



Department of Justice

STATEMENT

OF

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BEFORE THE

**SENATE CAUCUS ON INTERNATIONAL NARCOTICS CONTROL
UNITED STATES SENATE**

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**“PROTECTING OUR UNDERGROUND BORDER: EFFECTIVE
PROSECUTION OF TUNNEL-RELATED CRIMES”**

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JUNE 15, 2011

**Statement of Laura E. Duffy
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U.S. Department of Justice**

**Before the
Senate Caucus on International Narcotics Control
United States Senate**

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**“Protecting Our Underground Border:
Effective Prosecution of Tunnel-related Crimes”**

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June 15, 2011

INTRODUCTION

Good Afternoon, Madam Chairman and distinguished members of the Caucus. Thank you for your invitation to address the Senate Caucus on International Narcotics Control. I appreciate the opportunity to discuss the efforts of the Department of Justice to stop drug smuggling and thwart tunnels along the Southwest Border. Madam Chairman, I have followed with great interest your efforts to strengthen the penalties for tunnel-related crimes and have read the report this Caucus released on Mexico on May 25, 2011. Your commitment to these issues comes at a critical time, given the recent discoveries of significant, sophisticated tunnels along our border and the accompanying specter of drug trafficking, money laundering, gun smuggling, and potential national security threats. This Caucus needs no reminding of the critical importance of Southwest Border control to the security of the United States. The National Drug Intelligence Center’s 2010 National Drug Threat Assessment indicates that Mexican Drug Trafficking

Organizations (DTOs) “continue to represent the single greatest drug trafficking threat to the United States.” The Mexican DTOs operate in every region of the country and are present in at least 230 U.S. cities, up from about 50 cities in 2006. Together, Mexican and Colombian DTOs generate, remove, and launder between \$18 billion and \$39 billion in wholesale drug proceeds in the United States annually. This Administration has made the dismantling and disabling of the Mexican DTOs a priority and is coordinating its efforts in this regard like never before.

Department of Justice investigators and prosecutors along the Southwest Border are working with agencies within the Department of Homeland Security (DHS) to share information, intelligence, and best practices. The Department’s strategy is two-pronged: first, to intensify our investigative and prosecutorial efforts through coordinated, intelligence-driven operations; and second, to strengthen the Mexican government’s own capacity to dismantle the DTOs.

The Department’s prosecutors, and particularly the United States Attorneys’ Offices in the five Southwest Border districts, work with all of the federal law enforcement agencies, including the Department of Justice’s Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), U.S. Marshals Service (USMS), and the Bureau of Alcohol, Tobacco, Firearms and Explosive (ATF), and the Department of Homeland Security’s U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP). In FY 2010, the five Southwest Border U.S. Attorneys’ Offices prosecuted approximately 43% (29,187 of 68,591) of all the nation’s felonies. For that same year, the five districts prosecuted approximately 72% (21,428 of 29,843) of the nation’s immigration cases and about 44% (4,998 of 11,366) of the nation’s non-Organized Crime Drug Enforcement Task Force (OCDETF) drug cases.

Between our aggressive enforcement and the recent enhancement of the physical fence at the border, it has become increasingly difficult to penetrate our border. The increased federal

presence explains the recent escalation in tunnel construction. The cartels have become more and more desperate to secure distribution routes into the United States; if they cannot cross the border above ground, they will tunnel under it. The Department of Homeland Security reports that 154 attempted tunnels have been found along the Southwest Border since 1990. Many of the completed tunnels in my district are considered highly sophisticated – but a majority of tunnels are shallow, undeveloped tunnels or utilize existing structures, such as storm drains, which are used for alien smuggling.

Our goal must be to shut down all tunnels, regardless of size and purpose. But to understand the nature and scope of this problem, we must take into account the size and scope of the different types of tunnels; the mechanisms used to create them; the likely criminal purposes of the tunnel; and the best way to collapse them.

Enforcement of border-related crimes drives much of my office’s work in the Southern District of California. By way of background, the Southern District of California serves an area that spans approximately 141 border miles across San Diego and Imperial Counties. It has six land border ports of entry (including the world's largest land port of entry, San Ysidro)¹, as well as a major international airport and sea port, several fixed Border Patrol checkpoints on major interstate thoroughfares (I-5 heading to Los Angeles, I-8 to Arizona, and I-15 to Las Vegas), and state highways that have long been recognized as principal transportation corridors for the national distribution of illegal immigrants and illicit controlled substances. The Southern District of California’s land area encompasses approximately 8,374 square miles, on which reside approximately 3.1 million people. The district embraces coastal, inland, mountain, and desert communities in a remarkable and sometimes uneasy geographic and climatic alliance.

¹ Each year, more than 80 million people enter the district through these ports of entry; 41 million people and 17 million vehicles cross through San Ysidro alone. The other heavily-traveled ports of entry in the district include two at Calexico, California in Imperial County, one at Andrade, California near the Arizona border, a commercial port of entry at Otay Mesa in San Diego County, and the Tecate port of entry, also in San Diego County.

Rugged and inhospitable isolation co-exists with enormous international urban centers. For example, Tijuana, Mexico's sixth largest city with a population exceeding 1.3 million people, is located directly south of San Diego, the eighth largest metropolis in the United States at approximately 1.2 million inhabitants. Mexicali, located south of Imperial County, is the state capital of Baja California and has a population of approximately 650,000. Although the district's portion of the border comprises only 7% of the entire U.S.-Mexico border, 60 % of the people who reside along the 2,000-mile U.S.-Mexico border reside in, or on the Mexican side adjacent to the Southern District of California. Consequently, this district has the largest concentration of population along the southern international border.

The U.S. Attorney's Office in the Southern District of California is the sixth largest in the nation and has one of the highest criminal and civil immigration caseloads in the country, in large part due to an extensive shared border with Mexico. During fiscal year (FY) 2010, the office continued its relentless prosecution pace, filing approximately 5,000 cases, nearly all felonies, in United States District Court. This figure placed the U.S. Attorney's Office in the Southern District of California behind only three other U.S. Attorneys' Offices in the country (Southern District of Texas, Western District of Texas, and the District of Arizona). Narcotics prosecutions exceeded 1,000, immigration-related cases surged beyond 3,600, and we prosecuted approximately 2,000 more felonies than all other California districts combined.

More than half of the sophisticated tunnels discovered along the Southwest Border since May 1990 were found in California. Southern California attracts tunnels due to a combination of geography and geology. Because San Diego sits on the border and offers busy border crossings and easy access to interstate freeways, it is a highly desirable entry point for narcotics smugglers. In Otay Mesa, there are numerous buildings on both sides of the border that conceal trucks during the loading process. The area is buzzing with the activity of tractor trailers, many of

which are conducting legitimate business. Moreover, California has clay-like soil that is easy to dig with shovels.

In 2003, ICE formed the San Diego Tunnel Task Force now formally called Border Enforcement Security Taskforce (BEST), a unique group of multi-agency professionals that includes CBP Border Patrol agents, DEA, the Naval Criminal Investigative Service, the California Air National Guard, and local law enforcement. Since then, the United States Attorney's Office in the Southern District of California has been working with the task force to prevent, discover, investigate and close down underground tunnels. In November 2010, within a space of three weeks, the task force discovered two tunnels in the Otay Mesa area. One of those discoveries led to a seizure of 20 tons of marijuana. This particular tunnel had two entrances on the U.S. side roughly 800 feet apart in warehouses, and ran 90 feet deep. Inside, one of the tunnel's walls was fortified with wood and cinderblock supports and the passageway was equipped with advanced rail, electrical and ventilation systems. This sophistication suggests that drug cartels, which can devote significant financial resources and man hours to tunnel construction, are responsible for the more intricate tunnels discovered along the border.

Our tunnel-related investigative activities and prosecutions are multi-faceted. First and foremost, our goals are to shut down the tunnel, seize illegal drugs, and thwart the varied threats posed by underground entry. Particularly in a post 9/11 world, once a tunnel is discovered, it must be shut down; thus, we often do not have the luxury of conducting further investigation or surveillance. But experience shows that when one tunnel shuts down, a new one invariably takes its place. The highly organized Sinaloa Cartel is believed to be responsible for most of the large drug smuggling tunnels discovered in California. Despite its devotion of immense time and resources to create an ultimately collapsed tunnel, this cartel is not deterred. It simply engineers

another one. Accordingly, dismantling the cartel, not just the tunnel, is and must be the ultimate goal.

The Sinaloa cartel is believed to be the largest of the drug syndicates operating in Mexico. Sources estimate that this cartel is responsible for 25 percent of drug exports into the United States. The cartel functions like a transnational firm, with operations in over 40 countries. In addition to the Americas, its reach is believed to extend across the Pacific to Australia and Japan and across the Atlantic to Eastern Europe, Italy, Portugal, Spain, Germany and several African nations.

Our goal is to connect the dots in a careful investigation and strike a significant blow against the cartels. Recognizing that tunnel cases share unique characteristics, the U.S. Attorney's Office for the Southern District of California has assigned a 20-year, seasoned OCDETF prosecutor to all tunnel cases arising in San Diego and Imperial Counties. The prosecutor works collaboratively with the BEST Tunnel Task Force on complex investigations that have led to the discovery of tunnels and the successful prosecution of perpetrators. This approach reflects the reality that increased dedication of manpower, effective information sharing and coordination produces results.

The U.S. Attorney's Office for the Southern District of California has recently prosecuted four illustrative cases involving a total of fifteen defendants on charges relating to cross-border subterranean tunnels.

(1) The September 2006 Calexico Tunnel

On September 15, 2006, a sophisticated tunnel was discovered at a residence in Calexico, California. Agents initially followed a pick-up truck leaving the residence. When they stopped the truck, they discovered over 1,000 pounds of marijuana. The tunnel was 20 feet underground and 400 feet long, and was equipped with lighting,

ventilation, and a water-pump system. Four individuals were convicted of narcotics-related offenses in connection with this tunnel, including one of the individuals responsible for the tunnel's construction, the individual who rented the Calexico residence, and the driver of the vehicle.

(2) December 2007 Tecate Tunnel (“Tecate”)

In December 2007, a 13,000-foot long tunnel was discovered near Tecate, California. The Mexican point of entry was a building in Tecate, Mexico, and the U.S. exit was a large shipping container on a lot in Tecate, California. At this commercial lot, agents seized nearly 15,000 pounds of marijuana. Through an investigation conducted by the task force, agents determined who rented the lot. This individual was charged with conspiracy to distribute marijuana. Currently, there is an outstanding warrant for his arrest.²

(3) December 2009 Tunnels

On December 2, 2009, acting on information provided by ICE and DEA, the Mexican Federal Police located a sophisticated incomplete tunnel in a warehouse twenty yards south of the border. The tunnel was 90 feet below ground, 6 feet in height, and ran 862 feet in length. This tunnel was highly sophisticated. It was equipped with electrical lighting, air delivery systems, and a generator to power the digging equipment. Its entrance point was accessible via a bathroom floor mounted on hydraulic jacks which, when lowered, accessed an underground room. Once in the underground room, a ladder led to a larger underground chamber containing the tunnel shaft, which was accessible via a cart attached to a winch. When the Mexican Federal Police gained entry into the

² Given that the amount of marijuana seized is over 1,000 kilograms, the individual who rented the commercial lot faces a mandatory minimum sentence of 10 years and a maximum sentence of life imprisonment for the importation or possession of marijuana with intent to distribute.

warehouse, access to the underground room was being closed. The concealment method was so thorough that if entry had been made 10 minutes later, the tunnel may not have been located.

Based on the investigation and information provided by the property owner, the planned U.S. exit for this tunnel was located at a warehouse in Otay Mesa. Later in December 2009, another incomplete tunnel was discovered in Calexico. That tunnel's planned exit was in Otay Mesa. One individual, Daniel Bernabe Alvarez-Peralta, was connected to the warehouse by a receipt. The tunnel had been operational, but it was covered by a mudslide, so they were in the process of re-drilling it when the Mexican Federal Police discovered its entrance. This is one of many examples of how persistent and patient the drug cartels are in the financing and construction of cross-border tunnels. Alvarez confessed to assisting in constructing the tunnel but claimed that he did not know how the tunnel would be used. He also indicated that "test runs" made through the tunnel did not involve smuggling any contraband. He pled guilty to a felony information charging aiding and abetting the construction of a cross-border subterranean tunnel in violation of 18 U.S.C. § 555.

(4) November 2010 Tunnels

The two tunnels discovered in November of 2010 allowed U.S. law enforcement officers to confiscate more than approximately 80,000 pounds of marijuana. Mexican officials discovered nine tons on their side of the tunnels. My office is prosecuting nine defendants under 21 U.S.C. Sections 841 and 846. Six of the defendants have already entered guilty pleas, and another is expected to plead guilty later this week. The sole defendant sentenced thus far received 260 months in custody. The two remaining

defendants are scheduled for trial. We believe one of the tunnels was operational for only a week before it was shut down.

Although the tunnel problem, for the most part, is limited to Arizona and California, the U.S. Attorney's Office for the Western District of Texas also prosecuted a case involving a tunnel in El Paso in which the juvenile defendant was sentenced to incarceration until age 21 after pleading guilty to the offense of importation of controlled substances.

Arizona prosecutors successfully prosecuted parties related to two tunnels discovered there. The first was the 1990 Douglas Tunnel case, in which the United States Attorney's Office prosecuted the architect of that tunnel, who was employed by Joaquin Guzman Loera, aka El Chapo, believed to be the head of the Sinaloa cartel. The architect-defendant was present both in the U.S. and Mexico during the construction of the tunnel. He oversaw the construction of a warehouse on the U.S. side and had the construction workers move a drain and make it larger at one point during the construction; that drain served as the entrance to the tunnel on the U.S. side. We believe a ton of cocaine moved through that tunnel. While the prosecution was rendered more difficult by the timing of the trial (which occurred many years after the events in question), the tunnel architect, who had to be extradited from Mexico, was convicted of a narcotics conspiracy under Title 21 and sentenced to 18 years in prison.

Federal prosecutors in Arizona also handled three trials to date arising out of the 1999 discovery of the Naco Tunnel. Over 50 people were charged and convicted and 7 tons of cocaine were seized during the investigation. The person who organized the construction of the tunnel has been charged but remains a fugitive; the Department is still actively pursuing him. Our information is that the Tijuana and Juarez cartels used this tunnel, which was constructed by

unemployed/striking miners from a Mexican mining town, to move approximately 30 tons of cocaine into the United States.

In prosecuting tunnel-related crimes, we are fortunate to have a very powerful tool available to us - that is, the range of drug charges under Title 21. The reason is two-fold: (1) evidence may not be available to prove a defendant's direct link to the tunnel to a jury beyond a reasonable doubt, but there is typically sufficient evidence to prove that the defendant conspired or aided and abetted in some capacity in the importation or distribution of controlled substances; and (2) we want to ensure an appropriate sentence. The drug charges carry stiff mandatory minimum sentences and sometimes enable prosecutors to use "career offender" sentencing enhancements. Title 21 charges are beneficial because of mandatory minimum provisions as well as the career offender provision of the Sentencing Guidelines (4B1.1 of the Sentencing Guidelines). For example, one defendant in a tunnel case was recently sentenced to 260 months in custody. More significantly, Title 21 charges allow the prosecutor to enhance the mandatory minimum sentence from 10 years to 20 years if the defendant has a prior drug conviction. If the defendant has two or more convictions for a felony drug offense, the sentencing penalty is life imprisonment.

Understandably, American citizens react to news stories about the discovery of a large tunnel, complete with plumbing, lights, ventilation and a rudimentary railway system, with a mixture of surprise, indignation, alarm and dismay. How, they ask, can such a sophisticated illegal structure be constructed right under our noses? What will stop this from occurring again? And how can we punish those responsible for creating the tunnels? The answer is layered with complexities that are not always obvious to the casual observer. The reason tunnels seem to appear suddenly, with no tell tale signs of digging, is that most of the work is done on foreign

soil. All of the tunnels discovered thus far were started in Mexico. The critical witnesses and evidence are usually located in Mexico where we are unable to independently investigate.

Another factor is that the technology used to create tunnels is outpacing the creation of effective technologies for discovering them. For example, we have information that the cartels are purchasing highly sophisticated equipment that is capable of cutting through metal and concrete at costs as high as \$50,000 to \$75,000. In 2008 and 2009, three incomplete tunnels were discovered that were created with Horizontal Directional Drilling equipment, which constructs a path without disturbing the top soil. While the digging technology is clearly advancing, law enforcement efforts to employ creative methods to find tunnels have been met with mixed results. Given the rise in the number of tunnel discoveries in recent years, it is important to identify or develop technologies that can effectively detect the early phases of tunnel construction.

Technology is only part of the answer. Currently, old fashioned law enforcement methods – developing sources, gathering information, noting suspicious activity, following leads – bring the biggest pay-off. Most tunnels are discovered through the use of human intelligence. It takes significant man hours and resources to mount a savvy investigation that will lead to a sophisticated tunnel and the high-level criminals who created it. Due to the difficulty of conducting historical investigation once a tunnel is found, we need to rely more on human intelligence to develop real time information and wiretaps.

We also need to involve property owners and managers in the tunnel discovery process. And we stand ready to prosecute the bad actors. Federal prosecutors will not hesitate to press charges against a landowner who knowingly looks the other way while a sophisticated drug smuggling tunnel is constructed under his warehouse. The problem, however, is proving knowledge. Many landowners are absentees who rent their property through management

companies. Even most of the management companies are offsite; they are removed, both literally and figuratively, from the property. Moreover, the property is often leased in a false name to a bogus company. Even people who legitimately work near a tunnel's location are often oblivious. For example, business owners who drove by the buildings where the two most recent Otay Mesa tunnels were found said they had no idea something suspicious was going on there and never would have known border tunnels existed inside.

Concentrated education efforts should improve this situation. The BEST Tunnel Task Force is taking a proactive approach to educating landlords and others in the warehouse industry. In the industrial complex in Otay Mesa, the nation's busiest border crossing for trucks, there are roughly 600 warehouses and 12,000 businesses. BEST Tunnel Task Force members have already begun to visit these business owners to train them to look for signs of underground tunnels and to gather intelligence.

We have reason to believe that collaborating with landlords and tenants will eventually reap dividends. In December 2009, for example, warehouse tenants and a management company led ICE to discover a sophisticated incomplete tunnel in Otay Mesa. The tenants alerted their management company to underground noise and the management company notified ICE. The agency then tracked the building of the tunnel underground; although once it was compromised, the traffickers redirected the exit point to a different location, which was also tracked by ICE.

Despite our best efforts in this area, we do face certain hurdles in prosecuting tunnel cases. Ordinarily, when a tunnel is discovered, no one is found at the tunnel site. In some cases, tunnels are located on public land, and we cannot tie anyone in the U.S. to the tunnel. Moreover, it is difficult to gather intelligence because the sophisticated cartels that build the tunnels operate in a highly compartmentalized fashion. High and mid-level cartel members are insulated. The cartels use multiple players and relay transportation teams to ensure that the left hand does not

know what the right hand is doing. Furthermore, because the tunnels represent significant capital and time investments by the cartels, information about their location is highly protected. In fact, the BEST Tunnel Task Force believes that some tunnel excavators in Mexico are killed when the job is done to prevent them from spreading the word on the location.³ The violent nature of the organizations responsible for the tunnels inevitably limits the number of sources willing to come forward and cooperate. We must overcome this difficulty by aggressive investigation and prosecution to obtain the cooperation witnesses and sources.

Federal law enforcement officers along the Southwest Border also recognize the importance of a robust and collaborative relationship with our Mexican law enforcement counterparts. Our office has had substantial success in prosecuting higher-ranking leaders in the Arrellano-Felix Organization (AFO, also known as the Tijuana cartel), one of the cartels responsible for drug smuggling and tunnel operations. These prosecutions were possible because we worked effectively with Mexico to extradite defendants, including the recent extradition of Benjamin Arrellano-Felix to stand trial in the United States. Both countries recognize that clandestine tunnels represent a threat not only to the security interests of the United States but to those of Mexico as well. Just as illegal drugs and undocumented immigrants continue to be smuggled northbound into the United States using every conceivable method, including clandestine tunnels, firearms and drug proceeds continue to be smuggled southbound into Mexico. Tunnels provide criminal organizations on both sides of the border with the ability to quickly and efficiently circumvent inspection, and are thus, literally and figuratively, a two-way street.

³ Given the significant investment in and secretive nature of the large tunnels, and the exposure danger posed by using them to smuggle people who will likely be apprehended and questioned, their primary purpose is to smuggle large quantities of drugs. That said, we recognize that alien smugglers do use smaller “gopher holes” or storm drains to transport illegal immigrants, but these operations tend to be more haphazard and unsophisticated.

Cooperation between the Government of Mexico (GoM) and U.S. officials on issues related to tunnels has increased in the past several years. The ICE Assistant Attaché office in Tijuana, Mexico is currently establishing a joint ICE-GoM investigative tunnel response team that will focus on the identification and investigation of tunnels on the Mexico side of the border. The team will initially focus its efforts in the Tijuana area and eventually expand its scope to respond to tunnels detected along the entire Southwest Border.

ICE has also procured emergency rescue, tunnel safety equipment, and tunnel exploring robots to verify the safety and stability of the tunnels prior to entry by law enforcement. GoM Ministry of Public Security (SSP) officers assigned to the Mexico City BEST Transnational Criminal Investigative Unit (TCIU) and the Mexican military will receive a complete set of the tunnel equipment and a robot. ICE Tijuana Special agents and the San Diego BEST Tunnel Task Force are developing a training program for Mexican military and SSP officers on the proper use of the equipment. With this equipment at their disposal, Mexican law enforcement agencies will be able to respond to tunnel discoveries on the Mexican side of the border and secure the location while ensuring its safety for entry by law enforcement officers. Such equipment can also be used as rescue equipment in the event that a tunnel collapses. The equipment purchase was made possible through Mérida Initiative funds.

In recent years, the Department of Justice has strived to develop and strengthen information sharing with our Mexican counterparts. We have worked cooperatively, with both the Mexican police and the country's military, to shut down tunnels, to make arrests on both sides of the border, and to develop a protocol for handling discovered tunnels. In recognition of the particular challenges shared by law enforcement authorities on both sides of the border, in February of this year, the initial meeting of the Mexico/United States Federal Border Prosecutor Working Group was held in Mexico City. For the first time, U.S. and Mexican federal

prosecutors with jurisdiction over criminal activity on the U.S./Mexico border met as a group to discuss topics of common interest, including drug trafficking, alien smuggling and firearms. To continue this dialogue, I have met with the Mexican prosecutor who serves as my counterpart in Baja, California, and we have begun discussion regarding a protocol for handling tunnels. The cooperative dialogue between U.S. and Mexican federal prosecutors is continuing, with the next meeting tentatively set for late summer in San Diego.

Moreover, the Assistant United States Attorney (AUSA) assigned to prosecute tunnel cases has fostered ongoing relationships with Mexico's Office of the Attorney General (PGR) and individual Mexican prosecutors. The AUSA and ICE Special Agents met four Mexican prosecutors and other PGR personnel to discuss and exchange information and court documents regarding the tunnels discovered in November 2010. The PGR also arranged for ICE Special Agents to travel to Mexico to interview arrested defendants in connection with the November 25, 2010 tunnel in Tecate.

CONCLUSION

In sum, working with the federal law enforcement community and Government of Mexico to prevent, discover and shut down underground tunnels and to prosecute those who construct and use them is a top priority of the Department of Justice. I thank you for the opportunity to discuss our efforts and we look forward to partnering with you to ensure that we are doing all we can to curtail the threats posed by tunnels. I would welcome the opportunity to address any questions the Caucus Members may have on this important issue.