)(2) (discussing Operation Trident Surge and the cross-deputization of border enforcement responsibilities).

¹⁵⁴ MOU, *supra* note 13, at 2.

¹⁵⁵ *Id.* at 4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 4–5.

¹⁵⁸ *Id.* at 4–6.

¹⁵⁹ *Id.*

[the] MOU.”¹⁶⁰ This provision indicates that Border Patrol is still subject to federal land management agency regulations and protocol.

DHS’s invocation of exemption and waiver authority for national security purposes is occurring in the unprecedented context of immigration response on public lands due to more recent criminalized border policies.¹⁶¹ As a result, Border Patrol can take advantage of DHS’s discretion over that of other agencies. One sizable implication of this overreach is the reallocation of resources from federal land management agency duties towards border management. Testimony from agency representatives during various House hearings related to border security on federal and public lands shine light on this issue.¹⁶² Abigail Kimbell, a regional forester with USFS, testified that “[b]order operations and activities take [USFS] personnel away from other critical land management enforcement and investigation responsibilities.”¹⁶³ DHS activity authorized under the MOU offends long-standing and indoctrinated environmental protections, limiting the ability of land management agencies to execute their jobs properly.

For further illustration, Mitch Ellis, a FWS land manager at Buenos Aires National Wildlife Refuge in southern Arizona, testified that “[t]he staff at Buenos Aires are faced with the difficulty of continuing the conservation program at the refuge while being constantly affronted by border-related distractions and security issues.”¹⁶⁴ Ellis explained how, in light of more unauthorized border crossings, FWS staff are not allowed to enter some areas without being escorted by law enforcement officers.¹⁶⁵ Ellis also noted that the Refuge staff’s response is “rather like a triage,” directing fiscal and personnel resources to “pressing” immigration-related needs.¹⁶⁶ Approximately 30-40% of maintenance staff’s time is spent on border-related tasks such as installing security fences and vehicle barriers and putting bars on windows and doors at refuge housing.¹⁶⁷ FWS biologists spend their “precious time documenting and mitigating resource damage,” while Ellis and his deputy manager spend about half of their time “dealing with the border”—whether responding to day-to-day triage or pursuing interagency cooperation.¹⁶⁸ Ellis concluded that FWS “would love to direct more [of its] efforts at Buenos Aires to

¹⁶⁰ *Id.* at 3.

¹⁶¹ *See supra* Part II(C)(1) (describing border security-related exemptions and waivers to environmental laws).

¹⁶² *E.g., Border Security on Federal Lands: Oversight Field Hearings Before the H. Comm. on Res.*, 109th Cong. 66, 67 (2006) [hereinafter *Border Security Hearing*] (statement of Abigail Kimbell, Regional Forester, U.S. Dep’t of Agric. Forest Serv.).

¹⁶³ *Id.*

¹⁶⁴ *The Impacts of Illegal Immigration on Public Lands: Before the Subcomm. on Interior, Env’t and Related Agencies of the H. Comm. on Appropriations*, 109th Cong. (2006) [hereinafter *Illegal Immigration on Public Lands Hearing*] (testimony of Mitch Ellis, Refuge Manager, Dep’t of the Interior), <https://perma.cc/U57Z-P3S7>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

managing natural resources, instead of managing border issues and damage” but the “current situation will not allow for that.”¹⁶⁹

Although agency officials recognize that the increasing border enforcement activity on public lands subsumes their normal operations and responsibilities, many still desire stricter enforcement. Testimony by a FWS land manager in Arizona confirmed that Refuge officers “won’t get 30 minutes into their patrols before getting caught up in some activity related to illegal border crossers.”¹⁷⁰

As these land managing agents see it, immigration activity is more disruptive to the protection of public lands than is the Border Patrol response that immigration provokes:

All of this damage is caused by illegal border crossers and, of course, the necessary law enforcement response. There is a balance to be achieved whereby law enforcement activities result in a net benefit to the resource, and not a detriment. We must work effectively with agencies such as Border Patrol to not only mitigate damage as we address illegal activity, but also increase our efficiency as we work together to combat illegal activity. A significant amount of our time is spent on cooperative efforts with the Department of Homeland Security specific to enforcement activities on the Buenos Aires.¹⁷¹

So as proponents of stricter enforcement, land managing agents are acquiescent and more lenient in compromising with DHS, signing agreements like the MOU, and taking on more immigration-related enforcement responsibilities—which inherently detracts from their previous jobs and day-to-day land management operations. Federal land managers are suddenly cabined as proponents of anti-immigration policy as a way to curb environmental impact, yet are in no way incentivized to stand up to the root of the problem: an increasingly criminalized response to immigration.

The Buenos Aires National Wildlife Refuge in Arizona highlights the tension between the priorities of land management agencies and increasing border enforcement activity. FWS established Buenos Aires to protect unique desert grasslands that provide habitat for endangered species, a protection that is central to the mission of the agency.¹⁷² Yet because the landscape is also a prime avenue for unauthorized border crossings and an area of elevated concern for Border Patrol, public lands such as the Refuge have become a platform for DHS to exert dominance

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² U.S. FISH & WILDLIFE SERV., BUENOS AIRES: NATIONAL WILDLIFE REFUGE (1999); see *supra* text accompanying notes 121–122; see also *Endangered Species*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/CSV9-XATR> (last visited Mar. 7, 2024) (noting that the FWS “provide[s] national leadership in the recovery and conservation of our nation’s imperiled plant and animal species”).

in the regulatory turf battle.¹⁷³ For example: FWS staff facilitate use of the Refuge's airstrip by Border Patrol so that Border Patrol's aircraft patrols are more efficient; Refuge staff developed a three-acre facility to serve the Border Patrol's horse patrol unit; and the Refuge constructed fueling facilities so Border Patrol can continue its operations without inconvenient interruption.¹⁷⁴ These are just several instances when habitat protection was seemingly sidelined for the sake of border enforcement infrastructure and activity without adherence to any formal environmental assessments or regulations.¹⁷⁵

A different, yet equally pertinent, example of the ways DHS overreach on public lands infringes on the duties and responsibilities of BLM and USFS comes from the testimony of Jim McGarvie, vice president of Off-Road Business Association. McGarvie explained how road closures by Border Patrol—for security purposes and in the name of Homeland Security—negatively impact off-highway vehicle (OHV) recreational use on public lands east of San Diego.¹⁷⁶ He emphasized that on BLM land, such as Yuha Desert, OHVs are required to remain on designated roads and specific trails to protect species in the area, and upon violation they would be subject to fines, vehicle confiscation, and possible jail time.¹⁷⁷ However, “the Border Patrol frequently traverses the area in pursuit of illegal immigrants” and are not subject to the same limitations or consequences.¹⁷⁸ McGarvie pointed to the inconsistency that DHS can “heavily utilize[] . . . vehicles in chase,” with the consequent impact upon the environment, “while [OHVs] cannot access the area with vehicles for recreation” because OHV use would negatively impact the environment.¹⁷⁹ While this scenario does not implicate specific environmental laws per se, the example of OHVs elucidates the prioritization of Border Patrol enforcement activity over both environmental protection and the public's ability to recreate. Environmental protection and recreation are central to the mission of BLM yet are belittled in the Yuha Desert by DHS's justification of border security.¹⁸⁰

¹⁷³ See *The Impacts of Illegal Immigration on Public Lands*, *supra* note 164 (“A significant amount of [FWS's] time is spent on cooperative efforts with the Department of Homeland Security specific to enforcement activities on the Buenos Aires”). This suggests that unauthorized border crossings have caused DHS enforcement efforts to take priority over some of FWS's regulatory duties).

¹⁷⁴ *Id.*

¹⁷⁵ “[T]he refuge and Border Patrol have agreed to certain standard operating procedures for how patrols and apprehensions will be carried out on the refuge to minimize environmental impacts.” *Id.* (indicating the agencies have come to their own agreements without adhering to formal environmental protection or procedural standards).

¹⁷⁶ *Border Security Hearing*, *supra* note 164, at 30 (testimony of James McGarvie, Vice President, Off-Road Business Association).

¹⁷⁷ *Id.* at 31.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; see FLPMA, 43 U.S.C. §§ 1702(e), 1731(a) (2018) (noting management priorities under FLPMA to include management for recreation).

2. Land Managers Authorized as Immigration Enforcement Officers

In an effort to more effectively secure public lands sections of the U.S. border, DHS has authorized federal land management agents to act as non-traditional law enforcement officers—further integrating land management agencies into the crimmigration system.¹⁸¹ A byproduct of President Obama’s “whole-of-government approach” to increase national security, DOI has taken on a new role as an arm of immigration enforcement.¹⁸² By giving land management agencies immigration enforcement power, the government uses the public lands system as a vehicle to perpetuate the crimmigration system via the apparatus of law enforcement.

The 2006 MOU outlines specific roles and responsibilities for land managing agents that include acting as immigration enforcement agents. This authority is an extension of and supplement to the powers afforded by their respective, mission specific, law enforcement programs.¹⁸³ Under the “Responsibilities and Terms Specific to DOI and USDA” section of the MOU, DOI and USFS “will” assist Border Patrol “in search and rescue operations on lands within the respective land managers’ administration when requested,” and may “cross-deputize or cross-designate their agents as law enforcement officers” with Border Patrol under each agency’s relevant statutory authority.¹⁸⁴ In this sense, DOI and USDA agents have become major players in the crimmigration system as their immigration decision making power is augmented by Border Patrol’s extension of authority.

The “cross-deputization” and extension of border enforcement responsibilities is seen in partnerships among DHS, USFS, and DOI agency law enforcement programs. One apt example is Operation Trident Surge, a collaborative enforcement approach taken by Border Patrol, BLM, NPS, FWS, and USFS to carry out joint patrols along the Arizona border.¹⁸⁵ The purpose of Operation Trident Surge is to leverage the capabilities and resources of multiple federal agencies to support an increasingly militarized National Border Patrol Strategy by “apprehending and deterring smugglers . . . and by increasing the

¹⁸¹ MOU, *supra* note 13, at 3, 7.

¹⁸² Obama’s “whole-of-government approach” to foreign affairs used the government’s military arm as just one tool to enforce national security priorities. See Jim Garamone, *Obama Stresses Whole-of-Government Approach in U.N. Speech*, U.S. DEPT OF DEF. NEWS (Sept. 28, 2015), <https://perma.cc/45C8-4WCB>. The principles of this approach, engaging other arms of the government, like DOI to support Border Patrol’s actions on the southern border can be seen as a continuation of the whole-of-government approach to foreign affairs. See Stephanie Ebbs, *Immigration Arrests on Public Lands Skyrocket Under Trump*, ABC NEWS (Nov. 15, 2018), <https://perma.cc/T2U8-SNBG>.

¹⁸³ See *supra* Part II(C)(2).

¹⁸⁴ MOU, *supra* note 13, at 7.

¹⁸⁵ Press Release, Forest Serv., U.S. Dep’t of Agric., USDA Forest Service a Partner in Border-Monitoring Operation Trident Surge (Feb. 14, 2011), <https://perma.cc/8SH5-ZY7L>.

probably of apprehending terrorists . . . seeking further entry into the United States.”¹⁸⁶

3. Interagency Coordination Efforts

The MOU—while attempting to harmonize divergent regulatory approaches—enables Border Patrol at the expense of land management agencies. Lee discusses the ineffectiveness of traditional administrative remedies and interagency coordination methods to relieve conflict, such as MOUs, because of their *ex-post* nature.¹⁸⁷ The MOU among DHS, DOI, and USFS indicates the agencies’ efforts to coordinate their regulatory and enforcement goals. The agreement serves to provide guidance to ensure agency actions are consistent with the common goals and principles of the parties, affirming the mutual understanding that Border Patrol may access public lands and waterways for enforcement purposes while DOI and USDA have responsibility for land management and resource protection under their jurisdiction.¹⁸⁸ The parties submit that they entered the MOU “in a cooperative spirit with the goals of securing the borders of the United States, addressing emergencies involving human health and safety, and preventing or minimizing environmental damage arising from [cross border violation] illegal entry on public lands.”¹⁸⁹ They also agreed to develop and utilize efficient communication protocol respecting each other’s chain of command, cooperate through compliance with applicable federal laws not otherwise waived by the MOU, plan and conduct joint local law enforcement operations, among other plans.¹⁹⁰

While the MOU seems productive in principle, it has its shortcomings in effectively addressing interagency conflicts. In the context of workplace enforcement, Lee describes how an MOU fails to promote harmonizing enforcement goals between ICE and DOL because it does not give labor officials meaningful monitoring authority.¹⁹¹ Agreements like an MOU do not “force the uncomfortable conversation needed to impose a stop-and-think effect on immigration officials,” who are not required to consider the effect of their actions on external agencies until after the fact.¹⁹² Although the MOU among DHS, DOI, and USDA attempts to sprinkle in *ex-ante* provisions that require consultation between agencies prior to action, Border Patrol can still broadly exercise its authorities in exigent circumstances so long as its agents “provide the local Federal land manager with a brief report” as soon as practicable.¹⁹³ Ultimately the MOU skews in favor of border enforcement activity

¹⁸⁶ *Id.*

¹⁸⁷ Lee, *supra* note 142, at 1122.

¹⁸⁸ MOU, *supra* note 13, at 3.

¹⁸⁹ *Id.* at 3.

¹⁹⁰ *Id.* at 3–4.

¹⁹¹ Lee, *supra* note 142, at 1121.

¹⁹² *Id.* at 1122–23.

¹⁹³ MOU, *supra* note 13, at 6.

despite its efforts to give credence to the environmental protection concerns of DOI and USDA.

Agencies with jurisdiction along the border have also tried to increase programmatic coordination and cooperation through interagency task forces and liaison programs. The Borderland Management Task Force (BMTF) program and Public Lands Liaison Agents (PLLA) program are two examples of efforts among DHS, DOI, and USDA to address their interagency conflict.¹⁹⁴ The BMTF program was a response to disagreements, lack of communication, and exacerbated tensions among Border Patrol, DOI, and USDA in Border Patrol's Tucson Sector, where 60% of the border miles consist of public lands.¹⁹⁵ To deal with the spike in unauthorized border crossings and increased Border Patrol presence, BMTF "filled a critical need to move slowly but steadily from interagency conflict to increased interagency collaboration."¹⁹⁶ These intergovernmental groups meet on a regular basis at various locations along the borders.¹⁹⁷ Border Patrol agents from local field offices along with a counterpart official from DOI or USFS co-chair BMTF meetings, and membership is composed of representatives from tribal, local, state, and federal governmental organizations.¹⁹⁸ Additionally, the PLLA program provides environmental and cultural resources training to Border Patrol carrying out day-to-day responsibilities in the field, focusing on NEPA compliance and stewardship practices.¹⁹⁹ The primary responsibility of the PLLA is to "build and maintain constructive relationships with the public land managers [across] sector[s]."²⁰⁰

These attempts to alleviate interagency conflict and "maximize opportunities for interagency collaboration" are provident in theory but in reality work to unify these agencies in a way that obscures their independent missions.²⁰¹ Here, the BMTF and PLLA programs ultimately embolden and sanction DHS to continue to perpetuate its own mission in a way that is in "coordination" with public land managers. Border Patrol's activity passes as permissible when it more closely adheres to the mission and standards held by land management agencies.

Ultimately, attempts at coordination among DHS, DOI, and USDA are largely ineffective and augment immigration enforcement powers. As Lee suggests, agreements like an MOU are unproductive given their ex-

¹⁹⁴ See Elaine M. Koerner, *Borderland Management Taskforces and U.S. Customs and Border Protection Liaison Programs: Vehicles for Greater NEPA Public Involvement?* 2, 13 (Sept. 19, 2012) (capstone paper, Duke Environmental Leadership Program, Duke University) (on file with Nicholas School of Environment at Duke University) (introducing BMTF and PLLA programs).

¹⁹⁵ *Id.* at 4.

¹⁹⁶ *Id.*

¹⁹⁷ *E.g., id.* at 3 (describing meetings for the BMTF group).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 13.

²⁰⁰ *Id.*

²⁰¹ *Id.*

post nature.²⁰² While the intent of the 2006 MOU was to harmonize agency efforts, its actualization is limited by Border Patrol's broad authority and discretion in exigent circumstances.

B. Legal Implications of Prioritizing Border Enforcement

The systematic prioritization of border enforcement over the protection of public lands authorizes Border Patrol and federal land management agencies with new crimmigration powers that were not foreseeable to Congress at the time of agency establishment. While one sector of the federal government is statutorily mandated to manage and protect federal lands for the public benefit,²⁰³ another is responsible for controlling and securing the Nation's borders, including those borders that run adjacent to federally owned lands.²⁰⁴ DHS has broad discretion to exempt its actions from environmental regulations on public lands, which erodes both the integrity of federal land management agency authority and the potential efficacy of environmental law to serve as a check on law enforcement overreach.²⁰⁵ Simultaneously, federal public land managers are authorized to act as immigration enforcement officers, which extends beyond the apparent scope of the agencies' original purpose.²⁰⁶

1. Land Managers' Authority Exceeds Congressional Intent

Land management agencies have new and atypical border enforcement responsibilities that exceed their original purposes and the intent of Congress in establishing the agencies.²⁰⁷ While Congress empowered federal land managers with certain law enforcement authorities specific to their agency missions, it is unlikely it intended to entrust land management agencies with immigration-related enforcement responsibilities as well.²⁰⁸

Extending immigration-related law enforcement authorization from DHS to DOI in the name of furthering national security reaches beyond the purpose, intent, and history of the intended role of DOI of focusing on domestic affairs and land management oversight.²⁰⁹ The legislative history and establishment of DOI illuminates how far agencies have

²⁰² Lee, *supra* note 142, at 1122.

²⁰³ MOU, *supra* note 13, at 2; *see also supra* Part II(B) (describing how the U.S. government has "delegated authority to federal agencies to manage the land for the public benefit and interest of U.S. Citizens").

²⁰⁴ MOU, *supra* note 13, at 2.

²⁰⁵ *See supra* Parts II(C)(1), III(A)(1).

²⁰⁶ *See supra* Part III(A)(2).

²⁰⁷ *See* MOU, *supra* note 13, at 7 (describing novel border enforcement responsibilities).

²⁰⁸ *See supra* Part II(C)(2) (describing the limited law enforcement roles delegated to federal land management agencies).

²⁰⁹ MARK K. DESANTIS, CONG. RSCH. SERV., R45480, U.S. DEPT OF THE INTERIOR: AN OVERVIEW 2 (2021) [hereinafter CRS REPORT ON DOI].

strayed from their initially intended purposes by taking on enforcement roles in the crimmigration system and participating in programs like Operation Trident Surge. Upon enablement by Congress in 1849, DOI absorbed the functions of a wide range of domestic matters that previously fell under other executive departments—such as the Patent Office, General Land Office, and Office of Indian Affairs.²¹⁰ However, “[b]y the twentieth century, DOI had evolved to focus primarily on protecting and managing natural resources, conducting scientific research, and exercising the nation’s trust responsibilities to Tribes.”²¹¹

In recent years, Congress has considered or approved changes to DOI and its original structure by authorizing legislation, appropriations, and oversight activities, as well as through more extensive executive branch reorganizations.²¹² For example, a Trump Administration Executive Order calling for reorganization proposals approved the plan of then-Secretary of the Interior Ryan Zinke to consolidate different regional boundaries of each DOI bureau and relocate agency headquarters into the field.²¹³ Despite recent indications that the structure of DOI is potentially malleable and can exist in ways that differ from how Congress originally enabled the Department, the reorganizations as of yet have been primarily procedural and logistical, rather than substantively changing agency responsibilities.²¹⁴

The changes in day-to-day operations of land management agencies housed along the border illuminate how far the agencies have strayed from their original missions and moved closer towards immigration-related monitoring and response obligations.²¹⁵ This expansion of immigration enforcement power to agencies that were previously tasked with protecting natural and cultural resources, wildlife, and beneficial uses raises suspicion with regard to the scope of authority afforded to land managers in the name of national security.

Under the crimmigration system, which blurs the lines between what is considered a criminal matter and what is considered an immigration matter, the proper scope of an agency’s enforcement authority is also blurred. The legislative history and establishment of USFS illuminate this point. In the National Forest Management Act (NFMA),²¹⁶ Congress designated USFS to be responsible for “assessing the Nation’s renewable resources, and developing and preparing a

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 6.

²¹³ *Id.* at 7–8; Comprehensive Plan for Reorganizing the Executive Branch, Exec. Order. No. 13781, 3 C.F.R. § 312 (2017).

²¹⁴ CRS REPORT ON DOI, *supra* note 209, at 7–8 (describing reorganization and changes in procedure and logistics).

²¹⁵ *See supra* notes 149–153 and accompanying text; *see also supra* Part III(A)(2) (describing roles and responsibilities of agents outlined in the MOU).

²¹⁶ National Forest Management Act of 1976, 16 U.S.C. § 1600 (2018) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

national renewable resource and program” and “assuring that the Nation maintains a natural resource conservation posture.”²¹⁷ Under NFMA, USFS must

[A]id in the enforcement of the laws...with regard to stock, for the prevention and extinguishment of forest fires, and for the protection of fish and game, and with respect to national forests...aid the other Federal bureaus and departments on request from them, in the performance of the duties imposed on them by law.²¹⁸

At first glance, USFS’s responsibilities appear limited to protection of natural resources. However, since transferring the agency to USDA, Congress has authorized USFS with law enforcement powers to make arrests for violations relating to national forests, conduct investigations of criminal violations relating to controlled substances, and make arrests for misdemeanor violations with probable cause.²¹⁹ According to this provision, USFS might, in fact, have a sound statutory basis for aiding Border Patrol—one that could be broadly interpreted to include enforcement of immigration-related criminal activity. Alternatively, one could narrowly read the legislative history to be specifically related to controlled substances response, where the Agency’s enforcement authority is limited to preventing illicit drug traffic.²²⁰ The takeaway here is that USFS does have preexisting statutory enforcement authority, but whether the scope of that authority was intended to include immigration-related activity is unclear and subject to manipulation, or broad interpretation, by the crimmigration system.²²¹

Similarly, DOI’s agencies have their respective law enforcement programs, but the statutory delegations do not make it apparent that the scope of law enforcement authority extends to immigration-related activity. The FWS enabling statute says the Agency may enter into cooperative agreements with other Federal agencies and may utilize “personnel, services and facilities . . . [under FWS] jurisdiction which are administered or managed for fish and wildlife purposes and for enforcement of any laws administered by [the agency] relating to fish and wildlife.”²²² BLM can also cooperate with law enforcement officials of other subdivisions “[i]n connection with the administration and regulation of the use and occupancy of the public lands.”²²³ Agency

²¹⁷ *Id.* § 1600(2), (6).

²¹⁸ 16 U.S.C. § 553.

²¹⁹ *Id.* §§ 559, 559c.

²²⁰ National Forest Management Act of 1976, Pub. L. No. 99-570, 100 Stat 3207 (1986); Pub. L. No. 100-690, 102 Stat. 4363 (1988) (providing legislative history for the enactment of § 599).

²²¹ See *Illegal Immigration on Public Lands Hearing*, *supra* note 164 and accompanying text (indicating the ways USFS officials are limited in their ability to execute their jobs properly in light of the crimmigration system).

²²² 16 U.S.C. § 742l(b).

²²³ 43 U.S.C. § 1733(d).

enabling statutes seemingly grant broad authority for agencies to cooperate with other agencies like DHS, but these provisions lack specific language and directive to help clarify whether such cooperation includes involvement in immigration-response activity. This is a point of congressional oversight and ultimately a product of the immigration system merging with criminal law—the consequence of which is increased collaboration with Border Patrol and a prioritization of immigration-related enforcement activity by land management agencies.

2. Border Patrol Overreach via Exemptions and Discretionary Waivers

Border Patrol activity on public lands threatens the efficacy of environmental law as a tool for federal land management agencies to use as a check on law enforcement overreach. First, DHS's waiver authority pursuant to the REAL ID Act and Secure Fencing Act has threatened public oversight of the agency's actions by circumventing environmental impact assessments and any necessary mitigation that lies at the heart of federal environmental law regulation.²²⁴

Second, the broad authority DHS has for “emergency” or “exigent” circumstances has potential to supersede land management agency authority and further criminalize border management on public lands. Congress's willingness to allow for national security-related justifications where environmental laws have carved out emergency circumstance exceptions has afforded DHS wide discretion.²²⁵ Border Patrol leverages the broad interpretation of “emergency circumstance” to include national security agendas so it can build infrastructure on public lands without the check and accountability of NEPA and other environmental protection statutes.²²⁶ Additionally, the MOU states nothing is intended to prevent Border Patrol agents from “exercising existing exigent/emergency authorities to access lands” at any time, including in wilderness areas, when they conclude that an off-road pursuit is “reasonably expected to result in the apprehension of a suspected [cross-border violation].”²²⁷ Having the ability to waive environmental regulations in “exigent” circumstances allows DHS to broadly use national security as a justification to take actions that have tangible consequences on ecosystems and local communities.²²⁸

Furthermore, if the prescribed response to an unauthorized border crossing on protected federal land is allowing Border Patrol to disregard preexisting federal land management policies for national security reasons, the act of migration is inherently one of heightened concern. The

²²⁴ Garbus, *supra* note 79, at 344.

²²⁵ See *supra* Part II(C)(1); see also, e.g., 40 C.F.R. § 1506.12 (2023) (allowing for “alternative arrangements” under NEPA for certain “emergency circumstances”).

²²⁶ See *supra* Part II(C)(1); 40 C.F.R. § 1506.12.

²²⁷ MOU, *supra* note 13, at 6.

²²⁸ Walker, *supra* note 96, at 937 (arguing that courts and private citizens should hold the DHS accountable for the ecological consequences of their actions taken under a national security justification).

broad interpretation of emergency exemptions in environmental laws to include national security agendas has made it easier to sweep immigration enforcement into the scope of authorized exemptions. This conflation of immigration and national security along the border continues to perpetuate the crimmigration system and threatens the power and authority of federal land managers as environmental protection entities in the process. While Congress was evidently willing to allow for national security related justifications to exempt compliance with certain environmental statutes,²²⁹ it unlikely intended this power to extend as far as it has onto public lands under the crimmigration system.

C. The Monster Crimmigrator

Attempts to create interagency cooperation and the promotion of one unified government effort to tackle the so-called “immigration crisis” have essentially formed one “monster crimmigrator” out of the administrative state.²³⁰ Juliet Stumpf proposes the idea of “crimmigrators” as decision makers within the crimmigration system or those who are empowered to move individuals into the crimmigration system.²³¹ The commingling of Border Patrol and federal land management agency responsibilities embodies a monster crimmigrator and perpetuates the crimmigration system in undesirable ways.

Border Patrol’s encroachment on public lands via waivers and exemptions threatens the value of federal land management agency responsibilities, which in turn curtails the potential efficacy of environmental regulations to serve as a check on law enforcement overreach.²³² The traditional role of Border Patrol is a prime example of a crimmigrator. Having the power to search and arrest border-crossers, upon reasonable suspicion, allows Border Patrol to easily push an individual into the crimmigration system. But as recent U.S. border policy has shifted crimmigration onto public lands, Border Patrol’s power as crimmigrator has also extended to these areas.²³³ Furthermore, Border Patrol’s power as crimmigrator is amplified by its ability to act on public lands, side-step environmental protection protocol, and extend the scope of its power as crimmigrator.²³⁴

Not only traditional law enforcement officers espouse the role of crimmigrator along the border; other actors whose interests are at stake at the intersection of immigration law, criminal law, and public lands conservation function as crimmigrators as well, such as federal land

²²⁹ See *supra* Part II(C)(1).

²³⁰ See Ortiz, *supra* note 1.

²³¹ Stumpf, Cimmigrators Deciding, *supra* note 7, at 7.

²³² See *supra* Part III(A)(1) (Border Patrol’s Overreach); see also *supra* Part III(B) (Legal Implications of Prioritizing Border Enforcement).

²³³ See *supra* Part II(A) (Changes in Border Management).

²³⁴ See *supra* Part II(C)(1) (Statutory Exemptions and Discretionary Waiver Authority under DHS).

management agencies and environmental and conservation advocates.²³⁵ As seen through the interagency conflict and attempted agency coordination among DHS, DOI, and USFS, crimmigration decision making power lies in the hands of multiple stakeholders along the border. Cooperative agreements among agencies ultimately favor DHS action and development on public lands because increased enforcement is easily justified under a criminal law framework of immigration response.²³⁶ By authorizing public land managers to act as law enforcement officers in an immigration context, Border Patrol is delegating and exacerbating its powers as crimmigrator.

Public lands have become a piece of the crimmigration apparatus and a place to back undocumented refugees and migrants into a criminalized corner.²³⁷ The statutory patchwork of exemptions invoked by DHS, transfers of immigration enforcement authority, and entanglement of land agents into Border Patrol-adjacent roles prioritizes immigration enforcement thus amplifying crimmigrator power along the border. This power has opportunistically expanded on public lands that abut the border where national security—an increasingly priority concern for government agencies—justifies immigration enforcement by federal agents.

In her work, Stumpf posits that “who” decides a crimmigration issue has the power and potential to reshape the decision itself.²³⁸ Determining who the decision maker is can help decide how a question is resolved and which institutions or individuals should aid in making that decision—which ultimately influences who is considered to “belong” in this country, and who the applicable law and policy targets.²³⁹ Furthermore, “determining the decision maker can determine whether an issue falls within or outside of the boundaries of crimmigration itself.”²⁴⁰

Placing emphasis on the significance of who decides helps to frame the appropriate role of federal land managing agencies within the crimmigration system. Land managing agents are not fully equipped—nor statutorily intended—to take on the role of crimmigrator.²⁴¹ As government officials entrusted with protecting public lands and natural resources, land management agencies are ultimately limited in their ability to diligently decide the fate of an undocumented migrant.²⁴² This line of thought provokes a broader policy discussion of crimmigration

²³⁵ See *supra* Part II(B); *supra* Part II(C)(3); see also Meierotto, *supra* note 62, at 14 (describing public perception and concern that migration causes environmental harm along the border); MOU, *supra* note 13, at 1 (listing the federal agency parties to the MOU “committed to preventing illegal entry into the United States”).

²³⁶ See *supra* Part III(A); *supra* Part II(A).

²³⁷ Cf. Stumpf, *Crimmigrators Deciding*, *supra* note 7, at 11 (discussing how Congress reconstituted the DMV clerk into a crimmigrator when it passed the REAL ID Act).

²³⁸ *Id.* at 8.

²³⁹ *Id.*

²⁴⁰ *Id.* at 7.

²⁴¹ See *supra* Part III(B)(1) (Land Managers’ Authority Exceeds Congressional Intent).

²⁴² See *supra* note 45 and accompanying text.

system reform which is beyond the scope of this Comment; however, perhaps more effort to distinguish agency missions and roles would disassemble the “monster crimmigrator,” and ultimately help reframe immigration response along the border and on public lands.

IV. CONCLUSION

This Comment has explored the tension that exists at the convergence of two contentious and provocative areas of law—the crimmigration system and the public lands system. U.S. policy informs management of the United States-Mexico border and is rooted in an immigration system that has merged with the criminal justice system. As a result, recent strategies to secure the border and address the “immigration crisis” have pushed individuals seeking entry to the United States away from urban ports of entry and toward more remote sections of the border on federal public lands. The crossover between immigration and public lands implicates various federal agencies that are responsible for regulating and enforcing separate yet inherently intertwined interests.

This intersection is where the root of the tension lies. The statutorily mandated duties and responsibilities of the various agencies along the border are at odds with one another, and this situation is the most acute on public lands. Border Patrol, under its parent agency DHS, is obligated to secure the Nation’s borders and respond to immigration-related activity, whereas USFS and DOI’s agencies are tasked with protecting and managing the Nation’s land and natural resources. Land management agencies do their job by enforcing statutory environmental protections and ensuring the land is being used in the public’s best interest. But conflicts of interest arise when DHS demands immediate access to these lands to build roads, barriers, and surveillance infrastructure for national security purposes and is unwilling to adhere to environmental regulations and protocols. Not only has DHS been unwilling, but discretionary mechanisms enable Border Patrol to invoke emergency exemptions and waivers in environmental statutes and regulations without explanation or analysis.

Simultaneously, public land managers have become an extension of DHS and are authorized to take on more immigration-related enforcement tasks, which is beyond the scope of Congress’s intent in establishing these distinct, natural resource protection agencies. The result has weakened the integrity of federal land management agency responsibilities, overriding their priorities with increased law enforcement. Not only that, but federal land managers have also assumed power that exceeds the scope of their mandated duties. The interagency conflict between Border Patrol and land management agencies results in a systematic prioritization of border enforcement over the protection of public lands. This government overreach on public lands perpetuates and exacerbates the crimmigration system.