



November 2020

SOUTHWEST BORDER

Information on Federal Agencies' Process for Acquiring Private Land for Barriers

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GAO Highlights

Highlights of [GAO-21-114](#), a report to congressional requesters

Why GAO Did This Study

In January 2017, the President issued Executive Order 13767, which directed the Secretary of Homeland Security to immediately plan, design, and construct a wall or other physical barriers along the southwest border. These new barriers would add to or replace 654 miles of primary pedestrian and vehicular barriers constructed as of fiscal year 2015. Of the nearly 2,000-mile southwest border, roughly 30 percent is federal land. Private, tribal, and state-owned land constitutes the remaining 70 percent of the border.

GAO was asked to review the U.S. government's efforts to acquire privately owned land along the southwest border for barrier construction. GAO's review focused on the government's acquisition of private land and did not address acquisition of federal, state, or tribal property. This report examines (1) federal agencies' process for acquiring private land identified for the construction of border barriers and (2) the status of federal acquisition of private land for the barrier construction. GAO reviewed key documents; interviewed Border Patrol, USACE, and Department of Justice officials; and interviewed stakeholder organizations and landowners. GAO also analyzed data on the status of private land acquisition and conducted a site visit to areas in south Texas.

View [GAO-21-114](#). For more information, contact Rebecca Gambler at (202) 512-8777 or GamblerR@gao.gov.

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What GAO Found

The interagency process for acquiring private land for border barrier construction along the southwest border involves the Department of Homeland Security's U.S. Border Patrol and the Department of Defense's U.S. Army Corps of Engineers (USACE) as well as the Department of Justice. The key acquisition steps are (1) identifying the landowners affected by planned barriers, (2) contacting landowners to obtain access to their property for surveying and other due diligence activities, (3) negotiating with landowners, and (4) concluding the acquisition preferably through negotiated purchase or via condemnation. The government may acquire temporary access to or permanent ownership of property by initiating a condemnation proceeding in federal district court. In this judicial process, the government articulates the public use necessitating the acquisition and the estimated compensation for the landowner, among other things.

Border Barrier Construction in South Texas



Source: GAO. | GAO-21-114

GAO's analysis of USACE data shows that, as of July 2020, the federal government acquired 135 private tracts, or sections, of land and is working to acquire 991 additional tracts. The privately owned land the government acquired or is working to acquire totals about 5,275 acres or 8.2 square miles, and most of it—1,090 of 1,126 tracts—is in south Texas. The Border Patrol planned for private land acquisition in south Texas to take 21 to 30 months compared with 12 months for comparable land acquisitions in other regions. Border Patrol estimated private land acquisition in south Texas would take more time due to factors unique to south Texas, including:

- **Barrier placement in south Texas.** Additional time is needed for the government to work with landowners to ensure that they have access to and are justly compensated for any negative impact on the value of remaining property between the border barrier and the Rio Grande River, according to Border Patrol officials.
- **Missing or incomplete land records.** Border Patrol officials said that it often takes time to identify parties with interest in a tract of land due to missing or incomplete land records. In cases where the government is unable to identify interested parties, the government has to use the condemnation process to resolve title issues and acquire ownership.

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Abbreviations

| | |
|-------|---------------------------------|
| CBP | Customs and Border Protection |
| DHS | Department of Homeland Security |
| DOD | Department of Defense |
| DOJ | Department of Justice |
| USACE | U.S. Army Corps of Engineers |

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November 17, 2020

The Honorable Charles E. Schumer
Minority Leader
United States Senate

The Honorable Dick Durbin
Ranking Member
Subcommittee on Border Security and Immigration
Committee on the Judiciary
United States Senate

The Honorable Martin Heinrich
United States Senate

The Honorable Tom Udall
United States Senate

The southwest border of the United States has long been vulnerable to cross-border illegal activity. Within the Department of Homeland Security (DHS), U.S. Customs and Border Protection's (CBP) U.S. Border Patrol is the federal agency responsible for securing U.S. borders between ports of entry.¹ CBP spent approximately \$2.3 billion between fiscal years 2007 and 2015 to deploy physical barriers along the nearly 2,000-mile southwest border and, as of March 2018, maintained 654 miles of primary pedestrian and vehicular barriers.² In January 2017, the President issued

¹See 6 U.S.C. § 211(a) (establishing CBP within DHS), (c) (enumerating CBP's duties), (e) (establishing and listing duties of U.S. Border Patrol within CBP). Ports of entry are facilities that provide for the controlled entry into or departure from the United States. Specifically, a port of entry is any officially designated location (seaport, airport, or land border location) where DHS officers or employees are assigned to clear passengers and merchandise, collect duties, and enforce customs laws, and where DHS officers inspect persons entering or applying for admission into, or departing the United States pursuant to U.S. immigration and travel controls.

²For the purposes of this report, we generally use the term "barrier" to refer to a physical structure, such as a pedestrian fence, vehicle barrier, or wall, or any combination of these structures, that is intended to impede the movement of people or vehicles. The primary barrier, which may include pedestrian or vehicle barriers, is the first barrier encountered when moving into the United States from the border; the secondary barrier, located behind the primary barrier on the U.S. side of the border, consists solely of pedestrian barrier; and the third barrier, or tertiary barrier, is further set back from the border, and is primarily used to delineate property lines rather than deter illegal entries.

Executive Order 13767, which directed the Secretary of Homeland Security to immediately plan, design, and construct a wall or other physical barriers along the southwest border.³ In response, CBP initiated the Border Wall System Program to replace and construct new barriers along the southwest border.⁴

In February 2017, we reported that CBP collects data that could help provide insight into how border barriers contribute to border security operations, including the location of illegal entries.⁵ However, we found that CBP had not developed metrics to assess the contributions of border barriers to its mission. We also found that the Border Patrol had not developed written guidance on the processes to identify capability gaps in border security operations and to identify solutions to those capability gaps. We recommended that the Border Patrol develop metrics to assess the contributions of pedestrian and vehicle barriers to border security along the southwest border and develop guidance for its process for identifying, funding, and deploying a variety of physical barriers, including gates, roads, bridges, lighting, and drainage infrastructure, for border security operations. CBP concurred with our recommendations and has taken action toward addressing them, such as developing and testing initial metrics and developing and distributing guidance that outlines a governance structure for Border Patrol officials to review and approve operational requirements, among other things.

In July 2018, we reported that CBP was evaluating designs and locations for border barriers but was proceeding without an analysis of the costs associated with deploying barriers in each location or segment.⁶ As a result, we recommended, among other things, that CBP analyze the costs

³Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, § 4, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017) (issued Jan. 25). Executive Order 13767 defines “wall” as a “contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.” See id. § 3, 82 Fed. Reg. at 8794.

⁴CBP uses the term “wall system” to describe planned combinations of barriers, separated by an enforcement zone; lighting and surveillance technology for the barriers and enforcement zone; access roads; and interfaces for current or future technologies to support detection capabilities.

⁵GAO, *Southwest Border Security: Additional Actions Needed to Better Assess Fencing’s Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, [GAO-17-331](#) (Washington, D.C.: Feb. 16, 2017).

⁶GAO, *Southwest Border Security: CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information*, [GAO-18-614](#) (Washington, D.C.: July 30, 2018).

associated with future barrier segments and include cost as a factor in its methodology for prioritizing future barrier deployments. CBP concurred with this recommendation, and stated that it will continue to include cost as part of the capital investment process for the Border Wall System Program, adding for example, that it developed a life cycle cost estimate for planned barrier segments in one sector and was developing a life cycle cost estimate for the planned barrier segment in another sector. We agreed that these were important steps but noted that according to *Leading Practices in Capital Decision-Making*, when evaluating where to make capital investments, organizations should conduct financial analyses in order to prioritize investments that allow the organization to obtain the greatest benefits for the least cost.

You requested that we review the U.S. government's efforts to acquire privately-owned land along the southwest border for border barrier construction. In this report, we examine (1) federal agencies' process for acquiring private land identified for the construction of border barriers along the southwest border and (2) the status of federal acquisition of private land for border barrier construction. Our review focuses on the government's acquisition of private land and does not address the acquisition of federal, state, or tribal land.

To examine federal agencies' process for acquiring private land identified for the construction of border barriers, we reviewed key documents, such as the CBP's Border Wall System Program Management Plan. We also reviewed interagency agreements and the memorandum of understanding between CBP and U.S. Army Corps of Engineers (USACE) within the Department of Defense (DOD) and interagency agreements between CBP and the Department of Justice (DOJ). In addition, to further understand how federal agencies interact with landowners, we reviewed sample documents that federal officials provide landowners, such as notification letters, *Right of Entry for Survey and Site Assessment* forms, and Offers to Sell, among other things. We interviewed and received written responses from Border Patrol officials from the Border Wall System Program Office, CBP Office of Chief Counsel, DOJ's Environment and Natural Resources Division, and USACE headquarters and real estate officials based out of the Fort Worth District regional office. USACE's Fort Worth District oversees all DHS-funded barrier construction in south Texas.

Further, we conducted a site visit in February 2020 to the Border Patrol's Rio Grande Valley Sector, where we interviewed Border Patrol officials to learn about their engagement with landowners and other federal agencies

as part of the land acquisition process.⁷ We selected the Rio Grande Valley Sector for the site visit because the sector was the primary area in which Border Patrol and USACE were acquiring private land for barrier construction. In addition, we sought to interview landowners whose property the government had purchased or condemned. After discussions with CBP and in light of ongoing discussions between the federal government and landowners, we did not contact landowners with whom the government was interacting at the time of our review, including landowners in active negotiations with the federal agencies and landowners whose condemnation proceedings have not formally concluded. CBP provided us with a list of 21 tracts of land that the government had already acquired from private entities (i.e., not federal, state, county, municipal governments, or special districts such as irrigation districts). Eighteen of the 21 tracts were located in south Texas. With contact information provided by CBP, we tried to reach the 18 private landowners, and we interviewed three who agreed to share their perspectives on the land-acquisition process. We also interviewed individuals from three local organizations—the South Texans’ Property Rights Association, the Citrus Mutual Foundation, and the Independent Cattlemen’s Association of Texas—to understand the perspectives of landowners who have been or may be affected by the acquisition of private land to construct border barriers. The information we collected from interviews with landowners and organizations cannot be generalized, but provided perspectives of those who may be affected by land acquisition.

To determine the status of the federal government’s acquisition of private land for border barrier construction, we analyzed USACE’s tract-level data on land acquisitions for DHS-funded and DOD-funded border barriers from January 2017 through July 2020 to cover the general timeframe of border barrier construction following the issuance of Executive Order 13767.⁸ From the tract-level data, we excluded land that was owned by any level of government—including federal, state, county, municipal, and special districts (such as irrigation districts)—as well as

⁷Border Patrol divides responsibility for border security operations geographically among nine sectors, each with its own headquarters. Each sector is further divided into varying numbers of stations.

⁸The Border Patrol defines a project area as the geographic area that defines the project boundaries and can be comprised of one or more real estate tracts to include access roads and may not be contiguous. The Border Patrol defines a tract as a section of land comprised of one or more parcels. A tract identified as needed for a project area may be a subset area of a larger parent tract.

land from which the government sought easements for the purpose of towers, road access, or both. To determine the reliability of these data, we examined the data for obvious errors and missing data, interviewed knowledgeable USACE and Border Patrol officials, and corroborated the property descriptions with information provided by Border Patrol. We found these data to be sufficiently reliable for the purposes of presenting the number of tracts in the land acquisition process, disaggregated by Border Patrol sector. In addition, we reviewed condemnation cases filed by U.S. Attorneys for barriers along the southwest border in federal court from January 2017 to August 2020. We obtained this information through our own docket searches using industry standard legal research tools. We reviewed the declarations of taking setting forth the size and location of the land tracts acquired, the purpose of the acquisition, and the proposed compensation, among other things. We summarized these cases and disaggregated them by type—namely, temporary or permanent acquisitions—as well as Border Patrol sector, among other factors. By interviewing knowledgeable attorneys at CBP and at the Department of Justice and by reviewing the data for obvious errors, we found these data to be sufficiently reliable for presenting summary data on these cases.

Further, we reviewed the Border Wall System Program Management Plan and other documents identified above. We also interviewed Border Patrol officials in the Rio Grande Valley Sector during the site visit described above, officials from Border Patrol's Border Wall System Program Office, and real estate officials from USACE headquarters and regional offices. In addition, we interviewed individuals from the three organizations listed above as well as three landowners about the perspectives of landowners for greater context on factors that may have delayed the acquisition of private land. The information we collected from these interviews cannot be generalized, but provided perspectives of those who may be affected by land acquisition.

In this report, we also analyzed Border Patrol's geospatial data on constructed and proposed barriers along the southwest border. Specifically, we obtained data on barrier projects completed between October 2016 and June 2020 as well as proposed barrier projects. We selected this time period because it covers the fiscal years since Executive Order 13767 was issued in January 2017. For both completed and proposed projects, we disaggregated the data by new barriers (barrier constructed where there was no existing barrier) and replacement barriers (barriers that replaced existing barriers). We also disaggregated by agency—that is, whether funded by DHS or DOD—and by pedestrian or vehicle barriers. We compared these data to data on the status of

extant barriers at the end of fiscal year 2016 that we obtained for our February 2017 report on border barriers.⁹ To assess the reliability of border barrier data, we reviewed the data for inconsistencies and missing information, interviewed knowledgeable officials, and compared the data to our prior analysis. Based on this assessment, we determined that the Border Patrol geospatial data are sufficiently reliable for the purposes of presenting summary data on border barriers in descriptive tables and maps.

We conducted this performance audit from December 2019 to November 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

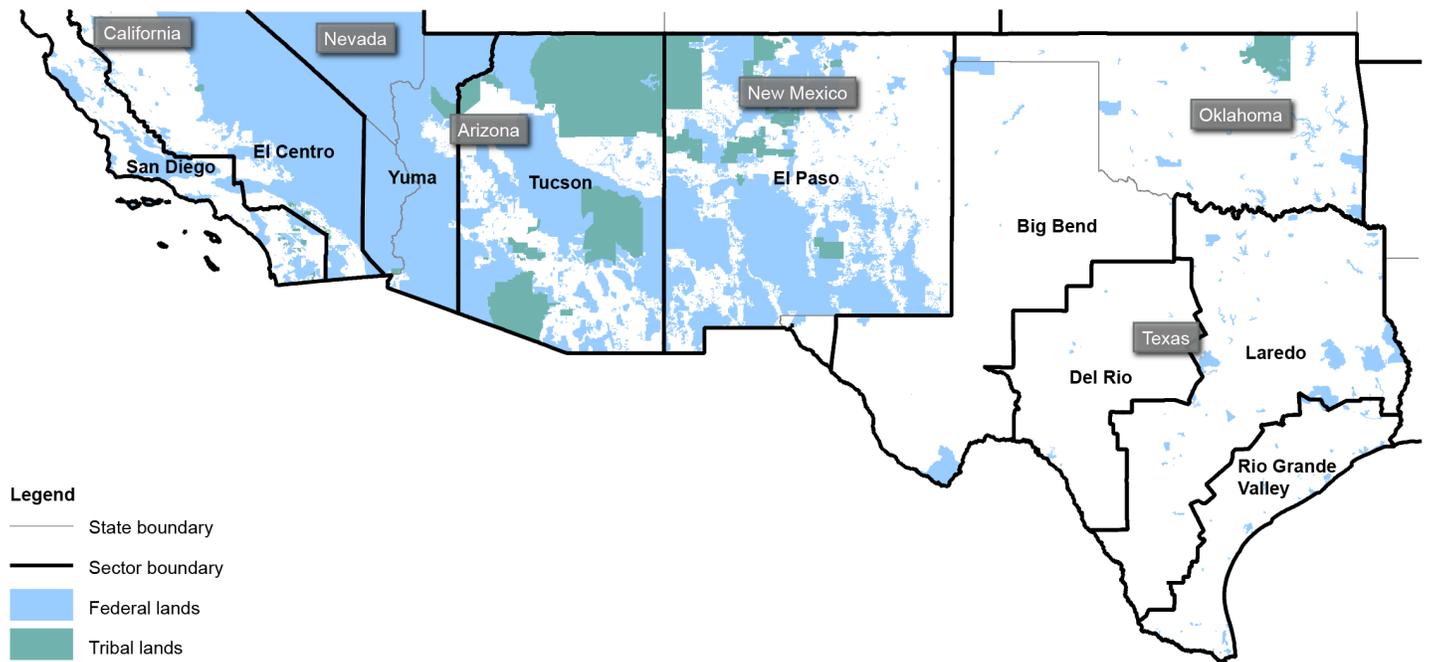
Background

Border Patrol Sectors and Land along the Southwest Border

Border Patrol divides responsibility for border security operations geographically among nine sectors along the southwest border of the United States, as shown in figure 1.

⁹[GAO-17-331](#).

Figure 1: Map of Southwest Border Lands with Border Patrol Sectors



Source: GAO presentation of CBP information. | GAO-21-114

The southwest border spans almost 2,000 miles across four states and comprises different types of terrain—a fact that challenges border security efforts. For example, in Arizona, the border is characterized by desert and rugged mountains; in Texas, the border is marked by the Rio Grande River. The southwest border along the southern boundary of California is primarily comprised of coastal beaches, inland mountains, rugged canyons, and high desert, whereas in New Mexico the border is mountainous.

The southwest border varies not only in geography but also with regard to the U.S. entities and individuals who own land along the border. More specifically, the border is comprised of a combination of federal, state, tribal, and privately-owned land. Approximately 565 miles or roughly 30 percent, of the nearly 2,000 total border miles are federal land. Private, tribal, and state-owned land constitutes the remaining 70 percent of the border.

Barriers along the Southwest Border

Barriers along the southwest border are generally constructed pursuant to section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended by the REAL ID Act of 2005, Secure Fence Act of 2006, and DHS Appropriations Act, 2008.¹⁰ Pursuant to section 102, CBP increased the total miles of primary barriers on the southwest border from 119 miles in fiscal year 2005 to 654 miles in fiscal year 2015—of which 354 miles are primary pedestrian barriers and 300 miles are primary vehicle barriers.¹¹

To implement Executive Order 13767, CBP created the Border Wall System Program in January 2017. The program office, which was moved to Border Patrol's Program Management Office Directorate in June 2018, is responsible for planning the construction or replacement of physical barriers and deploying other infrastructure and technology within defined segments along the southwest border. Proposed barrier construction in Texas, specifically in the Border Patrol's Rio Grande Valley and Laredo Sectors, include a 150-foot wide border enforcement zone on the river side of the barrier. Border Patrol uses technology (e.g., surveillance cameras), lighting, and roads for maintenance and patrolling to establish the enforcement zone. Border Patrol officials stated that, in some urban areas of the border in California and Arizona, proposed barriers include border enforcement zones between primary barriers and secondary

¹⁰The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, as amended, requires the Secretary of Homeland Security to take necessary actions to install physical barriers and roads in the vicinity of the border to deter illegal crossings in areas of high illegal entry. Pub. L. No. 104-208, div. C, title I, subtitle A, § 102(a), 110 Stat. 3009, 3009-554 (classified, as amended, at 8 U.S.C. § 1103 note). The REAL ID Act of 2005 amended IIRIRA by expanding the authority of the Secretary of Homeland Security to waive all legal requirements, as determined to be necessary, in the Secretary's sole discretion, to ensure expeditious construction of barriers and roads along the border. Pub. L. No. 109-13, div. B, tit. I, § 102, 119 Stat. 231, 306. The Secure Fence Act of 2006 amended the Illegal Immigration Reform and Immigrant Responsibility Act to require DHS to construct at least two layers of reinforced barriers, as well as roads, lighting, cameras, and sensors, on certain segments of the southwest border in California, Arizona, New Mexico, and Texas. The Secure Fence Act also required that DHS achieve and maintain operational control over U.S. borders through surveillance activities and physical infrastructure enhancements to prevent unlawful entry by foreign nationals and facilitate CBP's access to the borders. See Pub. L. No. 109-367, §§ 2, § 3, 120 Stat. 2638, 2638-2639. Subsequently, the DHS Appropriations Act, 2008, rewrote IIRIRA's border fencing section and replaced it with requirements for DHS to construct at least 700 miles of reinforced fencing where it would be most practical and effective; and to install additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border. IIRIRA § 102(b), 110 Stat. at 3009-554 to -555, as amended by Pub. L. No. 110-161, div. E, tit. V, § 564(a)(2)(B)(ii), 121 Stat. 1844, 2090-91 (2007) (classified at 8 U.S.C. § 1103 note).

¹¹See [GAO-18-614](#).

barriers. Border Patrol uses the term “wall system” to describe the combination of physical barriers, technology, and other infrastructure. Figure 2 shows border barrier construction with its associated enforcement zone in Rio Grande Valley Sector.

Figure 2: Border Barrier and Enforcement Zone under Construction in Rio Grande Valley Sector



Source: GAO. | GAO-21-114

Following the issuance of Executive Order 13767, DHS has received appropriations totaling around \$4.5 billion for construction of new and replacement barriers along the southwest border for fiscal years 2017 through 2020. Appropriations acts have included various provisos, such as locational requirements requiring or proscribing the construction of barriers in specified areas. These recent appropriations are summarized in table 1.

Table 1: Border Barrier Appropriations to the Department of Homeland Security, Fiscal Years 2017-2020

| Law | Amount appropriated (in millions) | Selected appropriation provisions |
|---------------------------------------|-----------------------------------|--|
| Consolidated Appropriations Act, 2017 | 341.2 | To replace approximately 40 miles of existing primary pedestrian and vehicle border barriers along the southwest border using previously deployed and operationally effective designs, such as currently deployed steel bollard. |
| Consolidated Appropriations Act, 2018 | 1,375.0 | For approximately 14 miles of secondary barriers along the southwest border in the San Diego Sector, approximately 25 miles of primary pedestrian levee barriers along in the Rio Grande Valley Sector, for primary pedestrian barriers along in the Rio Grande Valley Sector, and replacement of existing primary pedestrian barriers in any southwest border location, and for border barrier planning and design. Funding cannot be used for border barriers within the Santa Ana Wildlife Refuge. |
| Consolidated Appropriations Act, 2019 | 1,375.0 | For the construction of primary pedestrian barriers, including levee pedestrian barriers, in the Rio Grande Valley Sector. The act placed new restrictions on the use of funds made available for U.S. Customs and Border Protection barrier construction in certain listed cities and one specific census-designated place while efforts to reach mutual agreement with local elected officials are ongoing as to the design and alignment, or placement, of physical barriers in such city or place. Funding cannot be used for pedestrian barriers in the Santa Ana Wildlife Refuge, Bentsen-Rio Grande Valley State Park, La Lomita Historical park, National Butterfly Center, or within or east of the Vista del Mar Ranch area of the Lower Rio Grande Valley National Wildlife Refuge. |
| Consolidated Appropriations Act, 2020 | 1,375.0 | For construction of barrier system along the southwest border. Barriers must be constructed in the highest priority areas as identified by the Border Security Improvement Plan, and may not be built in the restricted areas included in the Consolidated Appropriations Act, 2019 or within historic cemeteries. |

Sources: GAO analysis of Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 433-434 (May 5, 2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 616-617 (Mar. 23, 2018); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13, 28-29 (Feb. 15, 2019); and Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2511-2512 (Dec. 20, 2019) | GAO-21-114

Notes: This table does not contain \$601 million that the U.S. Border Patrol received from the Treasury Forfeiture Fund in fiscal year 2019. This table also does not include funding that may be available to the Department of Defense for border barrier construction.

Separate from funds appropriated to DHS, the current administration has sought to use Department of Defense (DOD) funding for border barrier construction. In February 2019, the President declared a national emergency at the southwest border, requiring the use of the armed forces, and invoked various statutes to address the border security and humanitarian situation at the border. As a result, the administration identified supplementary funding sources to be used as necessary to build barriers along the southwest border, including the following provisions. First, 10 U.S.C. § 284(a) authorizes DOD to support the counterdrug activities of other federal agencies. CBP requested DOD’s counterdrug assistance in the form of construction of fences and roads and installation of lighting to block drug smuggling corridors, as authorized by section 284(b)(7). According to USACE officials, no private land acquisition is occurring under this provision, as all land designated

for construction of barriers under section 284 is federally owned or controlled.¹²

Second, 10 U.S.C. § 2808 authorizes the Secretary of Defense to undertake military construction projects in the event of a declaration of war or Presidential declaration of a national emergency when necessary to support the use of the armed forces. Such projects may be undertaken only within the total amount appropriated for military construction, including unobligated funds for family housing.¹³ In September 2019,

¹²While the President's national emergency declaration on February 15, 2019, did not expressly invoke section 284, following a February 25 request from DHS to DOD for assistance under section 284, the Acting Secretary of Defense authorized the USACE to begin planning and executing support to DHS pursuant to section 284. See Declaring a National Emergency Concerning the Southern Border of the United States, Pres. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (issued Feb. 20, 2019).

¹³Issues arising from DOD's involvement in border barrier funding and construction are being litigated in the federal courts. For example, in October 2020, the United States Supreme Court granted the administration's petition for a writ of certiorari seeking to overturn the Ninth Circuit's opinions in *Trump v. Sierra Club* and *Trump v. California* which held that it was unlawful to use \$2.5 billion in DOD (section 284) counter-drug funds for southwest border barriers by way of transfer authority under section 8005 of the DOD Appropriations Act, 2019 (Pub. L. No. 115-245, div. A, title VIII, § 8005, 132 Stat. 2981, 2999). See *Sierra Club v. Trump*, Nos. 19-16102, -16300, Filed Opinion, Doc. 187 (9th Cir. June 26, 2020) and *California v. Trump*, Nos. 19-16299, -16336, Filed Opinion, Doc. 120 (9th Cir. June 26, 2020). As background, in July 2019, the Supreme Court stayed the permanent injunction in *Trump v. Sierra Club*, pending appeal; therefore, as of November 2020, DOD can continue to use the \$2.5 billion for border barrier construction, through its counter-drug authority under 10 U.S.C. § 284, notwithstanding the Ninth Circuit decisions. See *Trump v. Sierra Club*, No. 19A60, 140 S. Ct. 1 (July 26, 2019). In October 2020, the Ninth Circuit issued a related ruling that DOD's military construction authority (10 U.S.C. § 2808) did not authorize the use of \$3.6 billion for challenged barrier construction projects. See *Sierra Club, et al. v. Trump* and *California, et al. v. Trump*, Nos. 19-17501, -17502, 20-15044, Filed Opinion (9th Cir. Oct. 9, 2020). Subsequently, Sierra Club sought for the Ninth Circuit to issue an emergency ruling to immediately halt border barrier projects using section 2808 funding consistent with the court's October 9 opinion. In another case, *El Paso Cnty., Tx. et al. v. Trump*, related to barrier construction under section 2808, in August 2020, plaintiffs also submitted a petition for a writ of certiorari to the Supreme Court, although this case regarding \$3.6 billion in military construction (section 2808) funding for border barriers is still pending before the Fifth Circuit. Previously, in January 2020, the Fifth Circuit had stayed the Texas federal district court's permanent injunction pending appeal; therefore, since January, DOD has been able to use its section 2808 authority to construct border barriers, and it may continue to do so unless and until the Supreme Court decides otherwise. See *El Paso Cnty., Tx., et al. v. Trump*, No. 19-51144, Per Curiam Opinion, Doc. 00515264406 (5th Cir. Jan. 8, 2020). Having granted certiorari in *Trump v. Sierra Club* and *Trump v. California*, the Supreme Court may choose to accept other requests for final review, and for any case(s) taken, the Court will ultimately issue its opinion(s) affirming or prohibiting, in whole or in part, DOD's continued efforts to use its appropriations for construction of barriers along the southwest border pursuant to sections 284 and 2808 of Title 10, U.S. Code.

DOD selected 11 military construction projects based on, among other things, DHS's prioritization of border locations and the location of military forces deployed to the southwest border, according to DOD officials. DOD officials stated that DOD's response to the national emergency may be supportive of CBP, but all the requirements for military construction projects are military requirements.¹⁴

From October 2016 to June 2020, primary barriers funded by appropriations to DHS have been completed across six Border Patrol sectors totaling 77.8 miles and by appropriations made to DOD across five sectors totaling 40.6 miles.¹⁵ According to Border Patrol officials, barriers are only considered completed for these mileage data if an entire project area has been completed, and Border Patrol data on proposed barriers includes project areas still under construction as well as project areas that have been funded but have not started.¹⁶ Of the 118.4 miles of barriers that have been constructed, 48.3 miles are new barriers—meaning that they were constructed on land that did not previously have barriers—and 70.0 miles replaced existing barriers.¹⁷ In addition, as of June 2020, there are 241.7 miles of proposed border barriers funded by DHS and 392.8 miles of proposed border barriers funded by DOD. The proposed barriers funded by DHS are predominantly located within the Border Patrol's Rio Grande Valley and Laredo Sectors. The proposed barriers funded by DOD are predominantly located in the Tucson and El Paso Sectors. The miles of existing border barriers as of October 2016,

¹⁴We have ongoing work on USACE's planning, awarding, and overseeing of construction contracts along the southwest border as well as on DOD's use of unobligated military construction funds along the southwest border.

¹⁵The primary barrier, which may include pedestrian or vehicle barriers, is the first barrier encountered when moving into the United States from the border. Pedestrian fencing is primarily intended to slow down and deter pedestrians from crossing the border. Vehicle fencing, which is intended to resist vehicles engaged in drug trafficking and alien smuggling operations, is typically used in rural or isolated locations that have a low occurrence of illegal pedestrian traffic. Secondary and tertiary barriers are not included in the barrier totals in this paragraph.

¹⁶The Border Patrol defines a project area as the geographic area that defines the project boundaries and can be comprised of one or more real estate tracts to include access roads and may not be contiguous. The Border Patrol defines a tract as a section of land comprised of one or more parcels. A tract identified as needed for a project area may be a subset area of a larger parent tract.

¹⁷In these totals, we consider areas where vehicle barriers were converted to pedestrian barriers to be replacement barriers.

constructed, and proposed are shown in table 2. Appendix I contains these data disaggregated by sector.

Table 2: Summary of Existing Primary Border Barriers as of September 2016, New and Replacement Primary Barriers Erected from October 2016 to June 2020, and Primary Barriers Under Construction and Proposed along Southwest Border

| | | Primary Pedestrian Barriers ^a | Primary Vehicle Barriers ^b |
|---|-------------|--|---------------------------------------|
| Barriers existing as of the end of fiscal year 2016 | | 352.5 miles | 298.8 miles |
| Barriers completed from October 2016 to June 2020 | New | 48.3 miles | — |
| | Replacement | 70.0 miles | — |
| Barriers under construction and proposed as of June 2020 | New | 278.3 miles | 0.8 miles |
| | Replacement | 355.3 miles | — |
| Total existing, completed, under construction, and proposed barriers ^c | | 679.1 miles | 299.6 miles |

Source: GAO analysis of U.S. Border Patrol data | GAO-21-114

Notes: The primary barrier, which may include pedestrian or vehicle barriers, is the first barrier encountered when moving into the United States from the border. Secondary and tertiary barriers are not included in these totals. For the purposes of this table, barriers that were or are planned to be upgraded from vehicle barriers to pedestrian barriers are counted as replacement barriers.

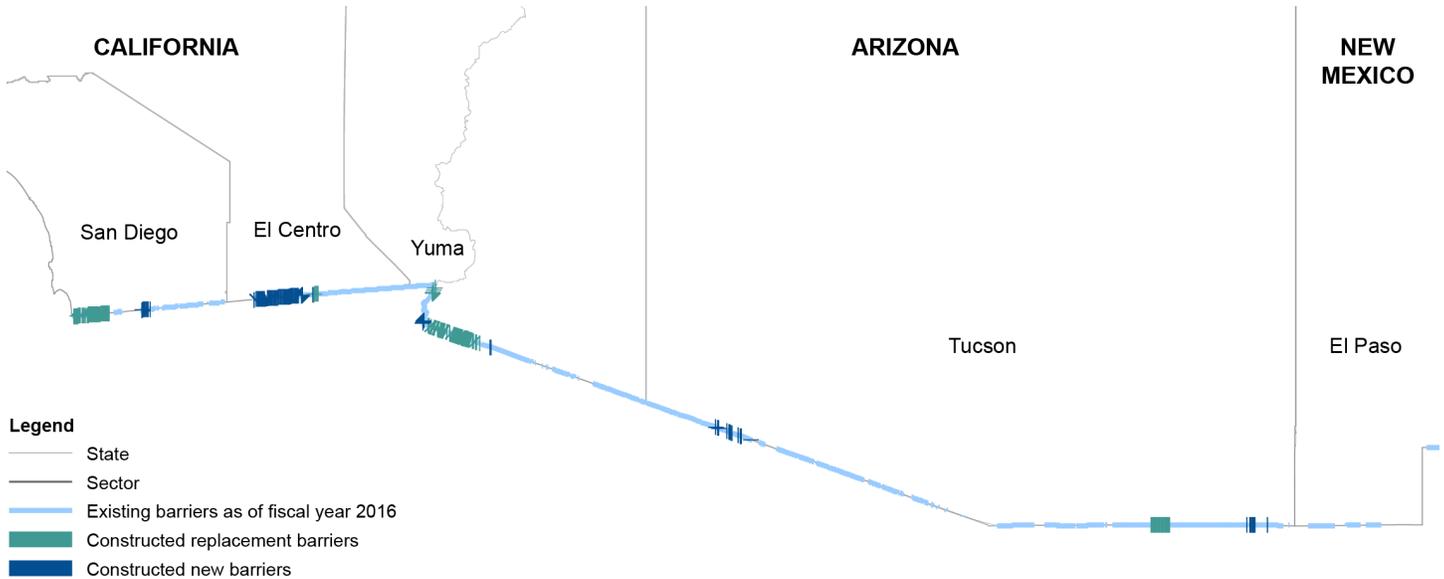
^aPedestrian barriers are primarily intended to slow down and deter pedestrians from crossing the border.

^bVehicle barriers, which are intended to resist vehicles engaged in drug trafficking and alien smuggling operations, are typically used in rural or isolated locations that have a low occurrence of illegal pedestrian traffic.

^cTo avoid double-counting, the total does not include replacement barriers, which take the place of existing barriers.

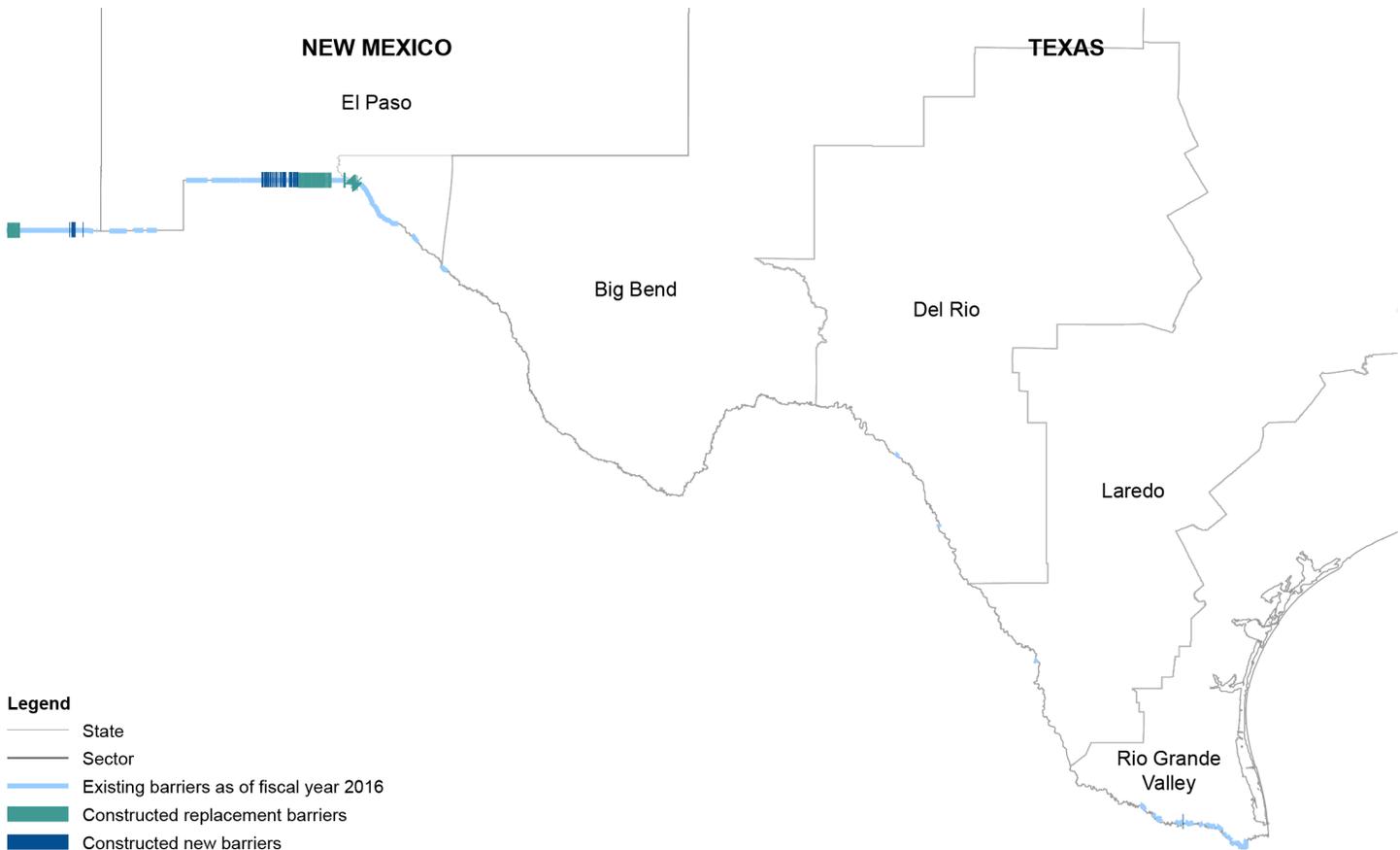
Figures 3 and 4 show the barriers existing at the end of 2016 and new and replacement barriers constructed between October 2016 and June 2020. Additionally, maps in appendix II show constructed barriers and proposed barriers funded by DHS and DOD.

Figure 3: Map of Existing Barriers as of October 2016 and Constructed New and Replacement Barriers between October 2016 and June 2020, California and Arizona



Source: GAO analysis of U.S. Border Patrol information. | GAO-21-114

Figure 4: Map of Existing Barriers as of October 2016 and Constructed New and Replacement Barriers between October 2016 and June 2020, New Mexico and Texas



Source: GAO analysis of U.S. Border Patrol information. | GAO-21-114

Federal Agencies' Roles and Responsibilities for Acquiring Private Land for Construction of Border Barriers along the Southwest Border

The process to acquire private land for barriers along the southwest border involves multiple federal agencies, each with roles and responsibilities related to the planning and execution of the Border Wall System Program.

- DHS.** Within DHS, Border Patrol is responsible for identifying placement of barriers and assisting with public outreach and coordination activities for the Border Wall System Program. For DHS-funded barriers, the Border Patrol is responsible for the management and oversight of barriers construction and ensuring that is completed on time, within budget, and meets program requirements.

-
- **DOD.** USACE is responsible for providing construction, real estate, and program management support, among other things, for DHS-funded border barriers as specified in a 2015 memorandum of agreement and a 2017 interagency agreement with CBP. The Border Infrastructure Program Management Office, which reports to the commander of USACE's Southwestern Division, is the primary program office that works with the Border Patrol's Border Wall System Program. For DOD-funded border barriers, USACE is DOD's construction agent.
 - **Department of Justice (DOJ).** Within DOJ, the Environment and Natural Resources Division and the U.S. Attorney's Office in which the land is located work to acquire real estate first through negotiated voluntary purchase and, if necessary, by direct condemnation for congressionally authorized public uses such as construction of border barriers and deployment of technology. The Attorney General is responsible for the review and approval of title to real property before it may be acquired for use by the federal government. Within DOJ, this responsibility is assigned to the Assistant Attorney General for the Environment and Natural Resources Division.¹⁸ Additionally, the United States Attorney for the area in which the land that the government is acquiring is located represents CBP and Border Patrol in federal court for land condemnation proceedings.

Table 3 outlines the interagency agreements, memoranda of agreement, and support agreements that inform the land acquisition process and describes each agency's roles and responsibilities with respect to DHS-funded border barriers.¹⁹

¹⁸In 1970, the Assistant Attorney General for the Environment and Natural Resources Division delegated the responsibility for review and approval of title to real property to the Department of the Army.

¹⁹In addition to identifying agency roles and responsibilities, the interagency agreements also state the payments that CBP will make to USACE or DOJ in exchange for stipulated services.

Table 3: Agreements between Customs and Border Protection (CBP), the U.S. Army Corps of Engineers (USACE), and the Department of Justice (DOJ) that Inform the Land Acquisition Process for Border Barriers Funded by the Department of Homeland Security

| Document | Description |
|--|--|
| Memorandum Of Agreement between CBP and USACE for Comprehensive Nationwide Program and Project Management (2015) | Establishes a framework for partnership between USACE and CBP for the delivery of goods and services by USACE to support CBP. The details of the partnership, working relationships, business rules, and processes are contained in a separate enterprise Program Management Plan, according to the agreement. |
| Interagency Agreement between DOJ, Environment and Natural Resources Division and CBP (2015) | Outlines the litigation services that Environment and Natural Resources Division will provide to enable CBP to access and acquire land for border projects. |
| Interagency Agreement Between CBP and USACE (2017) | Identifies how USACE is to perform programmatic, acquisition, project planning, and project execution activities in support of the Border Wall System Program. As additional funding became available, the agencies modified this agreement each fiscal year to adjust funding levels. |
| Support Agreement to Conduct Real Estate Services to Accompany the Memorandum of Agreement between CBP and USACE (last updated 2017) | Provides direction and specific parameters for USACE's land acquisition activities conducted on behalf of CBP. |
| Interagency Agreement between CBP and DOJ, Executive Office of U.S. Attorneys (2017) | Outlines the litigation services that Executive Office of U.S. Attorneys will provide to enable CBP to access and acquire land for border projects. |

Sources: GAO analysis of information from CBP, USACE, and DOJ | GAO-21-114

Legal Framework for Federal Acquisition of Private Property

If the federal government needs private property, it will try to acquire it through negotiated purchase. To enter into a contract or make a purchase on behalf of the U.S. government, the contract or purchase must be authorized by law and covered by an adequate appropriation.²⁰ In addition, the Attorney General must give prior written approval of sufficiency of title for the purpose that the land is being acquired, before public money may be used for such purpose.²¹ The transaction itself follows the same steps as one between private parties: a Purchase-and-Sale Agreement—known in the government as an Offer to Sell—followed by a closing at which the deed is delivered. However, if a negotiated purchase is not possible, the government may utilize eminent domain (i.e., condemnation or taking), which refers to the government's power to obtain property for a public use while compensating the property owner. Regarding DHS land acquisition authority, the Immigration and Nationality Act presupposes efforts to reach agreement in that only when a

²⁰See 41 U.S.C. § 6301.

²¹See 40 U.S.C. § 3111.

reasonable sale price cannot be agreed upon with the lawful landowner(s) may condemnation proceedings begin.²²

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that “private property [shall not] be taken for public use, without just compensation.”²³ According to statute, the U.S. Government may acquire real estate by condemnation (i.e., take property from an unwilling seller, provided there is just compensation), under judicial process, when deemed necessary or advantageous to the government.²⁴ To initiate condemnation proceedings to acquire permanent ownership of land, or a temporary easement or right of entry, for public use, the government typically files a complaint followed by a notice of condemnation and declaration of taking signed by the acquiring authority, which provides that the land is taken for use of the government.²⁵ Such a declaration is to be accompanied by exhibits including a statement of authority and of the public use for the taking; a sufficiently identifiable description of the property; a statement of the estate or interest sought; a plan showing the property; a listing of interested parties; and a statement of the amount of money estimated to be just compensation, among other items. Upon filing the declaration and depositing the compensatory funds with the court, title vests in the government, the land is condemned and taken for the

²²See 8 U.S.C. § 1103(b)(3); *U.S. v. 1.04 Acres of Land in Cameron County, Tx.*, 538 F.Supp.2d 995 (S.D. Tx. 2008) (Where the government failed to prove that it had engaged in “bona fide efforts to negotiate” with the landowner, as per 8 U.S.C. § 1103, prior to commencing eminent domain procedures, the court did not prohibit the taking, but did direct the parties to engage in, and provide evidence to the court of, bona fide negotiation).

²³U.S. CONST. amend. V.

²⁴40 U.S.C. §§ 3111-3118.

²⁵See 40 U.S.C. § 3114, which provides a procedure under which federal agencies may condemn and get immediate title to property upon filing the declaration of taking and depositing estimated compensation in the court. For further background, see GAO, *Principles of Federal Appropriations Law, Volume III, 3rd ed.* [GAO-08-978SP](#) (Washington, D.C.: September 2008).

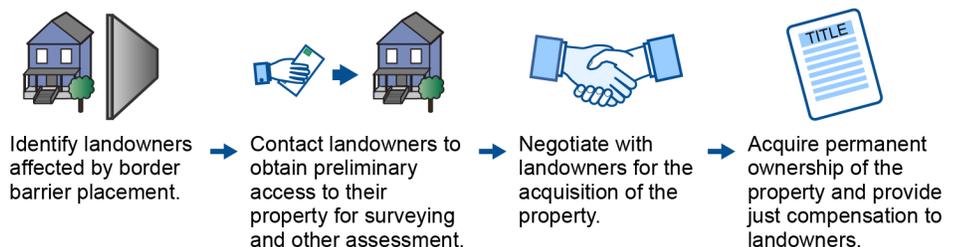
government’s public use, and the right to just compensation vests in the entitled person or persons.²⁶

The Border Patrol is pursuing “fee simple” acquisitions of almost all of the land for border barriers, which means that the government seeks permanent ownership of the land.²⁷ “Fee simple” permanent acquisitions and temporary easements both constitute government takings, for which the Fifth Amendment guarantees “just compensation” and involve similar condemnation processes including filing of a complaint and declaration of taking in the appropriate federal district court to obtain an ownership or possessory interest.

The Interagency Process for Acquiring Private Land Includes Multiple Steps and Interactions with Landowners

The interagency process for acquiring private land for DHS-funded border barrier construction involves Border Patrol and USACE as well as DOJ, if necessary.²⁸ This process includes multiple steps and interactions with landowners, as shown in figure 5.

Figure 5: Overview of Interagency Process to Acquire Private Land for Border Barriers



Source: GAO review of U.S. Border Patrol and U.S. Army Corps of Engineers documentation. | GAO-21-114

²⁶Subsequently, the government may file a motion for an order of immediate possession, which, if granted, would enable the government to immediately take possession of the condemned property. Separately, as to compensation, the landowner(s) may choose to accept the offer of compensation in exchange for title or access to their property at any point in the process, or they may decide to litigate further regarding compensation or another issue, in which case the suit will continue until any such issues are resolved by the court or through an out-of-court settlement.

²⁷According to USACE officials, the government will need to acquire the land at the location of international bridges through perpetual easements instead of fee simple acquisitions.

²⁸This review focused on the land-acquisition process for DHS-funded border barriers. According to DOD officials, DOD follows a similar process for the acquisition of land for DOD-funded barriers.

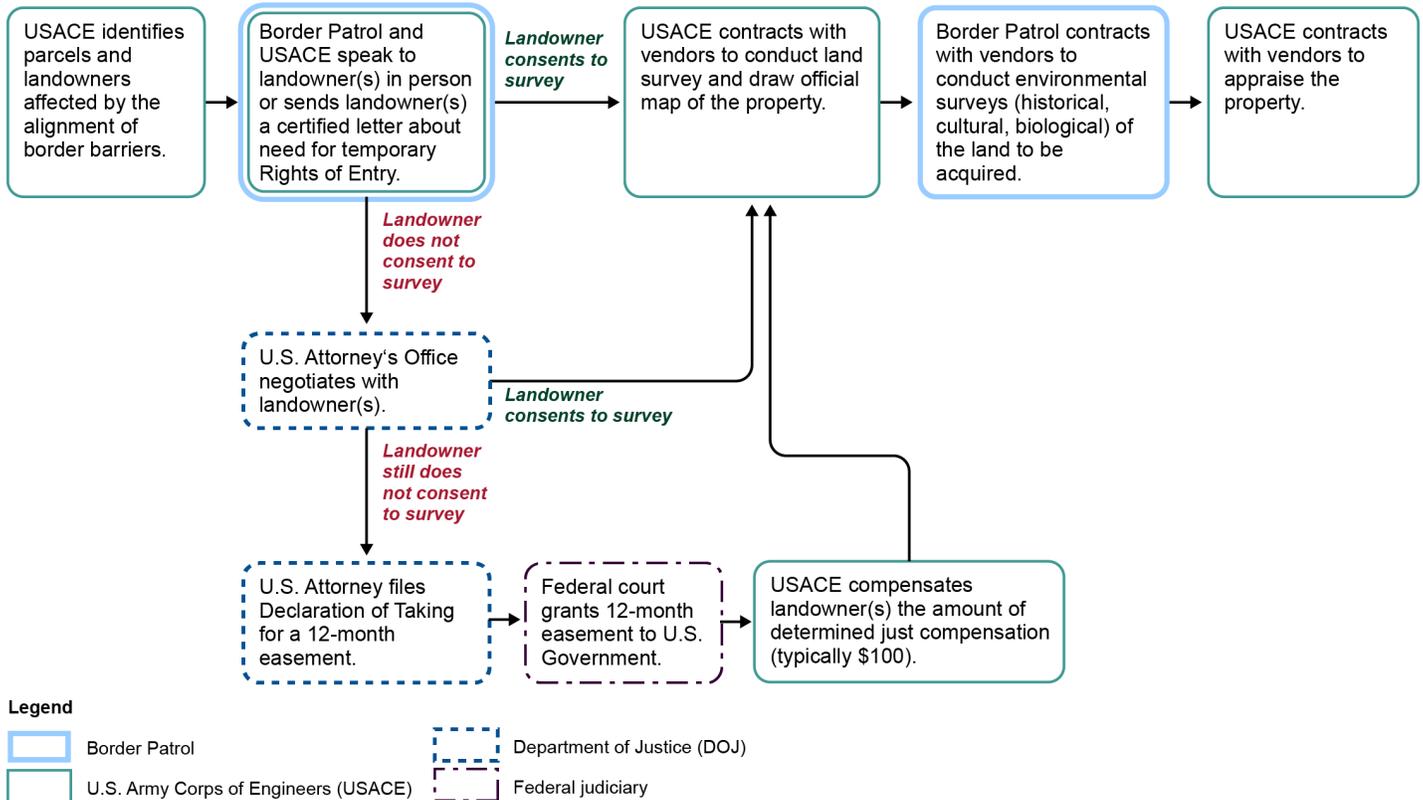
The process to acquire private land can be broken down into four main steps: (1) identifying the landowners affected by the locations of the proposed border barrier (referred to by Border Patrol as border barrier alignment or placement); (2) contacting private landowners to obtain preliminary access to their property for logistical purposes such as land surveying and analyzing other geospatial data pertaining to the property; (3) negotiating with landowners for the acquisition of their land; and (4) concluding the land acquisition process through negotiated purchase and real estate closing or condemnation proceeding.

**Border Patrol and USACE
Ask Landowners Affected
by Border Barrier
Placement for Right of
Entry for Surveys and
Assessments**

According to CBP officials, to begin the land acquisition process, the Border Patrol shares its preliminary border barrier alignment plans with USACE, which identifies the properties that border barrier construction affects. USACE officials stated that they identify affected landowners through tax records and other ownership verification tools if county records are missing or unclear.

After USACE identifies parcels and landowners affected by the alignment of barriers, Border Patrol and USACE officials seek to gain rights of entry to the properties to complete environmental assessments, property surveys, and appraisals of the properties, as described in figure 6.

Figure 6: Federal Process for Acquiring Land from Identifying the Affected Landowner to the Appraisal



Source: GAO review of U.S. Border Patrol and U.S. Army Corps of Engineers documentation. | GAO-21-114

Note: This figure outlines the general process for land acquisition, and individual circumstances may require some variations.

Border Patrol and USACE then have an initial meeting with landowners to provide documentation related to the real-estate acquisition process. Border Patrol officials told us that at initial meetings with individual landowners they provide maps of the proposed border barrier alignment that indicates where barriers may be located in relation to the individual landowner’s property. According to Border Patrol officials, they also take this opportunity to learn more about how the land is used and to discuss specific landowner needs, for example, requirements for existing drainage infrastructure and potential locations for gates for access to land on each side of the border barriers. Border Patrol officials stated that they prefer to be involved in the initial outreach to landowners because they have already established relationships with those who own property adjacent to the border.

According to Border Patrol officials, at initial meetings with private landowners, Border Patrol and USACE officials formally request right of entry to the land and ask the owners to sign a *Right of Entry for Survey and Site Assessment* form.²⁹ Signing the right of entry form grants the government and contractors access to the property for a period of time (typically 18 months) to conduct environmental assessments, property survey, and property appraisal. If the landowner is not available to meet in person, the Border Patrol will send the landowner a certified letter that includes the right of entry form. According to the *Support Agreement to Conduct Real Estate Services* between CBP and USACE, USACE will use approved standardized right of entry forms and cover letters and will tailor them to each specific real estate action as necessary. According to USACE officials, USACE and Border Patrol generally negotiate with landowners for 14 days, during which they make multiple attempts to discuss the terms of access and landowners' concerns. USACE officials also stated that after the 14-day period DOJ attorneys will continue to negotiate with the landowner while the condemnation is being processed.

If the government is unable to obtain right of entry, the Border Patrol and USACE work with the United States Attorney for the area in which the land is located to negotiate with the landowner, according to CBP. If the negotiation is unsuccessful, the U.S. Attorney's Office will file the complaint in condemnation, declaration of taking, and other associated documents. USACE officials stated that the USACE prepares the declaration of taking package. The declaration of taking at this stage of the acquisition process is typically for a temporary easement for a period of 12 months to survey, make borings, and conduct other investigatory work for the purposes of proposed construction of border barriers as well as roads, security lighting, cameras, and sensors to help secure the southwest border.

Once the government has secured the right to access the property, USACE contracts with vendors to survey, map, and appraise the

²⁹DOJ officials stated that land and its ownership is unique for each piece of land, and the government's ability to obtain right of entry depends on the individual facts. For example, if a landowner with dominion and control of the property (e.g., an owner living and farming the land despite others also having some ownership interest) assents, then the government will access under the right of entry provisions.

property.³⁰ Border Patrol officials told us that upon request of the landowner, Border Patrol or USACE will provide 24 to 72 hours' notice prior to attempts by government officials or contractors to access the property. According to USACE policy, the valuation of real estate in federal acquisitions must be determined in accordance with the *Uniform Appraisal Standards for Federal Land Acquisitions*.³¹ The appraisal is to establish the fair market value of the property, which includes the economic uses of the property.³² According to statute, the landowners or their representative are to be given the opportunity to accompany the appraiser during the inspection of the property.³³ According to USACE officials, they prepare the preliminary title opinion before or along with the appraisal.

In addition to the land survey, Border Patrol officials stated that they contract with vendors to conduct historical, cultural, and biological surveys of the land to be acquired. These surveys, which are part of the overall environmental review process, are coordinated by the Border Patrol. The Secretary of Homeland Security has waived various environmental and other legal requirements, as authorized by statute.³⁴ However, in a response to public comments in April 2020, CBP wrote that

³⁰After the government has secured the right to access the property, government officials and contractors may access the property for the purpose of conducting environmental assessments and property surveys, including to temporarily store, move and remove necessary equipment and supplies; survey, stake out, appraise, bore and take soil and/or water samples, among other things.

³¹Interagency Land Acquisition Conference, *Uniform Appraisal Standards for Federal Land Acquisitions* (2016).

³²The Uniform Appraisal Standards for Federal Land Acquisitions defines fair market value as "the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date. of value, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither compelled to buy or sell, giving due consideration to all available economic uses of the property."

³³See 42 U.S.C. § 4651.

³⁴The REAL ID Act of 2005 amended the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 by expanding the authority of the Secretary of Homeland Security to waive all legal requirements, as determined to be necessary, in the Secretary's sole discretion, to ensure expeditious construction of barriers and roads along the border. Pub. L. No. 104-208, div. C, tit. I, subtit. A, § 102(c), 110 Stat. 3009, 3009-555, as amended by Pub. L. No. 109-13, div. B, tit. I, § 102, 119 Stat. 231, 306 (classified, as amended, at 8 U.S.C. § 1103 note).

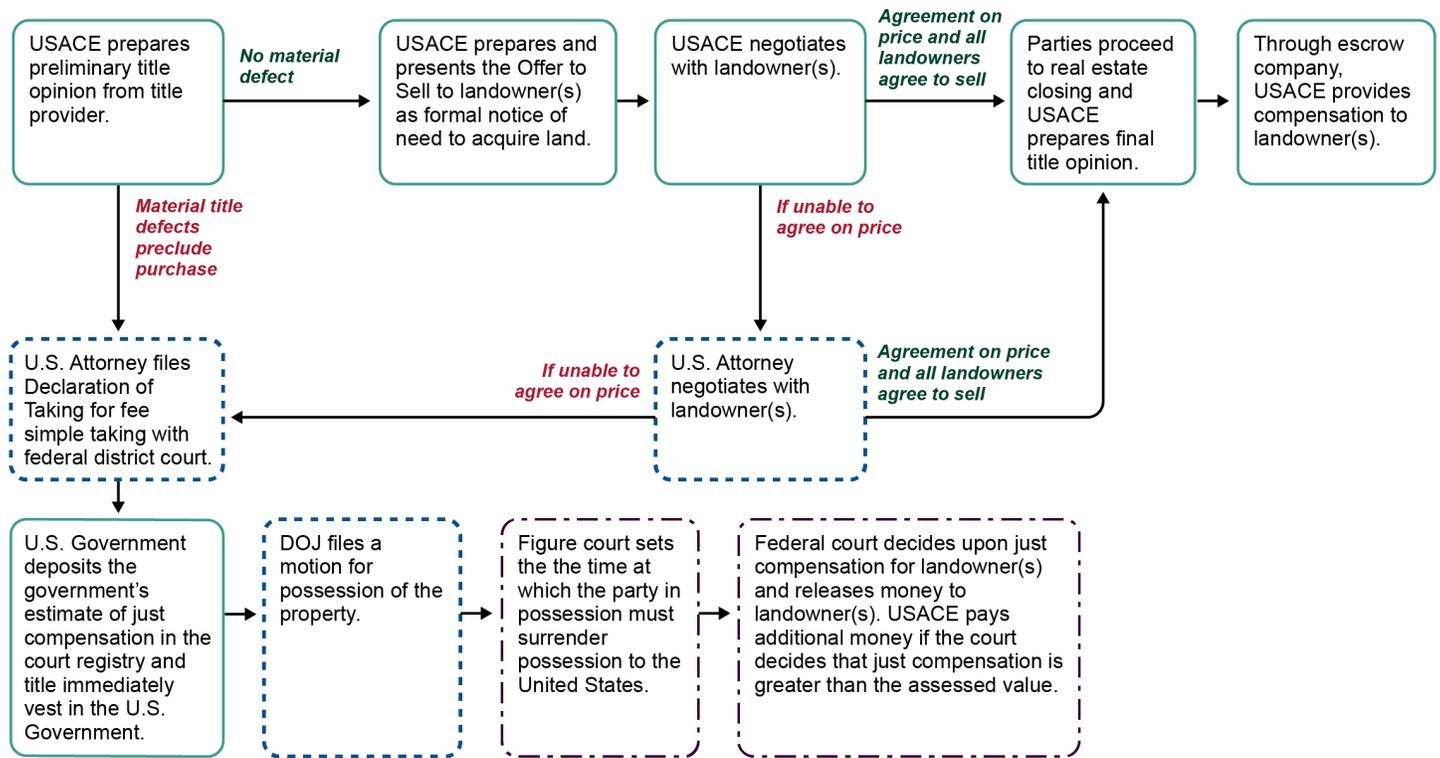
that the agency will consider stakeholder feedback and the results of natural, biological, and cultural resource surveys in construction planning, and such information will inform the review of impacts to the environment, culture, quality of life, and commerce, including socioeconomic impacts.³⁵

**Federal Agencies
Negotiate Final Purchase
of Private Land and May
File a Complaint in Court
to Obtain Land**

After USACE prepares the preliminary title opinion, USACE officials prepare the Offer to Sell Real Estate Property and begin the negotiation process, as shown in figure 7. USACE officials told us they can begin negotiations with landowners before having a preliminary title opinion, though this is not standard practice.

³⁵Response to Public Comments Regarding the Construction of Border Wall Within Certain Areas in the Rio Grande Valley, Texas, 85 Fed. Reg. 23,983, 23,984 (Apr. 30, 2020)

Figure 7: Federal Process for Acquiring Ownership of Land from the Preliminary Title Opinion to Final Purchase or Condemnation



Legend
 [Solid box] U.S. Army Corps of Engineers (USACE) [Dashed box] Federal judiciary
 [Dotted box] Department of Justice (DOJ)

Source: GAO review of U.S. Border Patrol and U.S. Army Corps of Engineers documentation. | GAO-21-114

Note: This figure outlines the general process for fee simple land acquisition, and individual circumstances may require some variations. For example, according to DOJ officials, new information about potential owners could be revealed at any point in the acquisition process, which would require the government to go back to ensure that owners were provided just compensation.

Next, USACE presents the Offer to Sell to the landowners as formal notice of the intent to acquire the land. The Offer to Sell is a form letter that outlines the terms and conditions associated with the purchase. If the landowners agree to the sale, the Offer to Sell will be signed by all landowners as well as the Border Patrol Wall Program Portfolio Manager. The Offer to Sell includes USACE’s assessment of “just compensation” for the specified property. Consistent with statute, the level of compensation is to be no less than the government’s approved appraisal

of the fair market value.³⁶ According to the *Support Agreement to Conduct Real Estate Services* between CBP and USACE, USACE may negotiate to a price above the estimated fair market value to achieve agreement with property owners in consideration of, among other things, the government's anticipated cost savings from avoiding condemnation proceedings.

According to Border Patrol officials, USACE officials negotiate monetary compensation with landowners on behalf of the Border Patrol. The Border Patrol sets the parameters for negotiating above the fair market value, but Border Patrol agents do not directly participate in negotiations with landowners. Border Patrol officials said that Border Patrol agents may become involved if the landowner has questions or concerns about operational needs or design issues. For example, Border Patrol officials told us that some landowners have questions regarding mineral and water rights, irrigation or power access, or gate access at this point in the process. USACE officials added that they may also negotiate over cattle fencing, crossing guards, and the right to maintain oil and gas pipelines. Although Border Patrol officials stated that they are not involved in discussions with landowners about monetary compensation, they stated that they can offer various "concessions" to the landowner, such as shifting barrier placement or gate locations. The Border Patrol plans for gates to be installed at strategic points along the border barriers, so that landowners can access the portion of their land on the opposite side of the border barriers. An existing gate in the Rio Grande Valley Sector is shown in figure 8.

³⁶Pursuant to 42 U.S.C. § 4651(3), "before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property."

Figure 8: Gate in Hidalgo County that Landowners Can Use to Access Their Property on the River Side of Border Barriers



Source: GAO. | GAO-21-114

According to Border Patrol and USACE officials, after the landowner accepts and signs the Offer to Sell, USACE conducts the real estate closing, prepares the final title opinion, and conducts various tasks to certify the real estate availability for construction purposes.³⁷ USACE officials stated that USACE, through an escrow company, makes payments to individuals for the land purchases, as CBP has funded USACE to conduct the land acquisition.

According to the interagency agreement between CBP and DOJ, DOJ attorneys file declarations of taking for acquisition of a permanent or temporary interest in land in three general situations: (1) if the parties, including all of the landowners, cannot reach an agreement; (2) if the

³⁷Agencies are required to adhere to, among other things, the *Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions*. DOJ promulgated these regulations under the authority of 40 U.S.C. § 3111(a), which states that “[p]ublic money may not be expended to purchase land or any interest in land unless the Attorney General gives prior written approval of the sufficiency of the title to the land for the purpose for which the Federal Government is acquiring the property.”

ownership title of the land is unclear; or (3) if the government cannot locate owners.³⁸ DOJ officials stated that they make their best effort to negotiate with and educate all locatable and identifiable landowners and interested parties. In the cases where the government cannot initially reach a negotiated agreement with the landowner or landowners, DOJ officials said that they try to continue negotiating with landowners in a final effort to avoid condemnation. According to CBP officials, DOJ attorneys continue to negotiate even after filing a declaration of taking to settle on compensation and transfer of possession.

The United States Attorney for the area in which the land is located files the complaint in condemnation, declaration of taking, and other associated documents. The documents include the declaration of taking, a statement about the public purpose of the land, and official maps developed for USACE. With the filing of the declaration of taking, the title for the land is vested to the United States. This acquisition is known as “fee simple,” meaning the United States has permanent and outright ownership.

Along with the declaration of taking, the government is required to deposit money equal to an estimate of just compensation, based on an approved property appraisal, with the court registry. The actual compensation owed to the landowner will be decided by the litigation in the condemnation case. Depending on the court’s determination, the government may be required to provide money in addition to the amount deposited with the registry of the court. The court also sets a time at which the landowner must surrender possession of the property to the United States. According to CBP officials, in such cases, the United States generally receives possession of the land in 1 to 3 months.

USACE officials stated that they ensure that the government has title and possession of the property required for construction of a project, or portion of a project, prior to certifying availability of these lands for

³⁸Regarding permanent acquisitions in particular, DOJ officials noted that there are six situations in which the government files declarations of taking to acquire ownership of land. The circumstances are when (1) the landowner is unwilling to sell at any price; (2) the landowner is willing to sell, but cannot agree on price with the government; (3) title defects prevent the owner from selling; (4) there is a missing or unknown landowner; (5) the landowner violates the terms of contract for sale; and (6) the landowner requests condemnation for necessity, such as when the landlord lacks the legal authority to convey the land. DOJ officials also noted that the government may negotiate with known and identifiable landowners in some cases, even if the title is less than clear.

construction. After USACE certifies the availability of real estate, USACE may issue notice to contractors to proceed with construction.

Federal Agencies Are Planning to Acquire Private Land and Various Factors Delayed Efforts

Federal Agencies Are in the Process of Acquiring Private Lands for Border Barriers

For DHS-funded border barriers, the federal government plans to acquire or has acquired 1,016 private land tracts along the southwest border, primarily in south Texas, as of July 2020. The privately owned land the government acquired or is working to acquire for DHS-funded barriers totals about 3,752 acres or 5.9 square miles, and most of it—1,009 of 1,016 tracts—is in the Rio Grande Valley Sector or the Laredo Sector in south Texas. Table 4 shows the status of the tracts of private land that the government is in the process of acquiring or acquired as of July 2020.³⁹

Table 4: Number of Private Tracts Acquired or to Be Acquired for DHS-Funded Border Barriers, by U.S. Border Patrol Sectors, as of July 2020

| Status | Rio Grande Valley Sector | Laredo Sector | El Centro Sector | San Diego Sector | Total |
|--|--------------------------|---------------|------------------|------------------|--------------|
| Seeking right of entry | 4 | 6 | — | — | 10 |
| Acquired signed Right of Entry | 73 | 266 | — | — | 339 |
| Preparing declaration of taking for right of entry | 18 | 26 | — | — | 44 |
| Survey completed | 90 | — | — | — | 90 |
| Appraisal completed | 38 | — | — | — | 38 |
| Survey completed with modifications necessary | 1 | — | — | — | 1 |
| Preparing Offer to Sell or in negotiations | 269 | — | — | — | 269 |
| Preparing declaration of taking for fee simple | 92 | — | — | — | 92 |
| Acquiring signed Offer to Sell | 3 | — | — | — | 3 |
| Real estate acquired, in possession, and certified | 123 | — | 5 | 2 | 130 |
| Total | 711 | 298 | 5 | 2 | 1,016 |

Source: GAO analysis of U.S. Army Corps of Engineers data | GAO-21-114

³⁹Totals in this section include the acquisition of land used to construct gates for 35 existing gate openings that were not constructed as part of the Secure Barrier Initiative in the Rio Grande Valley Sector.

DOJ filed 109 declarations of taking with federal courts to secure the right to access to private landowners' property or to permanently acquire portions of their property from January 2017 to August 2020. DOJ filed five of the 109 cases in the Southern District of California and the remainder in the Southern District of Texas. Fifty-eight of the cases were for the government to access landowners' property for surveying and other activities. The other 51 cases were for "fee simple," or permanent, acquisition of the land.⁴⁰ For the 51 "fee simple" acquisitions, the government offered between \$1,440 and \$870,261 per acre, with a median of \$13,336 per acre.⁴¹ The filings, disaggregated by Border Patrol sector, are summarized in table 5.

Table 5: Condemnation Cases Filed in Federal Court for Temporary Easements for Surveying or Permanent Fee Simple Acquisitions for Border Barriers, January 2017 to August 2020

| | | Rio Grande Valley Sector | Laredo Sector | El Centro Sector | Total |
|--------------------|---|--------------------------|---------------|--------------------|-----------------------------|
| Temporary Easement | Number of cases | 35 | 23 | — | 58 |
| | Total acreage | 1,881 | 809 | — | 2,690 |
| Fee Simple | Number of cases | 46 | — | 5 | 51 |
| | Total acreage | 256 | — | 28 | 285 |
| | Range of proposed compensation per acre | \$ 1,440 – \$870,261 | — | \$ 1,491 – \$1,522 | \$ 1,440 – \$870,261 |
| | Median proposed compensation per acre | \$14,702 | — | \$ 1,497 | \$13,336 |

Source: GAO analysis of public federal court information | GAO-21-114

Notes: All declarations of taking identified in this table were for border barriers funded by the Department of Homeland Security. As of August 2020, the government had not filed any declarations of taking for Department of Defense-funded barrier. Declarations of taking may include more than one tract. For temporary easements, total acreage includes the entire "parent" tract of which the government is acquiring part. For fee simple acquisitions, which are permanent purchases, total acreage represents only the area of the land in which the government is seeking an ownership interest.

⁴⁰Declarations of taking may identify a single tract for surveying or acquisition or multiple tracts. The 58 cases that involved a request for a temporary easement included 68 tracts. The 51 cases in which the government sought to permanently acquire the property included 72 tracts. Twenty-four of these 72 tracts are associated with prior barrier construction. The other 48 tracts are among the 1,016 tracts that the government acquired or is in the process of acquiring for DHS-funded barriers.

⁴¹As discussed earlier, the proposed compensation is based on the fair market appraisal of the property's value. The federal court ultimately determines the just compensation, which may be less than or greater than the proposed value.

In the Rio Grande Valley and Laredo Sectors, CBP awarded contracts prior to completing the land acquisition process, even though construction cannot begin until real estate has been acquired and certified. For example, in March 2020, CBP awarded a contract for the construction of approximately 15 miles of new barriers in Starr County within the Rio Grande Valley Sector, but, as of July 2020, the acquisition of land for the project was not completed. As such, CBP has noted that the construction projects will begin only subject to the availability of real estate. Figure 9 shows newly constructed barriers in the Rio Grande Valley Sector.

Figure 9: Newly Constructed Border Barriers in Starr County, Texas



Source: GAO. | GAO-21-114

For DOD-funded border barriers, the federal government plans to acquire or has acquired 110 private land tracts along the southwest border, as of July 2020. In total, these 110 tracts are approximately 1,435 acres or 2.2 square miles. As previously noted, USACE officials stated that the government is acquiring private land only for section 2808 military

construction projects and not for section 284 counterdrug projects.⁴² Officials told us that all counterdrug projects are located on land already owned by the federal government. The private land is located predominantly in Border Patrol’s Laredo Sector, as shown in table 6. In August 2020, DOD officials told us that the DOD has not sought to condemn private land for border barriers, but they anticipate initiating condemnation proceedings.

Table 6: Status of Private Tracts Acquired or to Be Acquired for Department of Defense-Funded Border Barriers, by U.S. Border Patrol Sectors, as of July 2020

| Status | Laredo Sector | El Centro Sector | San Diego Sector | Total |
|--|---------------|------------------|------------------|------------|
| Signed Right of Entry | 59 | — | — | 59 |
| Due Diligence | — | 4 | — | 4 |
| Pending Offer to Sell | — | 8 | 1 | 9 |
| Negotiating Offer to Sell | — | — | 4 | 4 |
| Offer to Sell Fully Executed | — | — | 5 | 5 |
| Preparing Declaration of Taking for Fee Simple | 1 | 7 | — | 8 |
| Unknown ^a | 21 | — | — | 21 |
| Total | 81 | 19 | 10 | 110 |

Source: GAO analysis of U.S. Army Corps of Engineers data | GAO-21-114

Note: According to Department of Defense (DOD) officials, land acquisition for border barriers will only be necessary in relation to 10 U.S.C. § 2808 military construction projects.

^aWe were not able to determine the status of these tracts.

Various Factors Delayed Federal Efforts to Acquire Private Land in South Texas for Border Barrier Construction

According to the Border Wall System Program Management Plan, the Border Patrol planned for private land acquisition in south Texas to take 21 to 30 months compared with 12 months for comparable land acquisitions in other regions. Border Patrol estimated private land acquisition in south Texas would take more time due to factors unique to south Texas that take time to resolve. According to the Border Wall System Program Management Plan and officials with whom we spoke, the following factors delayed federal efforts to acquire private land in south Texas: (1) barrier placement, or construction, north of the Rio Grande River; (2) missing or incomplete land records; and (3) negotiations with multiple landowners for one tract of land.

⁴²See 10 U.S.C. §§ 284(b)(7), 2808.

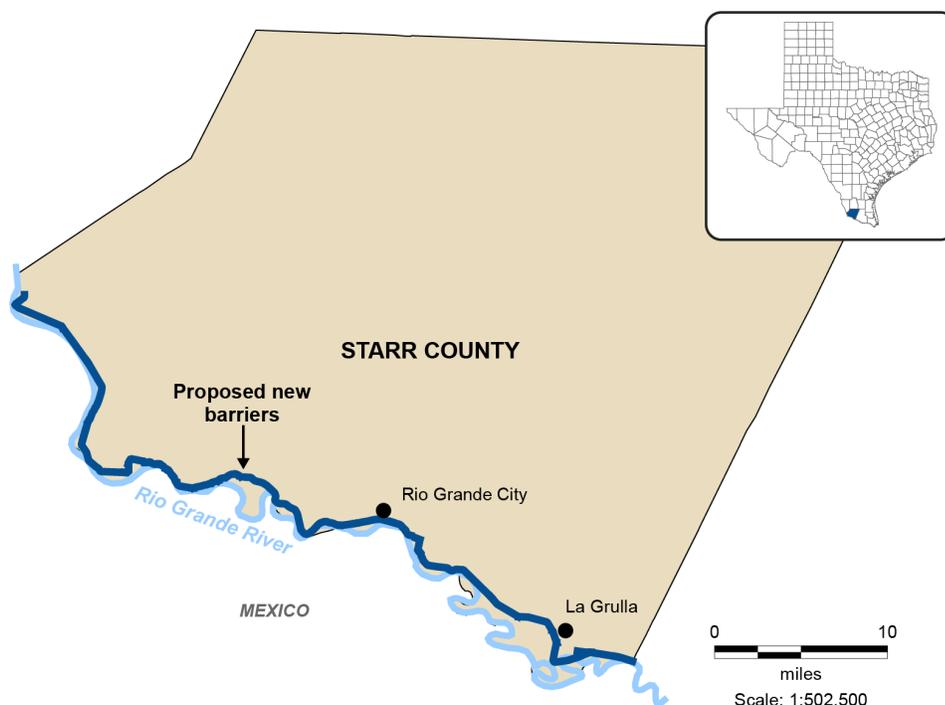
Border barrier placement. According to Border Patrol officials and the Border Wall System Program Management Plan, in some cases, the placement of border barriers delays the acquisition of private land in south Texas because of the added time needed for the government to work with landowners to (a) ensure access to the land and (b) agree on compensation for the decreased value of remaining property south of the border barrier. Border Patrol officials told us that, in the Rio Grande Valley Sector, the barriers range from 30 to 50 feet from the river up to a mile from the river, putting an estimated 40,000 acres of land between the barriers and the river. According to the Border Wall System Program Management Plan, barriers must be built “well north” of the Rio Grande River in some areas in south Texas because of a 1970 treaty between the United States and Mexico prohibiting the placement of barriers in locations that will cause deflection or obstruction of the normal flow of the Rio Grande River.⁴³ As a result, barriers could cut through parcels of land and leave landowners with ownership of land on both sides of the barrier. In these cases, Border Patrol needs to provide landowners with a way to access their land south of the barrier. According to USACE and Border Patrol officials, in these cases landowners still plan to derive economic use from land south of the border barrier through farming and thus need access to irrigation pipelines, fencing for cattle, and utility relocations, among other things. In such cases, Border Patrol provides landowners access to their land between the border barriers and the river through a series of gates in the border barriers. Border Patrol officials told us the location of gates is frequently a key negotiating point. In addition, representatives from two organizations that we spoke with told us landowners have expressed concerns to them regarding the loss of value of their property south of the border barrier. CBP officials said that they are compensating landowners for the reduced value of their land—a concept known as diminution that is factored into the government’s calculation of compensation—but this factor can complicate negotiations.

One landowner we spoke to, whose residence lies between the proposed border barriers and the Rio Grande River, said that even though she is aware of the plans to install a nearby gate, she is concerned about access to her property. She also expressed safety concerns because she said she did not know whether the Border Patrol and the local police department plan to patrol the area near her residence after barrier construction is complete. Similarly, a representative of a local trade

⁴³Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex., Nov. 23-Dec. 21, 1970, T.I.A.S. No. 7313, 23 U.S.T. 371 (Entered into force on Apr. 18, 1972).

organization with whom we spoke expressed concern about the safety and security of farm crews working on the river side of the barriers. Border Patrol officials told us that they will continue to patrol on the river side of the barriers. Figure 10 shows how the distance between the Rio Grande River and proposed border barriers varies depending on the location.

Figure 10: Segment of Proposed Barriers in Starr County, Texas



Source: GAO analysis of U.S. Border Patrol information. | GAO-21-114

Major changes to the alignment of the border barriers delayed the federal government's acquisition of private land. According to USACE officials, these delays occurred because the government began land acquisition before the barrier design and alignment were finalized. USACE officials told us that design or alignment may change because Border Patrol and USACE officials try to meet operational requirements while minimizing the impact to landowners. For example, according to USACE officials, Border Patrol shifted the location of barriers multiple times for one community in the Rio Grande Valley Sector. They said that these shifts caused USACE to restart the acquisition process in this area—determining the affected tracts, identifying the affected landowners, and conducting surveys and

appraisals. USACE officials also noted that in some instances the design is changed or the alignment is shifted to provide landowners with better access to irrigation lines or utilities. According to the officials, minor changes do not delay the process, but if the changes are significant, USACE may need to conduct surveys and appraisals again.

Missing or incomplete land records. According to the Border Wall System Program Management Plan and Border Patrol officials, missing or incomplete land records in some counties in south Texas can delay the acquisition of private land because, after exhausting all efforts to identify parties with interest in a tract of land, the government has to use the condemnation process to resolve ownership. Border Patrol and USACE officials stated that some counties in south Texas, such as Starr County, do not have the infrastructure and funding to maintain recordkeeping systems. As a result, when the USACE or contracted title companies locate land records, they may not be current or accurate. If land records are insufficient and the title cannot be conveyed, the government must initiate condemnation proceedings even if landowners are willing to sell. Moreover, according to USACE officials, incomplete title records can make the condemnation preparation more difficult since they must ensure that they have named all interested parties in court filings.⁴⁴ Border Patrol officials told us that barrier construction in Starr County, Texas, would have begun earlier if not for difficulties in locating current and accurate land records. In addition, recent courthouse closures due to COVID-19 have resulted in further delays because land records must be reviewed in person for many counties in south Texas, according to USACE officials.

Multiple property owners. Border Patrol officials also told us that sometimes one tract of land is owned by several individuals, which can make negotiations more complicated and delay the purchase because all owners must agree to accept an Offer to Sell. For example, one case, initiated in 2019, listed at least 87 landowners for a plot of about 6 acres in Hidalgo County in south Texas. According to the court filings, eight landowners opposed the condemnation. DOJ attorneys subsequently asked for the federal court to grant the government possession of the property, and the court agreed.

⁴⁴*Regulations of the Attorney General Governing the Review and Approval of Title for Federal Land Acquisitions* state that identifying “all persons who have, may have, or claim to have, an interest in the subject property as disclosed by a search of the public land records [...] is critical so the United States can fulfill its constitutional obligations to provide notice and pay just compensation.”

For one 7.6-mile project in the Rio Grande Valley Sector, some of the factors discussed above, among others, delayed construction. Specifically, in a breach remediation status update, CBP officials identified specific factors that delayed real estate acquisition for this project. According to the update, the key factors were a lack of comprehensive land records—specifically, landowners’ estates not having been conveyed through probate; unrecorded fee or easement deeds; and discovery of irrigation lines that landowners use to support crop production. Further, because of landowners’ unwillingness to sell as well as title issues that cannot be cured without court action, at present, CBP estimated that the government will need to condemn over 50 percent of required privately owned tracts needed to complete this project. In addition, according to a January 2020 Border Wall System Program Acquisition Baseline Revision, these factors were anticipated but took longer to resolve than was originally planned for in the project schedule. As such, CBP was required to submit a revised project schedule to DHS leadership, according to a DHS memorandum from December 2019. In January 2020, CBP submitted a modified project schedule and now expects to complete this 7.6-mile project in the Rio Grande Valley Sector by December 2020 instead of September 2019 as in the original schedule.

Agency Comments

We provided a draft of this report to DHS, DOD, and DOJ for review and comment. We received written comments from DOD that are reproduced in appendix III. DHS, DOD, and DOJ also provided technical comments, which we incorporated as appropriate.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Acting Secretaries of Homeland Security and Defense, and the Attorney General. In addition, the report is available at no charge on the GAO website at <https://www.gao.gov>.

Should you or your staff have questions about this report, please contact me at (202) 512-8777 or GamblerR@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on

the last page of this report. GAO staff that made key contributions to this report are listed in appendix IV.

A handwritten signature in black ink that reads "Rebecca Gambler". The signature is written in a cursive, flowing style.

Rebecca Gambler, Director
Homeland Security and Justice

Appendix I: Summary of Primary Existing, Constructed, and Proposed Border Barriers by U.S. Border Patrol Sector

Table 7 shows the border barriers existing at the end of 2016, barriers that were completed between October 2016 and June 2020—including new barriers and barriers that replaced existing barriers—and proposed new and replacement barriers. Proposed barriers include barrier projects that are under construction as of June 2020. Barriers are disaggregated by pedestrian barriers, which are primarily intended to slow down and deter pedestrians from crossing the border, and vehicle barriers, which are intended to resist vehicles engaged in drug trafficking and alien smuggling operations and are typically used in rural or isolated locations that have a low occurrence of illegal pedestrian traffic.

Table 7: Summary of Existing Primary Border Barriers as of October 2016, New and Replacement Primary Barriers Erected from October 2016 to June 2020, and Primary Barriers Under Construction and Proposed along Southwest Border

| U.S. Border Patrol Sector | Category | Type | Miles of Primary Pedestrian Barriers ^a | Miles of Primary Vehicle Barriers ^b |
|---------------------------|--|-------------|---|--|
| Big Bend | Barriers existing as of the end of fiscal year 2016 | | 4.6 | 0.2 |
| | Barriers completed from October 2016 to June 2020 | New | — | — |
| | | Replacement | — | — |
| | Barriers under construction and proposed as of June 2020 | New | — | — |
| | | Replacement | — | — |
| Del Rio | Barriers existing as of the end of fiscal year 2016 | | 4.0 | — |
| | Barriers completed from October 2016 to June 2020 | New | — | — |
| | | Replacement | — | — |
| | Barriers under construction and proposed as of June 2020 | New | — | — |
| | | Replacement | 4.0 | — |
| El Centro | Barriers existing as of the end of fiscal year 2016 | | 43.9 | 14.8 |
| | Barriers completed from October 2016 to June 2020 | New | 18.3 | — |
| | | Replacement | 1.9 | — |
| | Barriers under construction and proposed as of June 2020 | New | 3.2 | — |
| | | Replacement | 25.6 | — |
| El Paso | Barriers existing as of the end of fiscal year 2016 | | 64.7 | 100.8 |
| | Barriers completed from October 2016 to June 2020 | New | 17.0 | — |
| | | Replacement | 25.4 | — |
| | Barriers under construction and proposed as of June 2020 | New | 3.0 | — |
| | | Replacement | 146.0 | — |
| Laredo | Barriers existing as of the end of fiscal year 2016 | | 1.2 | — |
| | Barriers completed from October 2016 to June 2020 | New | — | — |
| | | Replacement | — | — |
| | Barriers under construction and proposed as of June 2020 | New | 123.1 | — |

**Appendix I: Summary of Primary Existing,
Constructed, and Proposed Border Barriers by
U.S. Border Patrol Sector**

| U.S. Border Patrol Sector | Category | Type | Miles of Primary Pedestrian Barriers ^a | Miles of Primary Vehicle Barriers ^b |
|---|--|-------------|---|--|
| | | Replacement | — | — |
| Rio Grande Valley | Barriers existing as of the end of fiscal year 2016 | | 54.3 | — |
| | Barriers completed from October 2016 to June 2020 | New | 0.2 | — |
| | | Replacement | — | — |
| | Barriers under construction and proposed as of June 2020 | New | 107.0 | 0.8 |
| Replacement | | 0.9 | — | |
| San Diego | Barriers existing as of the end of fiscal year 2016 | | 45.7 | 0.4 |
| | Barriers completed from October 2016 to June 2020 | New | 3.4 | — |
| | | Replacement | 13.2 | — |
| | Barriers under construction and proposed as of June 2020 | New | 2.2 | — |
| Replacement | | 16.5 | — | |
| Tucson | Barriers existing as of the end of fiscal year 2016 | | 71.4 | 138.9 |
| | Barriers completed from October 2016 to June 2020 | New | 8.0 | — |
| | | Replacement | 7.7 | — |
| | Barriers under construction and proposed as of June 2020 | New | 39.9 | — |
| Replacement | | 96.3 | — | |
| Yuma | Barriers existing as of the end of fiscal year 2016 | | 62.7 | 43.7 |
| | Barriers completed from October 2016 to June 2020 | New | 1.5 | — |
| | | Replacement | 21.8 | — |
| | Barriers under construction and proposed as of June 2020 | New | — | — |
| Replacement | | 65.9 | — | |
| Total all sectors | Barriers existing as of the end of fiscal year 2016 | | 352.5 | 298.8 |
| | Barriers completed from October 2016 to June 2020 | New | 48.3 | — |
| | | Replacement | 70.0 | — |
| | Barriers under construction and proposed as of June 2020 | New | 278.3 | 0.8 |
| Replacement | | 355.3 | — | |
| Total existing, completed, under construction, and proposed barriers ^c | | | 679.1 miles | 299.6 miles |

Source: GAO analysis of U.S. Border Patrol data | GAO-21-114

Notes: The primary barrier, which may include pedestrian or vehicle barriers, is the first barrier encountered when moving into the United States from the border. Secondary and tertiary barriers are not included in these totals. For the purposes of this table, barriers that were or are planned to be upgraded from vehicle barriers to pedestrian barriers are counted as replacement barriers. Totals may not sum exactly due to rounding.

^aPedestrian barriers are primarily intended to slow down and deter pedestrians from crossing the border.

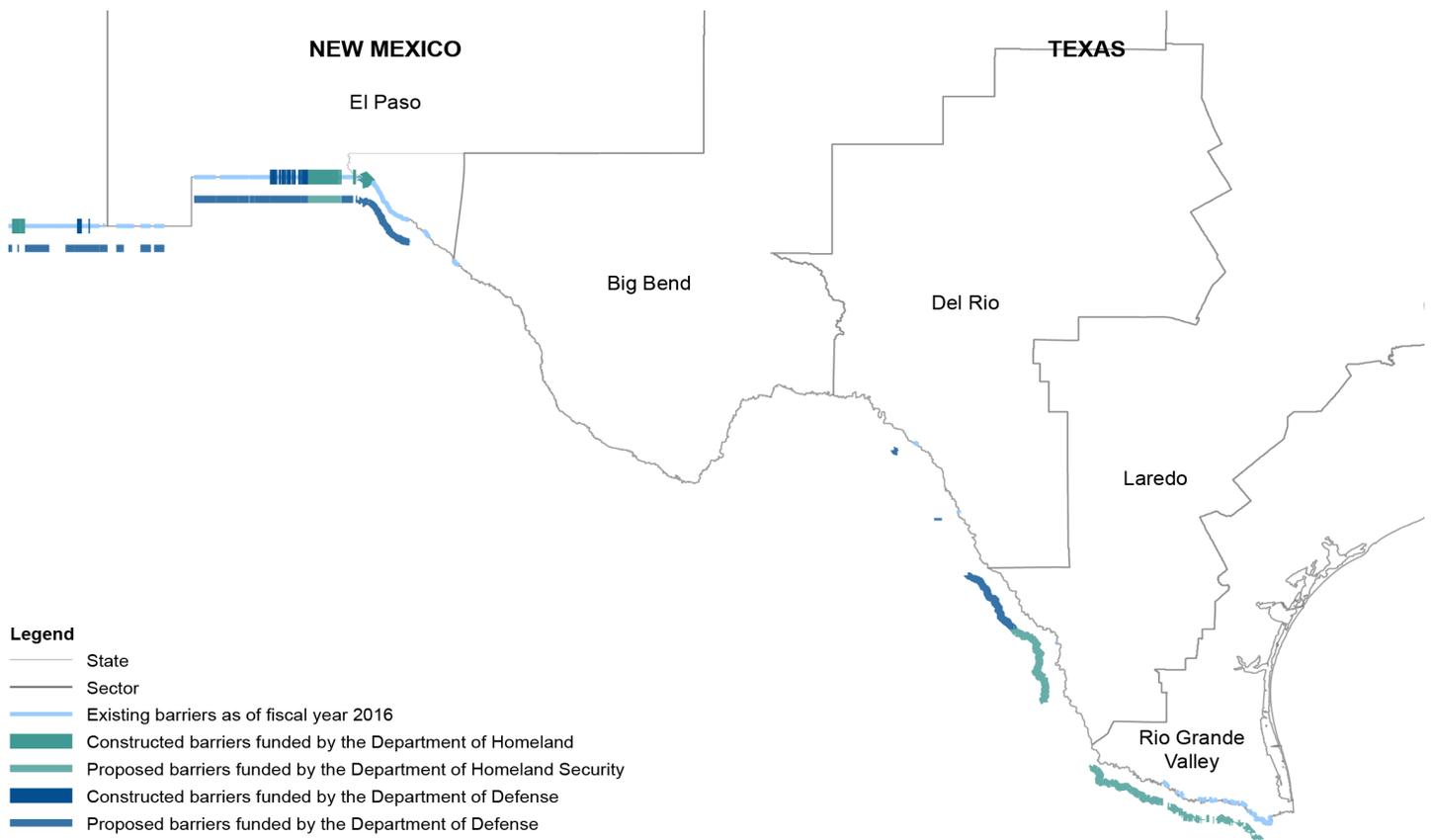
^bVehicle barriers, which are intended to resist vehicles engaged in drug trafficking and alien smuggling operations, is typically used in rural or isolated locations that have a low occurrence of illegal pedestrian traffic.

^cTo avoid double-counting, the total does not include replacement barriers, which take the place of existing barriers.

Appendix II: Constructed and Proposed Border Barriers Funded by DHS and DOD

Figures 11 and 12 show the border barriers funded by DHS and DOD that have been constructed from October 2016 to June 2020 and that are under construction or proposed as of June 2020. For the purposes of this map, barriers are only considered completed if an entire project area has been completed, and Border Patrol data on proposed barriers includes project areas still under construction as well as project areas that have been funded but have not started.¹

Figure 11: Border Barriers Constructed from October 2016 to June 2020 and Border Barriers under Construction or Proposed by Funding Department, California and Arizona



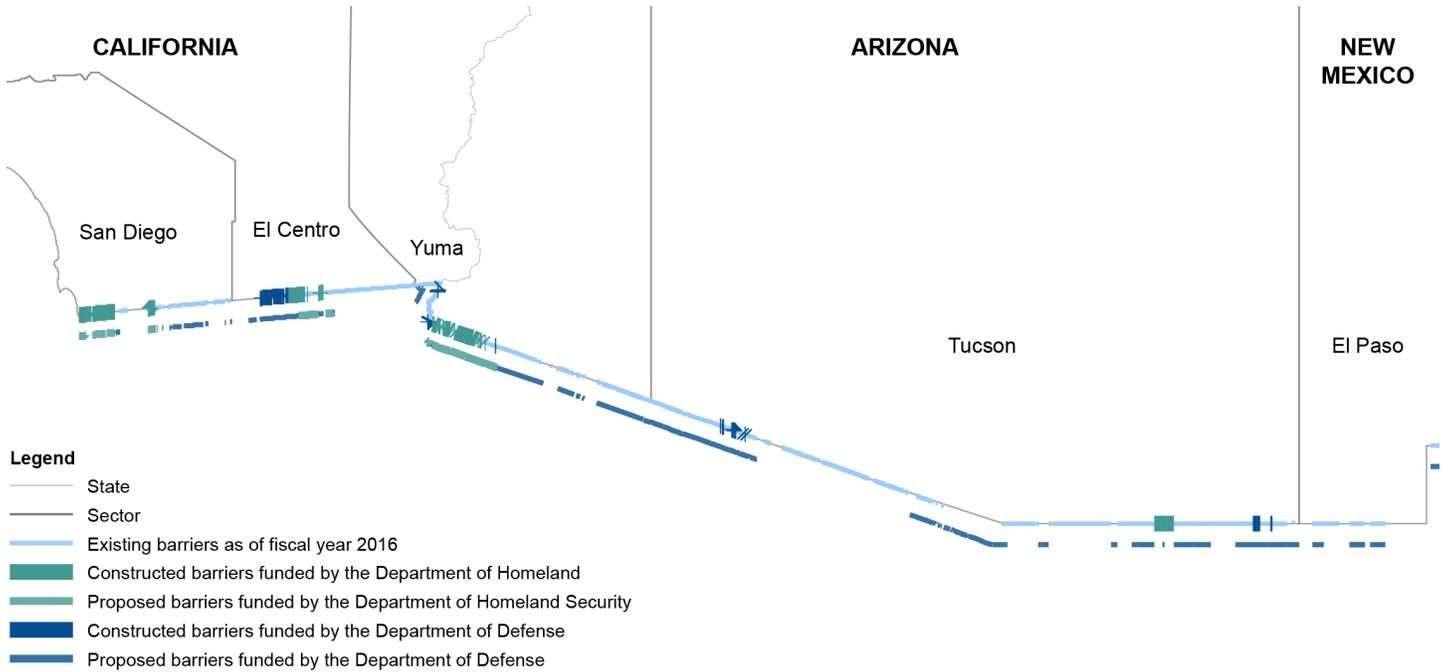
Source: GAO analysis of U.S. Border Patrol information. | GAO-21-114

Note: For the ease of reading this map, proposed barriers are shown offset from the actual border.

¹The Border Patrol defines a project area as the geographic area that defines the project boundaries and can be comprised of one or more real estate tracts to include access roads and may not be contiguous. The Border Patrol defines a tract as a section of land comprised of one or more parcels. A tract identified as needed for a project area may be a subset area of a larger parent tract.

Appendix II: Constructed and Proposed Border Barriers Funded by DHS and DOD

Figure 12: Border Barriers Constructed from October 2016 to June 2020 and Border Barriers under Construction or Proposed by Funding Department, New Mexico and Texas



Source: GAO analysis of U.S. Border Patrol information. | GAO-21-114

Note: For the ease of reading this map, proposed barriers are shown offset from the actual border.

Appendix III: Comments from the Department of Defense



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

October 26, 2020

Ms. Rebecca Gambler
Director, Homeland Security and Justice
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Ms. Gambler:

This is the U.S. Army Corps of Engineers response for the Department of Defense to the GAO Draft Report, GAO-21-114SU, "Southwest Border: Information on Federal Agencies' Process for Acquiring Private Land for Barriers," dated September 28, 2020 (GAO Code 104007).

We appreciate the opportunity to review draft report and value GAO's insights.

My point of contact is the USACE External Audit Liaison Officer, HQ-CEIR@usace.army.mil, (202) 761-8518.

Sincerely,

HEITKAMP.RICHARD.JOHN
HN EDWAR.1137796291
Date: 2020.10.23 16:46:30 -04'00'

Richard J.E. Heitkamp
Brigadier General, U.S. Army
Deputy Director, Military Programs

Appendix IV: GAO Contacts and Staff Acknowledgments

GAO Contact

Rebecca Gambler, gablerr@gao.gov, (202) 512-8777

Staff Acknowledgments

In addition to the contact named above, Jeanette Henriquez (Assistant Director), Eric Hauswirth, Landis Lindsey, Amanda Miller, John Mingus, Jr., Jan Montgomery, Sasan J. "Jon" Najmi, Jordan Tibbetts, Adam Vogt, and Eric Warren made key contributions to this report.

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