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Third World Texas: NAFTA, State Law, and Environmental Problems Facing Texas Colonias Symposium - The Environment and the United States-Mexico Border - Comment.

David L. Hanna

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**THIRD WORLD TEXAS: NAFTA, STATE LAW, AND
ENVIRONMENTAL PROBLEMS FACING TEXAS COLONIAS**

DAVID L. HANNA

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"They do most of the working and paying and living and dying in this community. Is it too much to have them work and pay and live and die in a couple of decent rooms and a bath?"¹

I. INTRODUCTION

Texas and Mexico have many common attributes: Spanish/Mexican heritage, culture, history, and a geographical boundary that spans nearly 1000 miles from the sister cities of El Paso and Ciudad Juárez to the Gulf of Mexico.² Texas and Mexico also share the hardship and poverty of the Colonias³—areas along the border exhibiting "third world"⁴ conditions

1. *IT'S A WONDERFUL LIFE* (Liberty Films 1946).

2. See Edward H. Kurth, *Adjudicative Resolution of Commercial Disputes Between Nationals of the United States and Mexico*, 14 ST. MARY'S L.J. 597, 597 (1983) (noting that border between Texas and Mexico extends nearly 1000 miles); see also Tony Garza, *U.S. Aid Package to Mexico Is Doing the Job*, HOUSTON CHRON., July 27, 1995, at A39 (observing that Texas and Mexico are linked by culture, geography, and history).

3. See TEXAS DEP'T OF HUMAN SERVS., *THE COLONIAS FACTBOOK: A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 1-3* (1988) (detailing location and population of Texas Colonias). Colonias are rural, unincorporated subdivisions along the United States-Mexico border that are usually characterized as having substandard housing, a lack of potable water and wastewater treatment, chronic disease, and high poverty levels. *Id.*; see ROBIN ALEXANDER, *TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER* 9 (1993) (relating struggles endured by residents of Colonias); see also *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (discussing how Colonians along Texas-Mexico border live in rural subdivisions that lack water, wastewater treatment, paved roads, and sometimes electricity), available in Westlaw, ALLNEWSPLUS Database.

4. See WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1237 (2d ed. 1983) (defining "third world" as underdeveloped or developing country); Rodolfo Mata & Lawrence Friedman, *Welcome to the Third World: Reflections on the Anniversary of the Boston College Third World Law Journal*, 15 B.C. THIRD WORLD L.J. 77, 80 (1995) (noting that term "third world" refers to underdeveloped and developing nations, such as Africa, Latin and South America, and Asia). The term "third world" is used in this Comment to describe conditions similar to those in underdeveloped nations, such as inadequate housing, a lack of potable water and wastewater treatment, unpaved roads, and a high frequency of diseases such as hepatitis, cholera, and tuberculosis. See James A. Garcia, *Austin Agency to Sort out South Texas Land Deals*, AUSTIN AMERICAN-STATESMAN, Nov. 24, 1995, at B1 (asserting that lack of potable water, wastewater treatment, and other services create third world conditions along Texas-Mexico border); *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (identifying third world conditions as substandard water and wastewater systems, inadequate roads, and lack of electricity), available in Westlaw, ALLNEWSPLUS Database; see also Philip True, *Nowhere to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L5 (indicating that cholera, tuberculosis, and hepatitis are common third world diseases found in Colonias).

that make the slums of urban America look like upscale neighborhoods.⁵ The horrendous conditions along the Texas-Mexico border stem from factors on both sides of the Rio Grande River, including maquiladoras,⁶ migrant farms,⁷ poverty,⁸ poor land development,⁹ and bureaucracy.¹⁰ The adverse living conditions in Texas's third world border region have re-

5. See Janin Friend, *The Colonias, Shantytowns on Mexico Border, Are Focus of Talk, Some Action by Texas, U.S.*, BOND BUYER, Oct. 14, 1993, at 1 (quoting HUD Secretary Henry Cisneros after tour of South Texas Colonias implying that they are worse than any of the poorest urban slums in other parts of United States); David LeGasse, *Pact to Be Monitored for Effectiveness in Cleaning up Border, \$8 Billion May Be Generated for Projects*, DALLAS MORNING NEWS, Dec. 26, 1993, at P8 (referring to extensive infrastructure and environmental needs along Texas-Mexico border); see also Guadalupe T. Luna, *Agriculture, Rural Workers and Free Trade*, 14 N. ILL. U. L. REV. 789, 796 (1994) (asserting that urban slums differ from Colonias in that urban slums have luxury of infrastructure).

6. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-92-102, REPORT TO THE CHAIRMAN, ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES; HAZARDOUS WASTE: MANAGEMENT OF MAQUILADORAS WASTE HAMPERED BY LACK OF INFORMATION 1-2 (1992) (stating that 850 United States companies and close to one-half million people have been attracted to border region by maquiladoras). Maquiladoras are generally United States companies located across the border in Mexico that are permitted to import materials into Mexico duty free as long as the finished products are exported. *Id.* Mexico initiated this program specifically to encourage labor-intensive industries to locate in Mexico. *Id.* at 2; see Michael J. Kelly, Comment, *Environmental Implications of the North American Free Trade Agreement*, 3 IND. INT'L & COMP. L. REV. 361, 364 (1993) (indicating that high wages paid by maquiladoras attracted numerous workers to border area, many of which now live in Colonias); Dan Fagin, *Border Town Mystery, Why Are So Many Brownsville Babies Being Born Brainless?*, NEWSDAY, July 12, 1992, at 5 (indicating that maquiladoras are major cause of pollution in border region and significant contributing factor to enormous health problems of Colonians); see also Mary Tiemann, *The Impact of Environmental Issues on NAFTA Implementation*, 3 Mex. Trade & L. Rep. 10, 15 (1993) (noting that Colonias have sprung up along border near maquiladoras), available in Westlaw, ALLNEWSPLUS Database.

7. See Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771, 777 (1994) (discussing problems facing migrant farmers in Colonias, including poisoning from pesticides and other toxic hazards); Viviana S. Patiño, *Legal Regulation of Farm Work in the United States*, 3 KAN. J.L. & PUB. POL'Y 37, 38 (1994) (asserting that migrant farm workers along border are forced to live in Colonias with poor safety and health conditions); see also Viviana S. Patiño, *Migrant Farm Worker Advocacy: Empowering the Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43, 44-45 (1987) (noting extremely substandard conditions in Colonias migrant farm housing).

8. See, e.g., A. Dan Tarlock & Darcy A. Frownfelter, *State Groundwater Sovereignty After Sporhase: The Case of the Hueco Bolson*, 43 OKLA. L. REV. 27, 38 (1990) (commenting that Colonians usually live under poverty level); Bruce Zagaris, *The Transformation of Environmental Enforcement Cooperation Between Mexico and the United States in the Wake of NAFTA*, 18 N.C. J. INT'L L. & COM. REG. 59, 84 (1992) (claiming that Colonias are characterized by extreme poverty); Lee Smith, *The Face of Rural Poverty*, FORTUNE, Dec. 31, 1990, at 106 (emphasizing link between extreme poverty and Colonias); cf. Buck J. Wynne, *The Impact of NAFTA on the U.S./Mexico Border Environment*, 26 URB. LAW. 11,

sulted in immense health and safety problems.¹¹ Residents of Colonias experience unusually high rates of dysentery, hepatitis, cholera, and gastrointestinal infections most common in third world countries.¹² For the most part, these residents, known as "Colonians," have become citizens of a third world border country all its own and are deprived of de-

11 (1994) (asserting that poverty is root of environmental problems in Texas and New Mexico Colonias).

9. See COSSMHO: *Congress Acknowledges Plight of Texas Colonias, Photography Expedition Details Accounts*, PR Newswire, July 14, 1995 (asserting that Colonias exist because of unregulated land development), available in Westlaw, ALLNEWSPLUS Database; Philip True, *Colonias: Places of Tar Paper and Dried-up Promises*, SAN ANTONIO EXPRESS-NEWS, July 2, 1995, at A1, A13 (stressing that third world living conditions in Colonias result from lack of enforcement of Texas land development laws and unscrupulous land developers).

10. See Marcus Stern, *Link to NAFTA Sullies Border Cleanup*, SAN DIEGO UNION-TRIB., Nov. 8, 1993, at A1 (addressing problem of bureaucratic indecision in attempts to remedy impoverished conditions of Colonias in border region); *Groundwater: A Concern in Fight to Halt Cholera*, DALLAS MORNING NEWS, Feb. 13, 1992, at A33 (noting that Colonias' water problems result from decades of political neglect); *Prepared Statement of Michael V. Dunn, Acting Undersecretary, Rural Economic and Community Development, Food and Drug Administration and Related Agencies*, Mar. 16, 1995 (commenting that Colonias residents are frustrated by bureaucracy of government aid programs), available in Westlaw, ALLNEWSPLUS Database.

11. See Angela C. Montez, *The Run Past the Border: Consequences of Treating the Environment Under NAFTA As a Border Issue*, 5 GEO. INT'L ENVTL. L. REV. 417, 421 (1993) (stating that conditions in Colonias pose substantial health risks to border residents); see also Stanley M. Spracker et al., *Environmental Protections and International Trade: NAFTA As a Means of Eliminating Environmental Contamination As a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 673 (1993) (referring to unusually high number of Colonians that contract hepatitis); David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323, 328 (1993) (noting that American Medical Association characterized Colonians' living conditions as breeding ground for disease).

12. See James E. Bailey, *Free Trade and the Environment: Can NAFTA Reconcile the Irreconcilable?*, 8 AM. U. J. INT'L L. & POL'Y 839, 864-65 (1993) (identifying conditions common in Colonias causing abnormally high levels of third world diseases); Stanley M. Spracker et al., *Environmental Protection and International Trade: NAFTA As a Means of Eliminating Environmental Contamination As a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 673 (1993) (noting that 90% of adults in El Paso, Texas, Colonias contract hepatitis by age 35); Janin Friend, *The Colonias, Shantytowns on Mexico Border, Are Focus of Talk, Some Action by Texas, U.S.*, BOND BUYER, Oct. 14, 1993, at 1 (emphasizing that, because of inadequate infrastructure, Colonians are susceptible to diseases resulting from fecal matter contaminating water supply). Compare Angela C. Montez, Note, *The Run Past the Border: Consequences of Treating the Environment Under NAFTA As a Border Issue*, 5 GEO. INT'L ENVTL. L. REV. 417, 439 n.128 (1993) (noting abnormally high presence of hepatitis, cholera, and other diseases in Colonias) with Philip True, *Nowhere to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L5 (asserting that hepatitis and cholera are typical diseases in third world countries).

cent living conditions by the United States, Texas, and Mexican governments.¹³

The United States government promised that the North American Free Trade Agreement (NAFTA)¹⁴ would bring new environmental prosperity to the border region.¹⁵ Yet, aside from one sentence in the preamble,¹⁶ NAFTA does not directly address environmental protection.¹⁷ In an ef-

13. See Xavier C. Vasquez, *Symposium on the North American Free Trade Agreement: The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L.J. 357, 374 (1993) (arguing that United States government's failure to control border pollution by cleaning up existing pollution or imposing strict environmental standards on United States-owned maquiladoras is violation of United States border residents' right to equal protection); see also *Living on the Edge: Saga of Those Along the Border Also Our Own to Write*, HOUSTON CHRON., Nov. 1, 1993, at C12 (indicating that citizens in border region have been forgotten by governments of their respective states and countries).

14. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. 605 (pts. 4-8 & annexes) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

15. See President's Remarks at the Initialing Ceremony for the North American Free Trade Agreement in San Antonio, Tex., 28 WEEKLY COMP. PRES. DOC. 1877, 1878 (Oct. 7, 1992) (asserting that NAFTA will improve environment along border); see also Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 658 (1994) (discussing promises made by Office of United States Trade Representative about positive impact NAFTA would have on Colonias); Lawrence J. Rowe, *NAFTA, The Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?*, 18 SUFFOLK TRANSNAT'L L. REV. 197, 215 (1995) (noting that proponents of trade liberalization assert that NAFTA creates means for better environmental protection). *But see* Nicholas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 61 (1994) (emphasizing that opponents of NAFTA view it as environmental catastrophe).

16. NAFTA, *supra* note 14, pmb., 32 I.L.M. at 297. The Preamble to NAFTA states in pertinent part:

The Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, resolved to . . . UNDERTAKE each of the preceding [trade objectives] in a manner consistent with environmental protection and conservation; [and] . . . STRENGTHEN the development and enforcement of environmental laws and regulations.

Id.

17. *Id.*; see NAFTA, *supra* note 14, ch. 9, art. 904(1), 32 I.L.M. at 387 (addressing establishment of "green" standards that might impact trade of goods or services, but failing to address environmental protection directly); Eric L. Garner & Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-First Century*, 27 ARIZ. ST. L.J. 469, 505 (1995) (asserting that aside from preamble, NAFTA fails to address specific environmental problems). *But cf.* Joel L. Silverman, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Havens by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, 24 GA. J. INT'L & COMP. L. 347, 360 (1994) (asserting that one-fifth of NAFTA preamble goals relate to environmental issues). NAFTA's Article 904 permits each nation to establish its own level of environmental protection, but only tacitly relates to protection of the environment or human life. NAFTA,

fort to gain approval of NAFTA and win election votes, President Clinton, then Governor of Arkansas, demanded a side agreement on the environment to address border environmental issues.¹⁸ The United States and Mexico, as part of a series of environmental side agreements, created the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBank) to implement and help finance infrastructure projects along the border.¹⁹ Despite the Environmental Side Agreement's passage in 1993, and notwithstanding the

supra note 14, ch. 9, art. 904(1), 32 I.L.M. at 387. Instead, Article 904 broadly enunciates commercial standards as they relate to environmental issues. *See id.* (indicating that NAFTA allows each member country to set its own level of environmental protection regarding standards and related measures). Article 1114 of NAFTA, which concerns investment matters, also cursorily mentions the environment, but gives no detail as to how NAFTA will improve environmental protection. *Id.* art. 1114, 32 I.L.M. at 642.

18. *See* Governor Bill Clinton, Remarks at the Student Center at North Carolina State University, Raleigh, North Carolina (Oct. 4, 1992) (indicating support for NAFTA only if accompanied by side agreement on environmental protection), available in LEXIS, News Library, SCRIPT File; William A. Lovett, *Current World Trade Agenda: GATT, Regionalism, and Unresolved Asymmetry Problems*, 62 FORDHAM L. REV. 2001, 2010 (1994) (noting that President Clinton claimed during election campaign that his acceptance of NAFTA hinged on side agreement for environmental protection); Stefan R. Miller, Comment, *NAFTA: A Model for Reconciling the Conflict Between Free Trade and International Environmental Protection*, 56 U. PITT. L. REV. 483, 513 (1994) (reiterating presidential candidate Bill Clinton's pledge to strengthen environmental aspects of NAFTA via side agreement); *see also* Jack I. Garvey, *Trade Law, and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 440 (1995) (referring to Governor Clinton's claim that he would not support NAFTA without environmental side agreement); *cf.* Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127, 151 (1994) (noting that once side agreements were passed, President Clinton supported passage of NAFTA). The ultimate result of then Governor Clinton's efforts is memorialized in the North American Agreement on Environmental Cooperation (Environmental Side Agreement). North American Agreement on Environmental Cooperation, *opened for signature* Sept. 9, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (entered into force Jan. 1, 1994) [hereinafter Environmental Side Agreement].

19. *See* Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, Nov. 16, 18, 1993, U.S.-Mex., 32 I.L.M. 1545 [hereinafter BECC/NADBank Agreement]; TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK) 1 (1994) (discussing NAFTA side agreement that created BECC and NADBank); *see also* Edward M. Ranger, *Environmental Aspects of Building a Facility in Northern Mexico*, C990 A.L.I.-A.B.A. 497, 559 (1995) (noting that BECC and NADBank were created to help fund environmental projects), available in Westlaw, TP-ALL Database; Eduardo Montes, *Agency Could Have an Image Problem/Environmental Advisor Develops Colonias*, HOUSTON CHRON., Oct. 15, 1995, at 47 (commenting that BECC was created to solve border environmental problems).

efforts of BECC and NADBank, there appears to be no relief for the Colonias in the immediate future.²⁰

Similar to the United States at large, Texas did little to curb Colonia development along the Texas-Mexico border prior to 1989.²¹ Since then, however, Texas has established a program to provide financial assistance for infrastructure development and has imposed restrictions on land development.²² Nonetheless, because of loopholes in the legislation and poor enforcement mechanisms, unscrupulous land developers are able to continue expansion of Texas Colonias unhindered by federal or state law.²³ In 1995, attempting to address these problems, the Texas Legislature implemented and amended several laws with the goal of halting the expansion of the Colonias region.²⁴ Although the new laws are a glim-

20. See Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (emphasizing that while infrastructure improvement projects are being planned, no projects had begun as of September 13, 1995 due to delays); see also *New Law Can Halt Colonias' Spread*, SAN ANTONIO EXPRESS-NEWS, July 8, 1995, at C6 (suggesting that in spite of efforts to help solve border problems, Colonians are on their own). *But cf.* Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Jan. 22, 1996) (noting that first NADBank-funded Colonias project is scheduled for 1996); Debra Beachy, *NAFTA Products Squabbles, Not Freer Trade*, HOUSTON CHRON., Feb. 4, 1996 (Business), at 1 (reporting that NADBank's Deputy Manager Victor Miramontes stated that NADBank approved its first project in January 1996).

21. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 5 (1990) (intimating that federal and state laws prior to 1989 allowed developers to create Colonias without interference). Prior to 1989, Texas attempted to control substandard housing development with regulation in the state's municipal zoning laws. See generally TEX. LOC. GOV'T CODE ANN. § 211.003 (Vernon 1988) (indicating that zoning laws give each municipality power to regulate land use within its jurisdiction).

22. See Act of June 14, 1989, 71st Leg., R.S., ch. 624, § 2, 1989 Tex. Gen. Laws 2063, 2064-67 (current version at scattered sections of TEXAS WATER CODE ANN. §§ 15.001-17.853 (Vernon Supp. 1996)) (enacting legislation designed to aid residents of economically distressed areas). The 1989 legislation, dubbed the Economically Distressed Area Program (EDAP), was designed to assist counties in providing water service and wastewater treatment to Colonias. TEXAS WATER CODE ANN. §§ 15.001(11), 16.341 (Vernon Supp. 1996). The EDAP also provided measures to prevent future Colonias development. See TEX. LOC. GOV'T CODE ANN. § 212.010 (Vernon Supp. 1996) (establishing standards for approval of new subdivision plats).

23. See *Colonias Resist Developer Greed and Pass Strong Rules*, DALLAS MORNING NEWS, May 15, 1995, at A12 (suggesting that laws up to May 15, 1995 continued to allow developers to build Colonias); *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (asserting that efforts by 71st Legislature to stop Colonias development have been unsuccessful due, in part, to alleged corruption among local officials and developers), available in Westlaw, ALLNEWSPLUS Database.

24. See, e.g., TEX. GOV'T CODE ANN. §§ 2306.581-.589 (Vernon special pamphlet 1996) (establishing Colonias self-help centers in certain counties to improve living condi-

mer of hope for Colonians, they may represent no more than political rhetoric.²⁵

This Comment analyzes state and federal programs that promise to remedy the Colonias dilemma. Part II of this Comment examines the Colonias and the challenges their residents endure. Part III considers the background of environmental laws and agreements in the United States and Mexico. Part IV addresses state and federal laws and agreements that in theory promise aid, but in reality offer false hope to the Colonias. Finally, Part V proposes a solution designed to help alleviate many of the Colonias problems.

II. THE COLONIAS: A LOOK INSIDE THE THIRD WORLD BORDER REGION

Talk about a third world country often conjures up images of desperate poverty, inadequate food and water, diseases one only hears about on the news, dirty children playing in filthy unpaved streets, and substandard housing that makes an urban-American slum look like a great place to raise a family.²⁶ Surprisingly, these conditions exist in

tions in Colonias); TEX. LOC. GOV'T CODE ANN. §§ 232.021-.042 (Vernon Supp. 1996) (regulating low-income housing developers). For plat approval, subdividers must provide a certified letter from the utility company that water is available to all lots, furnish sewage treatment facilities, build roads, and make a reasonable effort to provide gas and electrical services. TEX. LOC. GOV'T CODE ANN. § 232.032 (Vernon Supp. 1996); *see also Colonias Resist Developer Greed and Pass Strong Rules*, DALLAS MORNING NEWS, May 15, 1995, at A12 (positing that recent state legislation may solve Texas Colonias problems).

25. Compare TEX. GOV'T CODE ANN. §§ 2306.581-.589 (Vernon special pamphlet 1996) (purporting to establish Colonia self-help centers while restricting assistance to Colonias that have water and sewer service already available) with FACILITY NEEDS SECTION, TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF COLONIAS IN TEXAS 4 (1992) (noting that 275 out of 1193 Colonias have inadequate water supply and virtually all have inadequate wastewater treatment). *See generally* Philip True, *Nowhere to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L1 (suggesting that although lawmakers may have solved development problems of Colonias, they have not solved affordable housing problem causing Colonias growth).

26. *See* ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 4 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (comparing conditions common in border Colonias to those of third world slums); TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY 1 (1993) (commenting on extreme poverty conditions in Texas Colonias, including lack of potable water, inadequate wastewater treatment, flooding, and dilapidated housing); *see also* Janin Friend, *The Colonias, Shantytowns on Mexico Border, Are Focus of Talk, Some Action by Texas, U.S.*, THE BOND BUYER, Oct. 14, 1993, at 1 (describing deplorable conditions that exist in Colonias along border region); Viviana Patiño, *Migrant Farm Worker Advocacy: Empowering the Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43, 45 (1987) (discussing astonishingly poor condi-

our own backyard, in the Colonias along the United States-Mexico border.²⁷

Colonia is a Spanish word that literally translated means "neighborhood."²⁸ Yet, the Colonias are unlike any neighborhood most Americans have ever seen. In colloquial use, the word Colonia means a "rural slum" along the United States-Mexico border characterized by substandard housing, a lack of potable water, inadequate sewage and solid waste-disposal systems, inferior roads and drainage, extreme poverty, and third world diseases.²⁹ Approximately one-half million Americans³⁰

tions in border Colonias). The authors of a study on Colonias in the lower Rio Grande Valley compared Texas Colonias to the bidonvilles of South Africa, foveolas of Brazil, and barrios of Mexico. ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 4* (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993).

27. See ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 4* (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (discussing Colonias in Texas's Rio Grande Valley and comparing them to third world shantytowns); see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 1 (1990) (explaining that Colonias exist along United States-Mexico border in Texas, New Mexico, Arizona, and California and emphasizing that majority of Colonias are located in Texas); Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 *FORDHAM URB. L.J.* 771, 776-78 (1994) (noting deplorable housing, water, and sewage conditions in substandard subdivisions along United States-Mexico border). There are an estimated 1436 Colonias with an aggregate population of approximately 340,000 people along the Texas-Mexico border. TEXAS WATER DEV. BD., *WATER AND WASTEWATER NEEDS OF COLONIAS: UPDATE* app. (1995). Forty-three of these Colonias are located in Webb County, Texas; 868 in Hidalgo County, Texas; 109 in El Paso County, Texas; and 124 in Starr County, Texas. *Id.*

28. THE OXFORD SPANISH DICTIONARY 168 (1994); see SOUTHWEST CENTER FOR ENVIRONMENTAL RESEARCH AND POLICY, *REVIEW OF U.S.-MEXICO BORDER ENVIRONMENTAL INFRASTRUCTURE NEEDS 5* (1993) (defining Colonias by using actual Spanish translation).

29. See TEXAS DEP'T OF HUMAN SERVS., *THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 1-3* (1988) (defining Colonias as poverty-stricken rural slums without adequate water or wastewater treatment); see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 1-3 (1990) (identifying Colonias as unincorporated subdivisions along United States-Mexico border with substandard water and sewage facilities); Angela C. Montez, Note, *The Run Past the Border: Consequences of Treating the Environment Under NAFTA As a Border Issue*, 5 *GEO. INT'L ENVTL. L. REV.* 417, 421 (1993) (commenting that Colonias are make-shift slums commonly located in border regions).

30. See James E. Garcia, *Local Barriers Dam Flow of Water to Colonias*, *AUSTIN-AMERICAN STATESMAN*, Oct. 23, 1993 (noting that nearly 500,000 people live in substandard conditions along United States-Mexico border), available in Westlaw,

live in Colonias along the 2000-mile boundary between Mexico and the United States in the states of Texas, New Mexico, Arizona, and California.³¹ Compared to the general United States border population, Colonians are younger and more rural than their counterparts.³² They are usually members of larger nuclear families and become homeowners at a younger age than non-Colonians.³³ Two-thirds are born in the United States and the other one-third are usually from Mexico, but over three-fourths are United States citizens.³⁴ On average, Colonians have lower education levels than other border residents, which often equates to lower income levels.³⁵

ALLNEWSPLUS Database; *60 Minutes: The Other America* (CBS television broadcast, Oct. 8, 1995) (noting that Colonias population is equal in size to city of New Orleans).

31. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 2 (1990) (providing population estimates for Colonias and explaining that Colonias exist in all four United States border states).

32. See OFFICE OF THE ATTY. GEN., SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS 4-5 (1993) (indicating that Hidalgo County Colonias are predominantly in rural areas and noting age difference between Colonias residents and non-residents); TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY 3 (1993) (noting remote locations of Colonias and youth of residents); TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 2-3 (1988) (indicating that most Colonians are young and poor).

33. OFFICE OF THE ATTY. GEN., SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS 5-6 (1993); see TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 6-3 (1988) (noting that over 85% of Colonias residents own their homes).

34. See OFFICE OF THE ATTY. GEN., SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS 7 (1993) (explaining that almost one-fourth of Colonians are not United States citizens and one-third are foreign-born); TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 2-4 (1988) (noting that two-thirds of Colonias residents were born in United States); see also *60 Minutes: The Other America* (CBS television broadcast, Oct. 8, 1995) (stating that most Colonians are United States citizens).

35. See TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 4-3 (1988) (noting that three of four Colonias residents who are heads of households did not finish high school); see also OFFICE OF THE ATTY. GEN., SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS 8-9 (1993) (intimating that lower education levels result in jobs that pay lower wages among Hidalgo County Colonias residents).

In fact, about one-half of all Colonians fall well below the poverty level.³⁶

While Colonias exist in all four United States-Mexico border states, the majority are located in twenty-four counties along the 1000-mile Texas-Mexico border.³⁷ Recent studies indicate that Texas is home to approximately 340,000 Colonians.³⁸ Texas Colonias originated in the 1950s in response to the dire need for housing by low-income families, usually migrant farmers and other laborers.³⁹ With the onset of the maquiladora

36. See, e.g., OFFICE OF THE ATTY. GEN., SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS 9 (1993) (noting that 49.2% of Hidalgo Colonias residents have incomes below poverty level); TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY, 3 (1993) (stating that most Colonias residents have incomes below federal poverty level); TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 2-3 (1988) (indicating average annual income for Colonians as \$9137).

37. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 2 (1990) (stating that majority of Colonias are located in Texas); OFFICE OF THE ATTY. GEN., SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS 1 (1993) (noting Texas Water Development Board (TWDB) statistics indicating number and locations of Colonias in Texas).

38. See Philip True, *Colonias: Places of Tar Paper and Dried-up Promises*, SAN ANTONIO EXPRESS-NEWS, July 2, 1995, at A1, A12 (noting that recent TWDB study estimates Texas Colonias population at near 340,000). Compare TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF COLONIAS IN TEXAS 1 (1992) (estimating Colonias population at nearly 280,000 people) with TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF TEXAS COLONIAS: UPDATE 1 (1995) (recognizing that increase in Colonias population since 1992 study is estimated at just over 66,000). One study has estimated the Texas Colonia population to be 500,000. TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY 3 (1993).

39. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 2 (1990) (indicating that Colonias originated in Texas about 1950 and noting that many Colonias residents are seasonal farm laborers); TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 5-4 (1988) (noting that in 1988 about 30% of Colonias residents performed field work and 15% were employed in factories). The Texas Department of Human Services study also showed that about 25% of Colonians were construction workers. TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES 5-4 (1988).

program in 1965,⁴⁰ the border population mushroomed, creating a severe housing shortage for low-income wage earners.⁴¹

Unscrupulous land developers, seeing the demand for housing, took advantage of poor workers looking for affordable housing.⁴² As the demand for low-income housing increased, more developers bought, subdivided, and sold cheap, virtually useless land.⁴³ To a landowner, it was a

40. See SOUTHWEST CTR. FOR ENVTL. RESEARCH AND POLICY, REVIEW OF U.S.-MEXICO BORDER ENVIRONMENTAL INFRASTRUCTURE NEEDS 5 (1993) (describing maquiladora program that Mexico initiated to encourage international development and investment in Mexico by allowing foreign companies to locate plants in Mexico for purpose of assembly and other unskilled labor tasks). The maquiladora program started gaining momentum in the 1980s and by 1990 there were over 2000 maquiladoras along the United States-Mexico Border. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-92-102, REPORT TO THE CHAIRMAN, ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, HAZARDOUS WASTE: MANAGEMENT OF MAQUILADORAS' WASTE HAMPERED BY LACK OF INFORMATION 2 (1992) (describing background of maquiladoras program).

41. See SOUTHWEST CTR. FOR ENVTL. RESEARCH AND POLICY, REVIEW OF U.S.-MEXICO BORDER ENVIRONMENTAL INFRASTRUCTURE NEEDS 5 (1993) (noting substantial increase in Colonias population between 1965 and 1993); Bruce Zagaris, *The Transformation of Environmental Enforcement Cooperation Between Mexico and the United States in the Wake of NAFTA*, 18 N.C. J. INT'L L. & COMP. REG. 59 (1992) (noting that maquiladoras were major contributing factor in causing population to increase faster than affordable housing, thus creating Colonias), available in Westlaw, TP-ALL Database; see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-92-102, REPORT TO THE CHAIRMAN, ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE, COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, HAZARDOUS WASTE: MANAGEMENT OF MAQUILADORAS' WASTE HAMPERED BY LACK OF INFORMATION 2 (1992) (commenting that 420,000 persons were employed in approximately 2000 maquiladoras along border as of 1990).

42. See, e.g., TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY 3 (1993) (emphasizing developer's responsibility for creation of Colonias); ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 13 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (noting that "[f]or the developer, there seems [to be] little risk and high profits from colonia development"); *COSSMHO: Congress Acknowledges Plight of Texas Colonias*, PR Newswire, July 14, 1995 (reporting that developers lured residents with promises of affordable housing with services to be available in future), available in Westlaw, ALLNEWSPLUS Database.

43. See SOUTHWEST CTR. FOR ENVTL. RESEARCH AND POLICY, REVIEW OF U.S.-MEXICO BORDER ENVIRONMENTAL INFRASTRUCTURE NEEDS 3 (1993) (discussing formation of Colonias); Allen R. Myerson, *Profits in Poverty Developers Rake in Thousands from Squalid Border Towns*, CHI. TRIBUNE, Apr. 8, 1995, at 25 (indicating that Colonias are usually located on barren, useless land). The land that was developed along the border was often located along flood plains and unfit for residential use. See ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 11-15 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (discussing logistics regarding creation of Colonias). Because many Colonias lots are located in flood plains and most Colonias do not have adequate sewage disposal, Colonias

matter of economics.⁴⁴ If a landowner used the land to farm, then he would have the risks of planting, harvesting, and marketing crops that are subject to floods, droughts, freezes, insect and disease infestations, and market fluctuations.⁴⁵ On the other hand, a landowner could simply subdivide the land, which only required that he survey and plat the land and provide drainage and unpaved roads.⁴⁶

The subdivision alternative maximized profits and minimized risk for border-region landowners, thus making it the more attractive option. Once a landowner subdivides his land, he can sell the lots for as little as ten percent down and eighty dollars per month.⁴⁷ Land developers usually sell their lots under contracts-for-deed, preventing the buyer from acquiring title until the note is paid in full.⁴⁸ The developers typically

residents' primitive sewage systems become flooded during rainy periods causing fecal matter to literally run through the streets. *See id.* at 7 (emphasizing problems associated with flooding in Colonias).

44. *See* ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS* 11-13 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (illustrating how land owners along border region can make more money by becoming land developers than by farming or otherwise using land); *cf.* TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, *TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY* 3 (1993) (discussing financial issues as they relate to purchase of Colonias land).

45. ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS* 11-13 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993).

46. *See id.* at 12 (noting lax requirements for land development in rural areas); *see also* David Maraniss, *El Paso's Perimeter of Poverty; Lack of Running Water Creates a 3rd World on the Border*, WASH. POST, Aug. 17, 1987, at A1 (asserting that Texas law has made it easy for unprincipled developers to develop and sell substandard land).

47. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, *RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER* 3 (1990) (describing financing schemes used by developers to encourage low-income buyers to purchase underdeveloped land); *cf.* ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS* 13 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (stating that Colonias lots may be purchased for as little as \$100 down and \$100 per month).

48. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, *RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER* 3 (1990) (stating that Colonias developers often do not convey deed to land buyers until note is paid in full); TEXAS DEP'T OF HOUSING AND COMMUNITY AFFAIRS, *TEXAS COLONIAS: CREATING REAL SOLUTIONS TO POVERTY* 3 (1993) (discussing contract-for-deed method of payment on Colonias property, which does not convey title until all payments have been made). A contract-for-deed allows the seller to retain title to the land until all payments are made by the buyer. *See* OLIN L. BOWDER, JR. ET AL., *BASIC PROPERTY LAW* 992 (4th ed. 1984) (stating that under contract-for-deed seller retains deed until purchase price is paid in full). Selling land under a contract-for-deed allows developers to

provide the minimum legal roads and drainage and often make "undocumented" promises of water, sewage, electricity, and other necessary services.⁴⁹

Unfortunately, the primitive conditions of Colonias, particularly the inadequate sewage disposal systems,⁵⁰ have led to and continue to foster the spread of contagious diseases in third world proportions.⁵¹ Diseases

foreclose on property if the buyer is merely late on one payment. See ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 13* (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (stating that developers may repossess land up to last payment under contract-for-deed if payment is late); see also OLIN L. BOWDER, JR. ET AL., *BASIC PROPERTY LAW* 992 (4th ed. 1984) (noting that some jurisdictions allow sellers under contract-for-deed to recover possession upon default and retain all payments made toward purchase). This allows the developer to resell the lot to another person or the same person, resulting in a financial windfall. ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 13* (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993).

49. See, e.g., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, *REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 3* (1990) (stressing that under Texas law, in early days of Colonias development, developers only had to provide roads and drainage, which often led to lack of water and wastewater disposal services in Colonias); ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, *THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 12* (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (describing common Colonias developer tactic of promising prospective lot buyers that services will soon be available to induce purchase); James E. Garcia, *Texas Colonia Developers on Trial in Travis: Health Officials Say the Lack of Water and Sewage Treatment and Disposal Creates Third World Living Conditions in These Colonias*, AUSTIN AMERICAN-STATESMAN, Jan. 23, 1995, at B1 (noting that Colonias developers habitually promise basic utility service but rarely deliver); David Maraniss, *El Paso's Perimeter of Poverty: Lack of Running Water Creates a 3rd World on the Border*, WASH. POST, Aug. 17, 1987, at A1 (asserting that Colonia developers promised buyers that utilities were "on the way").

50. See OFFICE OF THE GOVERNOR, *ENVIRONMENTAL INFRASTRUCTURE ALONG THE U.S.-MEXICO BORDER IN TEXAS AND MEXICO 2* (1993) (stating that largest component of Colonia infrastructure need is wastewater treatment); TEXAS WATER DEV. BD., *WATER AND WASTEWATER NEEDS OF COLONIAS IN TEXAS 4* (1992) (noting that its studies show virtually all Colonias are without adequate wastewater treatment); see also Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (indicating that 70% of Colonias use septic tank systems susceptible to leakage during flooding), in *TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER* (1993).

51. See, e.g., Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (stressing high concentration of tuberculosis, typhoid, hepatitis, dysentery, and other infectious third world diseases in Colonias), in *TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER* (1993); TEXAS DEP'T OF HUMAN SERVS., *THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS COUNTIES 3-3 to 3-5* (1988) (illustrating that Colonians suffer from third world diseases such as hepa-

that commonly inflict Colonias residents include hepatitis, cholera, dysentery, and even leprosy.⁵² Furthermore, Colonians exhibit abnormally high rates of anencephaly,⁵³ lupus, leukemia, and breast cancer.⁵⁴ These conditions not only threaten the health and welfare of Colonians, they threaten United States citizens nationwide.⁵⁵ With NAFTA promising to bring more economic activity and an increase in population to the United

titis); David McLemore, *EPA Chief Pledges Help for Poor Areas Along Mexico Border*, DALLAS MORNING NEWS, Mar. 17, 1993, at A15 (noting that state health officials claim that Colonias are breeding grounds for third world infectious diseases); Philip True, *No-where to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L1, L5 (asserting that frequency of third world diseases along Texas-Mexico border is attributable to conditions in Colonias).

52. See Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (describing high incidence of infectious diseases in Colonias), in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993); TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS COUNTIES 3-4 (1988) (presenting study results indicating high rate of hepatitis among Colonias residents); see also Bob Rowland, *Hunger, Disease Plague Tijuana, Even with Sun, Torrents of Relief*, SAN DIEGO UNION-TRIB., Jan. 25, 1993, at B3 (discussing health crisis caused by water contamination along border). In addition to hepatitis, cholera, dysentery, and leprosy, studies have also indicated high incidents of tuberculosis and typhoid in the Colonias. Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects*, in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993).

53. See Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (defining anencephaly as "a birth defect in which babies are born with either incomplete or missing brains and skulls"), in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993); see also Carol Byrne, *A Fatal Birth Defect Is Haunting the Rio Grande Valley of South Texas*, STAR TRIB. (Minneapolis-St. Paul), May 2, 1993, at A1 (describing ultrasound image of anencephalic fetus); Dan Fagin, *Texas Birth Defect Mystery*, NEWSDAY, July 3, 1992, at 4 (emphasizing that border area has highest known rate of anencephaly in United States).

54. See, e.g., Demetria Martinez, *To Explore NAFTA's Future, Visit Nogales: Pollution in Mexican Border Industries*, NAT'L CATHOLIC REP., Jan. 7, 1994, at 12 (noting that rate of cancer among Colonias residents is well above national average); Philip True, *No-where to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L1 (discussing high concentration of cancer along border); Chris Wood & Angela Dwyer, *Borderline: Mexico's Vast Industrial Corridor Takes Heavy Toll on Health and the Environment*, MACLEAN'S, July 19, 1993, at 24 (noting high occurrences of cancer in Colonias on both sides of United States-Mexico border).

55. See *Water Supply Needs of the Colonia in Texas: Hearings Before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources*, 103d Cong., 2d Sess. 6-7 (1994) (statement of Rep. Coleman) (arguing that probability of persons contracting diseases in border region and transporting them to other parts of the United States is higher because of trade and tourism); Dan Morales, *Molly Ivins Can Say That, but Is It Correct?*, FT. WORTH STAR-TELEGRAM, Oct. 16, 1995, at 15 (claiming that Colonias pose national public health threat); see also *60 Minutes: The Other America* (CBS television

States-Mexico border region,⁵⁶ the need to remedy the Colonians' plight and the related environmental problems is even more critical.⁵⁷

III. BACKGROUND: NAFTA AND THE ENVIRONMENT

A. *Comparison of United States and Mexican Environmental Law*

Nearly thirty years ago, the United States Congress enacted several environmental laws to counter rampant pollution caused by industry and the growth of large cities.⁵⁸ The United States Environmental Protection Agency (EPA), created in 1970, represented the first step toward environmental recovery.⁵⁹ Initially, the EPA had limited statutory authority and

broadcast, Oct. 8, 1995) (emphasizing Attorney General Dan Morales's assertion that Colonians' health problems are potentially international).

56. See, e.g., OFFICE OF THE PRESS SECRETARY, THE NORTH AMERICAN FREE TRADE AGREEMENT: FACT SHEET 5 (1992) (emphasizing increase in land transportation across border resulting from increased trade); U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 4 (1992) (illustrating economic and population growth scenarios along United States-Mexico border resulting from NAFTA and suggesting that increased trade has improved border region); Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 108 (1994) (referring to economic growth resulting from free trade under NAFTA); Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 594 (1993) (claiming that population in border region rose 15% annually before NAFTA and suggesting that population growth may increase further after NAFTA); Laura J. Van Pelt, Note, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 134 (1994) (noting that proponents of NAFTA claim international trade will bring new growth to region).

57. See Michelle Mittelstadt, *Lawmaker's Links to Colonia Developers Scrutinized; Congressman also in Feud with State Attorney General Over Alleged Political Threat Involving Colonias*, AUSTIN AMERICAN-STATESMAN, Oct. 15, 1995, at B3 (arguing that solving Texas Colonias problems is critical issue); see also TEXAS CTR. FOR POLICY STUDIES, A RESPONSE TO THE BUSH ADMINISTRATION'S ENVIRONMENTAL ACTION PLAN FOR FREE TRADE 16 (1991) (predicting that NAFTA will cause increased environmental degradation); Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 619 (1993) (noting that overburdened border will likely experience increased growth because of NAFTA).

58. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1994) (establishing policy of restoring and maintaining quality of United States waters); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1994) (establishing first national policy on environmental protection); Clean Air Act, 42 U.S.C. § 7401 (1994) (establishing policy for protection of air quality). See generally Phillip D. Hardberger, *Industrialization in the Borderlands and the NAFTA Treaty*, 24 ST. MARY'S L.J. 699, 702-05 (1993) (discussing environmental law in United States).

59. See Reorganization Plan No. 3 of 1970, 40 C.F.R. § 1.1 (1994), reprinted in 42 U.S.C. § 4321 (1994) (establishing EPA by reorganization order); Roger D. Staton, *EPA's Final Rule on Lender Liability: Lenders Beware*, 49 BUS. L. 163, 164 (1993) (noting that

meager funds by which to effectively improve existing conditions.⁶⁰ Today, however, a multitude of statutes authorize enforcement of environmental protection laws and provide additional funds to effectuate change in environmental policy.⁶¹

Unlike the United States, Mexico is relatively new at environmental protection.⁶² Nevertheless, Mexico's environmental laws are just as strict as the environmental laws of the United States.⁶³ In fact, Mexico based its environmental laws on United States laws and has learned from the

federal environmental policy did not exist before 1970); David M. Levy, Comment, *Federalism and the Environment: National Solid Waste Management v. Alabama Department of Environmental Management*, 12 WHITTIER L. REV. 635, 642 (1991) (asserting that pollution problem was getting worse in 1970 when United States passed first environmental legislation).

60. See Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 608 (1993) (emphasizing that EPA achieved little success in its early years due to lax enforcement and underfunding).

61. See, e.g., 42 U.S.C. § 4321 (establishing general policy for protection of environment and review of environmental policies); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1994) (setting forth policy for disposal of hazardous wastes); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994) (providing inventory of inactive hazardous waste sites and establishing response system for protection of public health); TEXAS WATER CODE ANN. § 15.102 (Vernon Supp. 1996) (providing financial assistance for counties or government agencies to implement water projects that protect environment).

62. See Michael E. Arruda, *Effect of the North American Free Trade Agreement on Trade Between the United States and Mexico in the Energy and Petrochemical Industries*, 1 TULSA J. COMP. & INT'L L. 191, 224-25 (1994) (referring to Mexico's first general ecology law enacted in 1988); Terzah N. Lewis, Comment, *Environmental Law in Mexico*, 21 DENV. J. INT'L L. & POL'Y 159, 163-64 (1992) (noting late establishment of general ecology law in Mexico). In some respects, the environmental laws of Mexico are more stringent than those of the United States. Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 606 (1993). For example, Mexico requires environmental impact assessments by both public and private companies that are planning a potential pollutant-emitting activity. *Id.* However, Mexican law does not require cleanup of hazardous waste sites, restrict land that can be used for hazardous waste disposal, or regulate leaking underground storage tanks, as does the United States. *Id.*; see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 5 (1991) (comparing United States and Mexican environmental laws and concluding that Mexico's laws are deficient in hazardous waste disposal, storage, and cleanup).

63. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 2 (1991) (stressing similarities between environmental laws of United States and Mexico); see also U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 24-25 (1992) (providing comparison of United States and Mexico environmental regulations and asserting that Mexico's laws resemble those of United States).

efforts of the EPA and the United States Congress.⁶⁴ Additionally, Mexico created the Secretariat of Urban Development and Ecology (SEDUE),⁶⁵ which is similar to the EPA in the United States.⁶⁶ The Secretariat of Social Development (SEDESOL)⁶⁷ replaced SEDUE in 1992.⁶⁸ In December 1994, President Zedillo combined the National Ecology Institute (INE), responsible for environmental studies, with the office of the Attorney General for Environmental Protection (PROFEPA), responsible for enforcement, to form a new cabinet-level Secretariat for the Environment, Natural Resources, and Fisheries (SMARNAP).⁶⁹ While it is evident that Mexico has come a long way in a

64. See, e.g., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 2 (1991) (noting that Mexico modeled its environmental laws after United States and international standards); Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 605, 608 (1993) (explaining that Mexico based its environmental laws upon United States laws in recognition of United States' 30 years of experience in formulating environmental policies); Jay L. Camillo, *North American Free Trade and the Environment*, BUS. AM., Oct. 18, 1993, at 38 (stating that Mexico's 1988 General Ecology Law is based largely on United States law).

65. See Ley General del Equilibrio Ecológico y la Protección del Ambiente, D.O., Jan. 28, 1988 [hereinafter General Law] (noting that SEDUE was created to apply Mexico's environmental legislation).

66. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 1 (1991) (recognizing SEDUE as Mexico's environmental protection agency); Craig Kovarik, *NAFTA and Environmental Conditions on the United States-Mexico Border*, 2 KAN. J. L. PUB. POL'Y 61, 66 (1994) (stating that SEDUE serves same function as EPA); Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 605 (1993) (stating that SEDUE is Mexican equivalent of EPA); see also OFFICE FOR PRESS AND PUB. AFFAIRS, EMBASSY OF MEXICO, MEXICO ENVIRONMENTAL ISSUES: FACT SHEET 2 (1992) (explaining functions of SEDUE and SEDESOL).

67. Poder Ejecutivo, Secretaría de Desarrollo Social, D.O., May 26, 1992.

68. See *id.* (replacing SEDUE with SEDESOL); see also OFFICE FOR PRESS AND PUB. AFFAIRS, EMBASSY OF MEXICO, MEXICO ENVIRONMENTAL ISSUES: FACT SHEET 2 (1992) (stating that SEDESOL "fulfills and enhances" SEDUE's environmental functions); TEXAS CTR. FOR POLICY STUDIES, NAFTA AND THE U.S.-MEXICO BORDER ENVIRONMENT: OPTIONS FOR CONGRESSIONAL ACTION 1-2 n.3 (1992) (commenting that SEDESOL replaced SEDUE as Mexico's environmental protection agency); Bartlett P. Miller, Comment, *The Effect of the GATT and the NAFTA on Pesticide Regulation: A Hard Look at Harmonization*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 201, 224 n.62 (1995) (noting that SEDUE was abolished by creation of SEDESOL).

69. Decreto que Reforma Disposiciones de la Ley Organica de la Administracion Publica Federal, D.O., Dec. 28, 1994.

short time compared to the United States,⁷⁰ there are two distinct differences between the two legal systems that warrant discussion before considering the history of bilateral agreements affecting the Colonias region.

First, there are fundamental differences between the United States common-law system and the Mexican civil-law system.⁷¹ The most relevant difference for environmental protection purposes is the civil-law system's traditional reliance on administrative proceedings to interpret and enforce the law, in contrast to the common-law system's reliance on judicial precedent in administering its laws.⁷² In the United States, if a court renders judgment in an environmental case, that precedent will play a vital role in determining how future courts and administrative agencies will resolve similar environmental issues.⁷³ In Mexico, however, prior similar action by an administrative body or court does not affect subsequent administrative actions.⁷⁴

70. See Philip D. Hardberger, *Industrialization in the Borderlands and the NAFTA Treaty*, 24 ST. MARY'S L.J. 699, 705-06 (1993) (touting Mexico's efficiency in enacting environmental regulations); Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 488-89 n.26 (1994) (asserting that SEDESOL has accomplished impressive results during its short existence).

71. See U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 24-25 (1992) (comparing United States' common-law system to Mexico's civil-law system as applied to environmental regulations); AMERICAN BAR ASS'N, NAFTA AND THE ENVIRONMENT: SUBSTANCE AND PROCESS 185 (Daniel McGraw ed., 1995) (concluding that differences between civil-law and common-law legal systems limit extent to which environmental regimes can be compared); see also Philip D. Hardberger, *Industrialization in the Borderlands and the NAFTA Treaty*, 24 ST. MARY'S L.J. 699, 706-07 (1993) (comparing civil-law and common-law systems used by Mexico and United States, respectively).

72. U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 24-25 (1992); see Philip D. Hardberger, *Industrialization in the Borderlands and the NAFTA Treaty*, 24 ST. MARY'S L.J. 699, 706 (1993) (emphasizing Mexico's use of administrative bodies, rather than judiciary, as enforcement mechanism); James F. Smith, *The Problems and Prospects of a North American Free Trade Agreement: Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 85, 89-90 (1993) (contrasting Mexico's civil-law system that views its code of general legal principles as superior source of law with United States' common-law tradition that views judiciary as ultimate authority). See generally Boris Kozolxhyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT'L & COMP. L. 1, 8-9 (1989) (discussing Mexico's civil-law traditions as compared to common-law system of United States).

73. See Boris Kozolxhyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT'L & COMP. L. 1, 8-9 (1989) (noting that "to an American lawyer, constitutional and statutory language [is] . . . analyzed through the lens of judicial decisions that have interpreted the provisions").

74. See *id.* (explaining that judicial review and precedent exist in Mexico, in limited form, when issue of law has been decided same way by unanimous vote in five consecutive

Another key difference between the United States and Mexican legal systems is the traditional lack of environmental law enforcement by the Mexican government.⁷⁵ While Mexico's environmental laws closely parallel those of the United States, the laws have little effect because of virtually nonexistent enforcement mechanisms.⁷⁶ Weak enforcement is due primarily to the inadequate funding of environmental programs in Mexico.⁷⁷ Compared to the United States, Mexico is a developing country

cases, but noting that neither administrative agencies nor legislative bodies are bound by such precedents).

75. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 7 (1991) (addressing problem of insufficient resources as source of poor enforcement of Mexico's environmental laws); U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 41 (1992) (discussing SEDUE's lack of resources as reason for lax enforcement); see also Jack I. Garvey, *Trade Law, and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 80 AM. J. INT'L L. 439, 442 (1995) (pointing to Mexico's lack of enforcement of its environmental laws as problem with NAFTA side agreements). Notably, the United States allows more public participation in enforcement procedures than does Mexico. U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 25 (1992).

76. See, e.g., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 8 (1991) (suggesting that SEDUE needs additional financial resources to effectively implement Mexico's environmental laws); Santos Gomez, Comment, *Environmental Risks Related to the Maquiladora Industry and the Likely Environmental Impact of NAFTA*, 6 LA RAZA L.J. 174, 197 (1993) (noting that Mexico's environmental policies and enforcement capabilities are weak or nonexistent); Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 607 (1993) (noting that without appropriate resources, SEDUE cannot enforce its regulations); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 127 (1994) (illustrating that Mexico tries to negotiate voluntary compliance because it lacks enforcement mechanisms to compel compliance). But see U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 25 (1992) (stressing Mexico's proactive approach of requiring "environmental impact reviews" for public and private projects and noting lack of such programs in United States).

77. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 8 (1991) (asserting that Mexico needs additional financial resources to enforce its environmental laws); C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 103-04 (1994) (claiming that Mexico's poor environmental enforcement is due to lack of personnel and funding). But cf. Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 115-16 (1994) (opining that NAFTA may provide Mexico with necessary resources to provide environmental protection).

with a limited environmental enforcement budget.⁷⁸ Even if Mexico were willing to enforce its laws consistent with those of the United States, it would not be able to do so without reducing expenditures from other priority areas of its budget.⁷⁹ This is not likely to happen because Mexico's economic and industrial priorities are inconsistent with its promises to protect the border environment.⁸⁰ Consequently, authority to establish environmental policy, unaccompanied by sufficient resources and support, suggests that the Mexican government is simply engaging in political rhetoric with no real intention of improving its environment.⁸¹

78. Compare Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 608 tbl. 1 (1993) (indicating that Mexico's per capita spending on environmental protection was 8¢ in 1989, 20¢ in 1990, and 48¢ in 1991) with Michael J. Kelly, Comment, *Environmental Implications of the North American Free Trade Agreement*, 3 IND. INT'L & COMP. L. REV. 361, 377 (1993) (noting that EPA's 1991 per capita spending was \$24.40).

79. See Luis R. Vera-Morales, *Dumping in the International Backyard: Exportation of Hazardous Wastes to Mexico*, 7 TUL. ENVTL. L.J. 353, 382 (1994) (noting Mexico's fears that strict environmental enforcement will deter foreign investment and industrial expansion); Michael J. Kelly, Comment, *Environmental Implications of the North American Free Trade Agreement*, 3 IND. INT'L & COMP. L. REV. 361, 377 (1993) (claiming that environmental enforcement by Mexico would hamper economic growth efforts); see also Kathryn C. Wilson, Comment, *The International Air Quality Management District: Is Emissions Trading the Innovative Solution to the Transboundary Pollution Problem?*, 30 TEX. INT'L L.J. 369, 373 (1995) (emphasizing that Mexico's status as unindustrialized nation forces it to choose industrial growth over environmental protection).

80. See Luis R. Vera-Morales, *Dumping in the International Backyard: Exportation of Hazardous Wastes to Mexico*, 7 TUL. ENVTL. L.J. 353, 382 (1994) (discussing Mexico's desire to increase economic growth and its fears that environmental enforcement may thwart that objective); Michael J. Kelly, Comment, *Environmental Implications of the North American Free Trade Agreement*, 3 IND. INT'L & COMP. L. REV. 361, 377 (1993) (asserting that Mexico is economically ill-prepared to deal with environmental enforcement issues posed by NAFTA); see also Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 132 (1994) (suggesting that Mexico's inadequate environmental enforcement is due to its commitment to economic growth).

81. See Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 608 (1993) (contending that by granting SEDUE decision-making authority, but depriving it of sufficient resources, result is "useless regulatory agency ridden with scandal"); Joel L. Silverman, Note, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Havens by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, 24 GA. J. INT'L & COMP. L. 347, 356-57 (1994) (positing that Mexico's efforts to improve its environmental protection have been merely cosmetic); cf. Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 292-93 (1992) (contending that Mexico lacks appropriate funding for environmental protection necessary to effectively implement NAFTA environmental plan). In 1992, a government study of maquiladoras indicated that none were adhering to Mexico's environmental laws. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/

B. *Promises for United States-Mexico Border Environmental Protection*

In addition to their individual environmental protection infrastructures, the United States and Mexico have engaged in numerous cooperative efforts to regulate environmental conditions on the border. The United States and Mexico have cooperated on environmental issues since the Convention of 1889 created the International Boundary Commission to regulate Rio Grande River water use.⁸² Over the years, expanded industrial activity, the population explosion, air and water pollution, and the growing potential for environmental accidents increased the need for more stringent environmental regulations on the border.⁸³ In 1944, the United States and Mexico joined in an agreement replacing the 1889 International Boundary Commission with the International Boundary and Water Commission (IBWC).⁸⁴ The IBWC oversees conservation, quality, and utilization of all border waterways, including the Rio Grande, and,

GGD-92-113, U.S.-MEXICO TRADE: ASSESSMENT OF MEXICO'S ENVIRONMENTAL CONTROLS FOR NEW COMPANIES 3 (1992). Only 5% of the maquiladoras met minimum waste removal requirements. *Id.* Additionally, the study concluded that SEDESOL's \$263 million budget for urban renewal was inadequate when compared to the immense \$6.5 billion needed to reach minimum standards. *Id.*

82. Convention Between the United State of America and the United States of Mexico to Facilitate the Carrying out of the Principles Contained in the Treaty of Nov. 12, 1884, and to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Bed of the Rio Grande and That of the Colorado River, Mar. 1, 1889, U.S.-Mex., 26 Stat. 1512; see U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 9 (1992) (commenting on history of United States-Mexico environmental agreements dating back to 1889 International Boundary Commission); Darcy A. Frownfelter, *The International Component of Texas Water Law*, 18 ST. MARY'S L.J. 481, 525 (1986) (stating that Texas and Mexico have had long-standing relationship with respect to international agreements on common water resources); Farah Khakee, Comment, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 FORDHAM INT'L L.J. 848, 855 (1992-1993) (noting that 1889 convention creating International Boundary Commission was first United States-Mexico agreement to address border environmental issues).

83. See U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 8 (1992) (recognizing increasing challenges to environmental protection faced by United States and Mexico along border).

84. Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219, 1220; see M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 ST. MARY'S L.J. 639, 642-43 (1993) (referring to creation of IBWC in 1944 as vehicle for consultation and information exchange between United States and Mexico); Melissa Crane, Note, *Diminishing Water Resources and International Law: U.S.-Mexico, A Case Study*, 24 CORNELL INT'L L.J. 299, 302 (1991) (commenting that 1944 United States-Mexico water treaty was attempt to resolve border water and sanitation problems). See generally Farah Khakee, Comment, *The North American Free Trade Agreement: The Need to Protect*

more importantly, it regulates border sanitation.⁸⁵ Since the signing of the 1944 agreement, the IBWC has been instrumental in overseeing infrastructural and environmental projects that benefit both the United States and Mexico economically and socially.⁸⁶

In 1983, as a result of increased environmental degradation along the United States-Mexico border, leaders from the two countries met to negotiate a new environmental agreement.⁸⁷ This landmark meeting resulted in the 1983 United States-Mexico Border Agreement (La Paz Agreement)⁸⁸ and represents the first real cooperative commitment to address environmental problems along the border.⁸⁹ The La Paz Agreement has achieved at least modest environmental protection; however, it

Transboundary Water Resources, 16 FORDHAM INT'L L.J. 848, 855 (1992-93) (reviewing background of IBWC and 1944 Water Treaty).

85. See U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 8 (1992) (identifying responsibilities of IBWC after 1944 treaty); see also Mark A. Sinclair, Note, *The Environmental Cooperation Agreement Between Mexico and the United States: A Response to the Pollution Problems of the Borderlands*, 19 CORNELL INT'L L.J. 87, 111-12 (1986) (noting that IBWC is responsible for planning, building, and managing water works along United States-Mexico border).

86. See U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 9-11 (1992) (referring to numerous projects in which IBWC has been involved, including joint wastewater treatment plants in Tijuana/San Diego, Mexicalia/Calexico, and Nuevo Laredo/Laredo); see also U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 10 (1991) (commenting on IBWC's construction and expansion of wastewater treatment facilities in border region); M. Diane Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 ST. MARY'S L.J. 639, 645 (1993) (asserting that IBWC has been highly successful in border infrastructure development).

87. See U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 11 (1992) (commenting that purpose of 1983 negotiations was to help solve border pollution problems); U. S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 10 (1991) (noting that 1983 talks between United States and Mexico were intended to serve as basis for cooperative efforts to curb deterioration of border environment).

88. Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827, 22 I.L.M. 1025 & 26 I.L.M. 16 (annexes) [hereinafter La Paz Agreement]; see U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 11 (1992) (noting that La Paz Agreement enhanced environmental cooperation between United States and Mexico).

89. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S.-MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 10 (1991) (reiterating La Paz Agreement's objectives of cooperation for "protection, improvement, and conservation of the environment").

has been criticized as largely ineffective.⁹⁰ Criticism of the La Paz Agreement stems primarily from its lack of enforcement, funding, and specific obligations regarding prevention of border pollution.⁹¹ Lacking these resources, the La Paz Agreement has been unable to remedy the environmental degradation of the border region.⁹²

90. See Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 628-29 (1993) (emphasizing that although La Paz Agreement led to some improvements, lack of resources, personnel, and political commitment have made it ineffective); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 126 (1994) (noting that border environment and human health have deteriorated in spite of La Paz Agreement). But see James P. Duffy III, *The Environmental Implications of a North American Free Trade Agreement*, 10 HOFSTRA LAB. L.J. 561, 573 (1993) (stating that although critics have argued that La Paz Agreement is ineffective because of weak enforcement, it at least created binational effort to confront environmental issues and represents stepping stone for increased environmental protection).

91. See, e.g., TEXAS CTR. FOR POLICY STUDIES, *NAFTA AND THE U.S./MEXICO BORDER ENVIRONMENT: OPTIONS FOR CONGRESSIONAL ACTION 1-2* (1992) (noting La Paz Agreement was ineffective because it lacked financial resources, adequate enforcement, and specific obligations); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 127 (1994) (asserting that deficiencies in commitments and enforcement contributed to failure of La Paz Agreement); David Voigt, Note, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323, 337 (1993) (contending that La Paz Agreement is ineffective because it lacks sufficient enforcement, funding, and binding force). The La Paz Agreement, while containing five annexes regarding transborder environmental issues, does not expressly address border pollution prevention. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S. MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 10 (1991) (noting that La Paz Agreement addresses existing border problems for air pollution studies); TEXAS CTR. FOR POLICY STUDIES, *NAFTA AND THE U.S.-MEXICO BORDER ENVIRONMENT: OPTIONS FOR CONGRESSIONAL ACTION 2-1* (1992) (stating that La Paz Agreement is vague and fails to address prevention of future border pollution).

92. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/NSIAD-91-227, REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, SENATE, U.S. MEXICO TRADE: INFORMATION ON ENVIRONMENTAL REGULATIONS AND ENFORCEMENT 11 (1991) (commenting on EPA/SEDUE's efforts to develop master environmental plan based on problems not yet remedied by La Paz); Stanley M. Spracker et al., *Environmental Protection and International Trade: NAFTA As a Means of Eliminating Environmental Contamination As a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 674 (1993) (asserting that La Paz Agreement has failed to remedy border contamination problems); see also Sharrell Ables, Note, *The Integrated Environmental Plan for the Mexican-U.S. Border: A Plan to Clean up the Border or a Public Relations Ploy to Promote a Free Trade Agreement?*, 9 ARIZ. J. INT'L & COMP. L. 487, 496 (1992) (criticizing La Paz Agreement as not conferring authority to improve border environmental problems).

In December 1992, the United States, Mexico, and Canada signed the North American Free Trade Agreement (NAFTA), creating the world's largest free-trade zone encompassing over 6 trillion dollars annually and 360 million consumers, workers, and producers.⁹³ NAFTA's primary objective, like the international agreements that preceded it, is to promote economic growth by reducing barriers to trade.⁹⁴ This economic growth is to be achieved, however, in an environmentally conscious way.⁹⁵ Critics have argued that NAFTA, without more, would continue the environmental cooperation as it stood prior to adopting the trade agreement⁹⁶

93. *E.g.*, Alejandro Lopez-Velarde, *Trademarks in Mexico: The Effects of the North American Free Trade Agreement*, 17 HOUS. J. INT'L L. 49, 93 (1994); Frona M. Powell, *Environmental Protection in International Trade Agreements: The Role of Public Participation in the Aftermath of the NAFTA*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 109, 109 (1995); Jim D. Skippen, *The NAFTA Implications for Research and Development*, 7 INT'L L. PRACTICUM 99, 100 (1994); Kathryn L. McCall, Comment, *What Is Asia Afraid of?: The Diversionary Effect of NAFTA's Rules of Origin on Trade Between the United States and Asia*, 25 CAL. W. INT'L L.J. 389, 389 (1995).

94. *See* NAFTA, *supra* note 14, pmb., 32 I.L.M. at 297 (asserting that NAFTA's objective is to expand world trade and enhance competitiveness of firms in global markets); James P. Duffy III, *The Environmental Implications of a North American Free Trade Agreement*, 10 HOFSTRA LAB. L.J. 561, 561 (1993) (stating that NAFTA promotes economic growth through increased international trade); *see also* Kathleen Rogers & James A. Moore, *Revitalizing the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere: Might Awakening a Visionary but "Sleeping" Treaty Be the Key to Preserving Biodiversity and Threatened Natural Areas in the Americas*, 36 HARV. INT'L L.J. 465, 488 (1995) (indicating that NAFTA promotes economic growth through free trade zone).

95. *See* NAFTA, *supra* note 14, pmb., 32 I.L.M. at 297 (noting that parties to NAFTA should undertake trade in "a manner consistent with environmental protection and conservation"); James P. Duffy III, *The Environmental Implications of a North American Free Trade Agreement*, 10 HOFSTRA LAB. L.J. 561, 588 (1993) (arguing that NAFTA will become model for future environmental trade policies); Stefan R. Miller, Comment, *NAFTA: A Model for Reconciling the Conflict Between Free Trade and International Environmental Protection*, 56 U. PITT. L. REV. 483, 511 (1994) (claiming that NAFTA is revolutionary in its environmental consciousness).

96. *See* NAFTA, *supra* note 14, ch. 1, art. 103, 32 I.L.M. at 297 (indicating that existing international agreements will not be affected by NAFTA); Joel L. Silverman, Note, *The "Giant Sucking Sound" Revisited: A Blueprint to Prevent Pollution Havens by Extending NAFTA's Unheralded "Eco-Dumping" Provisions to the New World Trade Organization*, 25 GA. J. INT'L & COMP. L. 347, 359 (1994) (stressing that NAFTA does not change existing international environmental agreements); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 134 (1994) (stressing that, unless NAFTA does more to encourage environmental protection, economic growth is unlikely to lead to improvements in environmental protection). *But see* Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 69-70 (1994) (asserting that "NAFTA is the most 'environmentally conscious' trade agreement in history").

and that continued maintenance of the status quo, coupled with the increased trade along and across the border, could have devastating environmental consequences.⁹⁷ Proponents of NAFTA countered that increased economic growth in Mexico would raise the standard of living and, consequently, increase environmental standards and spending.⁹⁸ Realizing that these deficiencies could scuttle the chances of successfully passing NAFTA, President George Bush assured Congress that NAFTA would include environmental protection provisions.⁹⁹ Moreover, President Bill Clinton, during his presidential campaign, promised to deliver a side agreement to provide environmental protection and enforcement.¹⁰⁰

97. See Michael S. Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259, 269 (1992) (noting that critics fear NAFTA will increase physical degradation of border region as trade increases); Xavier C. Vasquez, *Symposium on the North American Free Trade Agreement: The North American Free Trade Agreement and Environmental Racism*, 34 HARV. INT'L L.J. 357, 358 (1993) (claiming that environmental problems are expected to increase along United States-Mexico border with expanded trade encouraged by NAFTA); Bartlett P. Miller, Comment, *The Effects of the GATT and the NAFTA on Pesticide Regulation: A Hard Look at Harmonization*, 6 COLO. INT'L ENVTL. L. & POL'Y 201, 201 (1995) (asserting that international trade traditionally leads to increased environmental degradation).

98. See Lawrence J. Rowe, Note, *NAFTA, the Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development*, 28 SUFFOLK TRANS-NAT'L L. REV. 197, 215 (1994) (claiming that NAFTA supporters think increased trade will lead to increased revenue, which will ultimately result in cleaner environment); see also U.S. TRADE REPRESENTATIVE, REVIEW OF U.S.-MEXICO ENVIRONMENTAL ISSUES 3 (1992) (asserting that border environment should improve under NAFTA and that, without NAFTA, environmental problems would have worsened); WHITE HOUSE FACT SHEET: THE NORTH AMERICAN FREE TRADE AGREEMENT, 28 WEEKLY COMP. PRESS DOC. 1424, 1426-27 (Aug. 1992) (asserting that NAFTA will enhance environmental protection).

99. See U.S. DEP'T OF COMMERCE: NAFTA ENVTL. INFO. PACKAGE 50 (1992) (re-stating President Bush's guarantee of environmental protection in NAFTA in his letter to Congress dated May 1, 1991); White House Fact Sheet: The North American Free Trade Agreement, 28 WEEKLY COMP. PRES. DOC. 1424, 1426-27 (Aug. 12, 1992) (commenting on President Bush's promise to provide environmental protection provisions in NAFTA); see also C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 100-01 (1994) (discussing how President Bush implemented Border Plan to abate fears of environmentalists and gain acceptance of NAFTA); Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 221 (1993) (claiming that Bush administration planned to secure NAFTA support with 1992 Border Plan).

100. See Governor Bill Clinton, Remarks at the Student Center at North Carolina State University, Raleigh, North Carolina (Oct. 4, 1992) (indicating that Clinton would not support NAFTA without environmental side agreement), available in LEXIS, News Library, SCRIPT File; Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 92 (1994) (indicating that then Governor Clinton, responding to unease of critics to NAFTA, prom-

IV. EMPTY PROMISES TO REMEDY BORDER ENVIRONMENTAL PROBLEMS

A. *The 1992 Border Plan, the BECC/NADBank Agreement, and the Environmental Side Agreement*

To ensure passage of NAFTA, the United States and Mexico adopted the 1992 Border Plan¹⁰¹ and signed the North American Agreement on Environmental Cooperation (Environmental Side Agreement)¹⁰² and the BECC/NADBank Agreement.¹⁰³ The Border Plan was intended to allay the fears of environmentalists that free trade with Mexico would cause catastrophic harm to the border area. Realizing that anxiety continued to exist even after the Border Plan was implemented, the United States and Mexico promised further environmental protection by instituting the Environmental Side Agreement and the BECC/NADBank Agreement.

The 1992 Border Plan was expected to address border environmental issues ignored by its predecessor, the La Paz Agreement.¹⁰⁴ Unfortu-

ised to pursue supplemental agreement on environment); *see also* Carrie Dolmat-Connell, *After NAFTA: Can a New International Conversation on Toxic Trade Be Far Behind*, 12 B.U. INT'L L.J. 443, 468 (1994) (stating that one of President Clinton's campaign promises was to deliver environmental side agreement to supplement NAFTA).

101. U.S. ENVTL. PROTECTION AGENCY (EPA) & SECRETARIA DE DESARROLLO URBANO Y ECOLOGICA (SEDUE), INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICAN-U.S. BORDER AREA (FIRST STAGE, 1992-1994) I-1 (U.S. Gov't Printing Office 312-014/40061, 1992) [hereinafter Border Plan]. The Bush Administration promoted the 1992 Border Plan as an answer to environmentalists' criticisms of NAFTA. *See Flaws in Free Trade, Border Plans Seen Drawing Environmentalists' Opposition*, Int'l Trade Rep. (BNA) No. 11, at 452 (Mar. 11, 1992) (asserting that Bush Administration was "shooting from the hip" attempting to encourage environmentalist's support of NAFTA); *From Fast Track to Back Burner*, THE ECONOMIST, Feb. 29, 1992, at 25 (commenting that President Bush promoted Border Plan to diffuse opposition to NAFTA).

102. Environmental Side Agreement, *supra* note 18; *see* Kal Raustiala, *The Political Implications of the Enforcement of Provisions of the NAFTA Environmental Side Agreement: The CEC As a Model for Future Accords*, 25 ENVTL. L. 31, 33 (1995) (identifying pressure from interest groups as reason for Environmental Side Agreement).

103. BECC/NADBank Agreement, *supra* note 19.

104. *See, e.g.*, Border Plan, *supra* note 101, at I-3 (noting that Border Plan was intended to strengthen environmental cooperation between United States and Mexico and improve border region); JAN GILBREATH RICH, PLANNING THE BORDER'S FUTURE: THE MEXICAN-U.S. INTEGRATED BORDER ENVIRONMENTAL PLAN 27 (Lyndon B. Johnson School of Public Affairs U.S.-Mexican Occasional Paper No. 1, 1992) (outlining promises between United States and Mexican governments under Border Plan, including increased enforcement of laws on both sides of border, greater sharing of information, and publication of companies' names having poor compliance records); Scott D. Cahalan, *Recent Development, NIMBY: Not in Mexico's Back Yard? A Case for Recognition of a Human Right to Healthy Environment in the American States*, 23 GA. J. INT'L & COMP. L. 409, 414 (1993) (suggesting that Border Plan was intended to control border pollution better than did La Paz Agreement); Laura J. Van Pelt, Note, *Countervailing Environmental Subsidies:*

nately, the Border Plan, which allocated hundreds of millions of dollars from both the United States and Mexico to enforce environmental laws, has been criticized as being politically motivated.¹⁰⁵ A recent study shows that the critics were correct in their assessment of the Border Plan's ineffectiveness based on its lack of "identifiable commitments."¹⁰⁶ Without identifiable commitments, the Border Plan has little power to improve the border environment, is virtually unenforceable, and is merely a political tool to promote free trade.¹⁰⁷

A Solution to the Environmental Inequities of the North American Free Trade Agreement, 29 TEX. INT'L L.J. 123, 127 (1994) (stating that intention of Border Plan was to address environmental issues not addressed by 1983 La Paz Agreement).

105. See TEXAS CTR. FOR POLICY STUDIES, NAFTA AND THE U.S./MEXICO BORDER ENVIRONMENT: OPTIONS FOR CONGRESSIONAL ACTION 1-2 (1992) (expressing doubt as to legitimacy of Mexico's financial commitment to border environmental concerns and intimating that 1992 Border Plan was public relations effort); Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 222 (1993) (asserting that some Border Plan critics refer to Border Plan as "a plan to plan" because it lacks power to stop pollution). The fact that the funding may only last a few years seems to indicate that the purpose of the Border Plan was to act as a public relations mechanism for NAFTA. Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 127-28 (1994) (noting that funding for Border Plan projects is only enough to last for couple of years).

106. See TEXAS CTR. FOR POLICY STUDIES, A RESPONSE TO THE EPA/SEDUE INTEGRATED BORDER ENVIRONMENT PLAN 1 (1992) (referring to lack of "identifiable commitments" as indicator of Border Plan's ineffectiveness); Laura J. Van Pelt, Comment, *Countervailing Environmental Subsidies: A Solution to the Environmental Inequities of the North American Free Trade Agreement*, 29 TEX. INT'L L.J. 123, 127-28 (1994) (asserting that Border Plan's lack of "identifiable commitments" indicates lack of commitment to Border Plan by EPA and SEDUE). *But see* Angela C. Montez, Note, *The Run Past the Border: Consequences of Treating the Environment Under NAFTA As a Border Issue*, 5 GEO. INT'L ENVTL. L. REV. 417, 426 (1993) (suggesting that Border Plan is comprehensive in scope and identifies specific cooperative measures); *but cf.* Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 519, 549 (1993) (asserting that Border Plan contains specific funding commitments for first stage of program).

107. See, e.g., TEXAS CTR. FOR POLICY STUDIES, A RESPONSE TO THE EPA/SEDUE INTEGRATED BORDER ENVIRONMENT PLAN 1-2 (1992) (claiming that Border Plan is inadequate to address environmental issues currently facing border region); Sharrell Ables, *The Integrated Environmental Plan for the Mexican-U.S. Border: A Plan to Clean up the Border or a Public Relations Ploy to Promote a Free Trade Agreement?*, 9 ARIZ. J. INT'L & COMP. L. 487, 502 (1992) (claiming that Border Plan is informal cooperative agreement that will not solve existing border pollution problems); Richard Vaznaugh, *Extraterritorial Jurisdiction—Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 222 (1993) (commenting that Border Plan lacks power to stop pollution); Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 629-30 (1993) (criticizing Border Plan be-

In contrast, the Environmental Side Agreement represents an unprecedented achievement in using trade agreements to approach international environmental problems¹⁰⁸ and recognizes each nation's right to establish its own laws for environmental protection.¹⁰⁹ The Environmental Side Agreement maintains that presently established international environmental agreements, such as the Border Plan and the La Paz Agreement, will remain in effect.¹¹⁰ Additionally, the Environmental Side Agreement improves upon the NAFTA scheme in two important ways. First, the Environmental Side Agreement creates "monetary enforcement assessments"¹¹¹ and suspends trade benefits for parties who refuse to en-

cause it does not include substantive enforceable agreements that would allow it to effectively implement environmental and human health protection measures).

108. See Environmental Side Agreement, *supra* note 18, pt. 1, art. 1, 32 I.L.M. at 1483 (stating that purpose of agreement is to address international environmental concerns for NAFTA parties); Ronald E. Kleinman & Joel M. Shapiro, *Presentations at the Second Annual Conference of the United States-Mexico Law Institute: Current Issues in U.S.-Mexican Business Law*, 2 U.S.-MEX. L.J. 25, 34 (1994) (claiming that in spite of flaws, Environmental Side Agreement is "unprecedented use of trade agreements" to improve environment); Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 484 (1994) (calling Environmental Side Agreement unprecedented trade agreement because of its environmental provisions); see also William P. Alford, *Introduction: The North American Free Trade Agreement and the Need for Candor*, 34 HARV. INT'L L.J. 293, 299 (1993) (suggesting that adoption of environmental side agreements has already begun to affect border region in remarkable ways by forcing United States, Canada, and Mexico to address long-standing contradictory standards).

109. See Environmental Side Agreement, *supra* note 18, pt. 1, art. 2, 32 I.L.M. at 1483 (permitting each member nation right to establish its own level of environmental protection); Michael D. Madnick, Comment, *NAFTA: A Catalyst for Environmental Change in Mexico*, 11 PACE ENVTL. L. REV. 365, 392 (1993) (explaining that Environmental Side Agreement recognizes each nation's ability to make its own environmental laws); see also C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 112 (1994) (reiterating that each member country has right to establish its own level of environmental protection).

110. See Environmental Side Agreement, *supra* note 18, pt. 6, art. 40, 32 I.L.M. at 1494 (asserting that Environmental Side Agreement will not interfere with existing rights under other international agreements); Bradley J. Condon, *NAFTA and the Environment: A Trade-Friendly Approach*, 14 NW. J. INT'L L. & BUS. 528, 541 (1994) (explaining that international environmental agreements are merely reinforced by NAFTA).

111. See Environmental Side Agreement, *supra* note 18, annex 34, 32 I.L.M. at 1496 (imposing monetary penalty of up to \$20 million for failure to enforce environmental regulations); see also Jack I. Garvey, *Trade Law, and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 453 (1995) (noting that Environmental Side Agreement provides for monetary penalties for noncompliance); Ronald E. Kleinman & Joel M. Shapiro, *Presentations at the Second Annual Conference of the United States-Mexico Law Institute: Current Issues in U.S.-Mexican Business Law*, 2 U.S.-MEX. L.J. 25, 32-33 (1994) (asserting that imposition of fines for noncompliance is unprecedented in international environmental agreements); Lawrence J.

force their environmental regulations.¹¹² Second, and more importantly, the Environmental Side Agreement created the Commission on Environmental Cooperation (CEC), which is responsible for furthering trans-boundary environmental protections between the parties.¹¹³

The CEC's purpose is to serve as the facilitator for cooperation between the parties on environmental and conservation issues by providing a forum for dispute resolution for disagreements concerning environmental law enforcement.¹¹⁴ In addition, the CEC strives to develop and im-

Rowe, *NAFTA, The Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?*, 28 SUFFOLK TRANSNAT'L L. REV. 197, 211-12 (1995) (examining possible impacts of monetary assessment as penalty for noncompliance with environmental laws).

112. See Environmental Side Agreement, *supra* note 18, annex 36B, 32 I.L.M. at 1497, (creating trade sanctions for side agreement violators); Jack I. Garvey, *Trade Law, and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 440-41 (1995) (discussing provisions for trade sanctions under Environmental Side Agreement); Lawrence J. Rowe, *NAFTA, The Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?*, 28 SUFFOLK TRANSNAT'L L. REV. 197, 227 (1995) (emphasizing that Environmental Side Agreement strengthens NAFTA's environmental goals by imposing trade sanctions on violators); see also Brian D. Patterson, Note, *Environmental Issues in the Evolving United States-Caribbean Trade Relationship*, 7 GEO. INT'L ENVTL. L. REV. 515, 523 (1995) (noting that under Environmental Side Agreement, CEC may impose trade sanctions on parties who do not comply with Environmental Side Agreement regulations).

113. Environmental Side Agreement, *supra* note 18, pt. 3, art. 8, 32 I.L.M. at 1485; see, e.g., Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1082 (1994) (discussing Environmental Side Agreement's establishment of CEC to serve as forum for discussion of environmental issues); Michael D. Madnick, Comment, *NAFTA: A Catalyst for Environmental Change in Mexico*, 11 PACE ENVTL. L. REV. 365, 393 (1993) (noting that CEC was created as enforcement mechanism under Environmental Side Agreement); Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 87 (1994) (noting that goal of CEC is furtherance of environmental protection).

114. See Robert Housman, *The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment*, 30 STAN. J. INT'L L. 379, 415 (1994) (asserting that CEC is dispute resolution tool designed to ensure enforcement of environmental laws); Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 89 (1994) (describing CEC dispute resolution as starting point for negotiations regarding environmental issues); Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 495 (1994) (noting that CEC is forum for discussion of environmental disputes); see also Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L.J. 607, 626 (1994) (stating that CEC considers allegations that NAFTA party is not enforcing its environmental laws).

prove environmental laws.¹¹⁵ Unfortunately, while the CEC has an honorable purpose, it lacks real “teeth” or enforcement authority.¹¹⁶ For example, the CEC has the power to investigate alleged violations of the Environmental Side Agreement, but this power does not include the power to *initiate* an investigation. Rather, the CEC must wait until a complaint is received before proceeding.¹¹⁷ Further, because of ambiguities in the Environmental Side Agreement’s language, it remains unclear whether alleged violators must respond to inquiries once the CEC has commenced its investigation.¹¹⁸ These shortcomings in the CEC’s investigative powers make the deterrent effect of monetary penalties and trade sanctions empty threats.¹¹⁹ Even if the CEC had the full power it pur-

115. See, e.g., Environmental Side Agreement, *supra* note 18, pt. 3, art. 10, 32 I.L.M. at 1485-87 (outlining responsibilities of CEC to foster cooperation on development and improvement of environmental laws); Kal Raustiala, *The Political Implications of the Enforcement of Provisions of the NAFTA Environmental Side Agreement: The CEC As a Model for Future Accords*, 25 ENVTL. L. 31, 40 (1995) (explaining that CEC is intended to assist NAFTA parties with development of environmental legislation); Lawrence J. Rowe, *NAFTA, The Border Area Environmental Program, and Mexico’s Border Area: Prescription for Sustainable Development?*, 28 SUFFOLK TRANSNAT’L L. REV. 197, 210 (1995) (discussing purposes of CEC to finance, plan, and construct infrastructure projects).

116. See Kal Raustiala, *The Political Implications of the Enforcement of Provisions of the NAFTA Environmental Side Agreement: The CEC As a Model for Future Accords*, 25 ENVTL. L. 31, 49 (1995) (noting that CEC is powerless to interfere in environmental matters as long as party is in compliance with its own standards); Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 486 (1994) (implying that CEC lacks power to effectively force compliance with NAFTA, the Environmental Side Agreement, and environmental regulations).

117. See Environmental Side Agreement, *supra* note 18, pt. 3, art. 14, 32 I.L.M. at 1488 (stating that CEC may investigate only after person or organization submits complaint); Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 499 (1994) (explaining that CEC’s power to investigate environmental violations is only activated when complaint is received).

118. See Environmental Side Agreement, *supra* note 18, pt. 4, art. 21, 32 I.L.M. at 1490 (stating that NAFTA parties under investigation are required to submit requested information unless they claim that request is unduly burdensome or excessive); Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 500 (1994) (discussing how ambiguous language in Environmental Side Agreement may permit investigated party to withhold requested information). Article 21 does not discuss what constitute unduly burdensome or excessive requests for information. Environmental Side Agreement, *supra* note 18, pt. 4, art. 21, 32 I.L.M. at 1490.

119. See Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 500 (1994) (claiming that vague language of Environmental Side Agreement with respect to CEC’s power to investigate violations of environmental laws makes CEC’s imposition of fines and suspension of trading privileges empty threats).

ports to have, it would have little or no impact upon the Colonias because the CEC only has the authority to enforce existing laws or agreements, which do not specifically address Colonias problems.¹²⁰ In sum, without appropriate enforcement mechanisms, the Environmental Side Agreement's objectives are virtually unattainable.¹²¹

In response to the deficiencies of NAFTA and the Environmental Side Agreement in addressing the environmental problems of the United States-Mexico border region, the governments of both countries entered into the BECC/NADBank Agreement.¹²² The purpose of these two separate but related organizations is to identify¹²³ and fund¹²⁴ border environmental infrastructure projects impacting the region within 100

120. See Environmental Side Agreement, *supra* note 18, pt. 6, art. 40, 32 I.L.M. at 1494 (stating that only existing international agreements between member parties are affected by Article 40). Article 40 states: "Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international agreements, including conservation agreements, to which such parties are party." *Id.* In fact, nothing in the Environmental Side Agreement specifically addresses the needs of Colonias. See, e.g., David S. Cloud & Matthew Philips, *Trade: NAFTA Side Deal All But Done; Focus Shifts to Congress*, 51 CONG. Q. WKLY. REP. 2211, 2219 (1993) (noting that Representative Gephardt opposed Environmental Side Agreement because it did not provide for border cleanup funding); Paul Houston & Ronald J. Ostrow, *Washington Insight*, L.A. TIMES, Sept. 20, 1993, at 5 (commenting that House Majority Leader Richard Gephardt opposes NAFTA because Environmental Side Agreement does not properly address environmental protection on border); Marcia Recio, *NAFTA Will Fail Without Help from Top*, FORT WORTH STAR-TELEGRAM, Sept. 13, 1993, at 1 (noting political controversy in California concerning side agreement, and opponents' contention that Environmental Side Agreement does not guarantee funding for border cleanup).

121. See Sandra Le Priol-Vrejan, Note, *The NAFTA Environmental Side Agreement and the Power to Investigate Violations of Environmental Laws*, 23 HOFSTRA L. REV. 483, 504 (1994) (asserting that if CEC cannot properly investigate alleged violations of Environmental Side Agreement, then it cannot achieve Environmental Side Agreement goals). The CEC is essentially powerless to use the "stick" of enforcement—trade sanctions—to encourage noncomplying parties to adhere to their respective environmental laws. See Kevin W. Patton, Note, *Dispute Resolution Under the North American Commission on Environmental Cooperation*, 5 DUKE J. COMP. & INT'L L. 87, 107 (1994) (stating that member nations, not CEC, retain power to impose trade sanctions on violative parties).

122. See BECC/NADBank Agreement, *supra* note 19, pmb., 32 I.L.M. at 1547 (emphasizing need to remedy serious environmental problems of United States-Mexico border region). The BECC/NADBank Agreement was passed in response to NAFTA and the Environmental Side Agreement's lack of border initiatives. See *id.* at 1546 (discussing BECC/NADBank's objective to correct deficiencies of NAFTA and Environmental Side Agreement).

123. See *id.* ch. 1, art. 1, 32 I.L.M. at 1548 (stating that BECC has responsibility to help identify border projects); TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK) 9 (1994) (stressing that purpose of BECC is to develop and coordinate border environmental projects); see also Jonathan J. Fisher, Note, *NEPA, NAFTA and Cross-Border Electric Generating Projects*, 7

kilometers of the United States-Mexico border.¹²⁵ The BECC/NADBank Agreement is the first agreement between the two nations to address directly the problems faced by Colonias residents.¹²⁶ This Agreement suggests that the governments of both countries are finally focusing their efforts on the severe environmental degradation of the border re-

GEO. INT'L ENVTL. L. REV. 277, 285 (1994) (asserting that BECC's purpose is to promote and certify environmental border projects).

124. See BECC/NADBank Agreement, *supra* note 19, ch. 2, art. 1, 32 I.L.M. at 1556-57 (stating that purpose and function of NADBank is to assist economically distressed areas by providing funding for infrastructure projects); TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK) 14 (1994) (noting that NADBank is source of financing for environmental projects certified by BECC); *see also* Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (explaining that NADBank's function is to provide funding for environmental infrastructure projects along United States-Mexico border); Daniel D. Coughlin, Comment, *The North American Agreement on Environmental Cooperation: A Summary and Discussion*, 2 MO. ENVTL. L. & POL'Y REV. 93, 104-05 (1994) (indicating that NADBank's function is to fund infrastructure projects to improve border area).

125. BECC/NADBank Agreement, *supra* note 19, ch. 1, art. 7, 32 I.L.M. at 1556; *see* TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK) 1 (1994) (indicating that BECC/NADBank Agreement's primary mission is to identify and finance environmental and infrastructure development projects in border region); Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (discussing BECC's role as project identifier and NADBank's role as project financier for Colonias within 100 kilometer region on either side of border). The BECC/NADBank Agreement defines an environmental infrastructure project as "a project that will prevent, control or reduce environmental pollutants or contaminants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life." BECC/NADBank Agreement, *supra* note 19, ch. 1, art. 7, 32 I.L.M. at 1556. The Agreement further defines the border region as an "area within 100 kilometers of the international frontier between the United States and Mexico." *Id.*

126. See DEPARTMENT OF TREASURY, FACT SHEET ON THE U.S./MEXICAN AGREEMENT ON THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK) 1 (1994) (emphasizing that BECC and NADBank are first bilateral organizations to address border water and wastewater issues); *see also* Jonathan J. Fisher, Note, *NEPA, NAFTA and Cross-Border Electric Generating Projects*, 7 GEO. INT'L ENVTL. L. REV. 277, 285 (1994) (noting that BECC/NADBank Agreement is first agreement to focus on Colonias water pollution). The issues of adequate water and wastewater supplies are the most critical problems faced by the residents of Colonias. TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF COLONIAS IN TEXAS 4 (1992) (stressing primacy of water supply and wastewater treatment problems in Colonias).

gion.¹²⁷ The question remains, however, whether the BECC/NADBank Agreement will actually improve border conditions or get caught in hopeless bureaucratic deadlock.¹²⁸

Based on the early indicators and the current state of environmental infrastructure development programs,¹²⁹ it is doubtful that the Colonias residents will see relief in the foreseeable future.¹³⁰ For example, border infrastructure development is estimated to cost between \$2 billion and \$3

127. See BECC/NADBank Agreement, *supra* note 19, ch. 1, art. 1, 32 I.L.M. at 1548 (asserting that purpose of BECC is to preserve, protect, and enhance border environment and well being of citizens of both countries); see also *id.* pt. 2, art. 1, § 1 (discussing NADBank's purpose of financing BECC-approved border projects); Lawrence J. Rowe, Note, *NAFTA, The Border Area Environmental Program, and Mexico's Border Area: Prescription for Sustainable Development?*, 28 SUFFOLK TRANSNAT'L L. REV. 197, 229-30 (1995) (predicting that BECC/NADBank Agreement will increase attention to border area needs).

128. See Jerry M. Keys, *Border Issues: An Industry Perspective* (claiming that it is too early to determine whether BECC/NADBank Agreement will improve environmental conditions along border), in STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, ADVANCED ENVIRONMENTAL LAW COURSE N-2, N-23 (1994); TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK) 26 (1994) (suggesting that BECC/NADBank Agreement contains significant gaps that need to be filled before it will be successful); see also Jerry M. Keys, *Border Issues: An Industry Perspective* (asserting that large number of governmental institutions are likely to decrease effectiveness of NADBank and BECC because of potential conflicts and bureaucracy), in STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, ADVANCED ENVIRONMENTAL LAW COURSE N-2, N-23 (1994); *Controversy Slowing Startup of Border Environment Agency*, SAN ANTONIO EXPRESS-NEWS, Sept. 1, 1995, at A17 (noting that BECC did not appear ready to begin environmental infrastructure projects because of internal controversies); Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (stating that NADBank has yet to initiate funding for specific environmental projects, even though BECC/NADBank Agreement went into effect in 1994).

129. See Robert Bryce, *U.S.-Mexican Border Cleanup Stalls in Bureaucratic Halls*, CHRISTIAN SCI. MONITOR, Nov. 28, 1994, at 6 (discussing economist's reaction to failure of BECC/NADBank to begin operations as anticipated); Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (emphasizing that BECC/NADBank projects are still in planning phase, but that implementation is expected to begin soon); cf. Sandra Dibble, *2 Border Water-Treatment Plants O.K.'d*, SAN DIEGO UNION-TRIB., Sept. 29, 1995, at A4 (reporting that BECC finally approved first border infrastructure projects on September 28, 1995).

130. Cf. Jerry M. Keys, *Border Issues: An Industry Perspective* (arguing that future of border environmental infrastructure development is questionable due to BECC/NADBank bureaucratic and implementation problems), in STATE BAR OF TEX. PROFESSIONAL DEV. PROGRAM, ADVANCED ENVIRONMENTAL LAW COURSE N-2, N-23 (1994); *New Law May Halt Colonias' Spread*, SAN ANTONIO EXPRESS-NEWS, July 8, 1995, at C6 (observing that Colonias seem to be on their own since HUD funding fell through).

billion.¹³¹ NADBank is intended to assist Colonias in obtaining financial resources to develop water and wastewater services.¹³² This funding is obviously the critical link to remedying existing Colonias problems.¹³³ However, after one year of operation, and following approval of several projects by BECC, NADBank has not funded a single infrastructure project.¹³⁴

NADBank's mission is to assist localities with Colonias in obtaining low interest loans and issuing bonds so that they can build the needed services.¹³⁵ However, the issue then becomes one of who is going to pay to maintain the infrastructure once a municipality gains funding. Coloni-

131. See *60 Minutes: The Other America* (CBS television broadcast, Oct. 8, 1995) (estimating that cost of providing adequate water and wastewater treatment to Colonias is \$2 billion); see also Stanley M. Spracker et al., *Environmental Protection and International Trade: NAFTA As a Means of Eliminating Environmental Contamination As a Competitive Advantage*, 5 GEO. INT'L ENVTL. L. REV. 669, 701 (1993) (positing that it could cost five to nine billion dollars to clean up contamination along United States-Mexico border).

132. E.g., TEXAS CTR. FOR POLICY STUDIES, *FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK)* 14 (1994); Edward M. Ranger, *Environmental Aspect of Building a Facility in Northern Mexico*, C990 A.L.I.-A.B.A. 559 (1995); C. O'Neal Taylor, *Fast Track, Trade, Policy, & Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 115 (1994).

133. See Brenda S. Hustis, Note, *The Environmental Implications of the North American Free Trade Agreement*, 28 TEX. INT'L L.J. 589, 595 (1993) (emphasizing that Colonias lack financial resources for basic infrastructure); Janin Friend, *The Colonias, Shantytowns on Mexico Border, Are Focus of Talk, Some Action by Texas, U.S.*, BOND BUYER, Oct. 14, 1993, at 1 (commenting that funds are needed for water and sewer systems in Colonias).

134. See William H. Carlile, *Douglas Water Project Is a Ist: Border Panel Approves Bid for \$2 Million to Upgrade System*, THE ARIZONA REPUBLIC, Feb. 27, 1996 (noting that criticisms of NADBank stem from lack of project funding in first year), available in Westlaw, ALLNEWSPLUS Database; Victor Miramontes, *With Focus on Region, Better Border Being Built*, AUSTIN-AMERICAN STATESMAN, Mar. 20, 1996 (stating that BECC has approved six border projects, yet none of these projects have begun), available in Westlaw, ALLNEWSPLUS Database; see also Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (commenting that BECC has identified some projects for NADBank financing, but noting that project funding has been postponed because of delays). Victor Miramontes is NADBank's Deputy Managing Director. Victor Miramontes, *With Focus on Region, Better Border Being Built*, AUSTIN-AMERICAN STATESMAN, Mar. 20, 1996, available in Westlaw, ALLNEWSPLUS Database.

135. See, e.g., Bob Benenson, *Events Cloud Clinton's Efforts to Turn the Tide on NAFTA*, 51 CONG. Q. WKLY. REP. 2949, 2950 (1993) (asserting that NADBank will provide project financing via loans); Robert Collier, *Cleanup Along Border Still a Dream*, SAN FRANCISCO CHRON., Sept. 26, 1995, at A1 (noting that NADBank funds border projects through loans); Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Sept. 13, 1995) (indicating that NADBank's purpose is to assist municipalities in acquiring low interest loans for infrastructure development).

ans are the likely candidates to fund the services because they are the primary service users.¹³⁶ Nonetheless, it is unlikely that Colonians will have the resources to pay for these services as they can barely afford their existing living expenses.¹³⁷ The inadequacies of the BECC/NADBank Agreement, the Environmental Side Agreement, and the Border Plan have left the federal government without a solution to the Colonias dilemma. Recognizing these deficiencies, the State of Texas stepped in to attempt to help Colonians along the Texas-Mexico border.

B. *Texas's Impotent Laws: Futile Attempts at Colonias Remedies*

1. Efforts to Remedy Existing Colonias Problems

Texas initially attempted to solve the Colonias problem with the Economically Distressed Areas Program (EDAP) of 1989.¹³⁸ However, the EDAP has been only modestly successful.¹³⁹ The Texas Legislature created the EDAP to assist Colonias in building the much needed environmental infrastructure.¹⁴⁰ Essentially, the EDAP requires counties

136. See Robert Collier, *Cleanup Along Border Still a Dream*, SAN FRANCISCO CHRON., Sept. 26, 1995, at A1 (noting that Colonias residents will be required to pay for infrastructure maintenance in form of higher usage rates).

137. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (1993) (Lawrence F. Alwin ed., 1993) (suggesting that Colonians will likely have little money left for other financial commitments after financing land and building materials for their homes); Robert Collier, *First Steps in Border Cleanup/NAFTA Panels on Environment Decide in 2 Cases*, SAN FRANCISCO CHRON., Sept. 29, 1995, at D4 (emphasizing that even though projects have been approved, financing is unavailable because Colonias residents cannot afford loans under NADBank program).

138. Act of June 14, 1989, 71st Leg., R.S., ch. 624, § 1, 1989 Tex. Gen. Law. 2063 (current version at scattered sections of TEX. WATER CODE ANN. §§ 15.001-17.853 (Vernon Supp. 1996)).

139. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 1-4 (Lawrence F. Alwin ed., 1993) (concluding that inadequate funding for Colonias programs under EDAP leaves some residents without indoor plumbing or sufficient drainage); TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT CO-OPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBank) app. at 2 (1994) (stressing that although EDAP project provided water service to Colonias in Hidalgo County, only 19% of residents could afford to connect to service); cf. TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF TEXAS COLONIAS: UPDATE 1-3 (1995) (indicating that number of Colonias has increased 19% and population of Colonias has increased 21% since 1992 Texas Water Development Board (TWDB) study).

140. See TEXAS WATER CODE ANN. § 16.341 historical note (Vernon Supp. 1996) (asserting that EDAP was intended to remedy water and wastewater needs of economically distressed areas); TEXAS WATER DEV. BD., ECONOMICALLY DISTRESSED AREAS PROGRAM 1 (1994) (stating that EDAP was designed to "provide financial assistance to bring

containing “economically distressed areas,” like the Colonias, to adopt certain “model rules.”¹⁴¹ The EDAP model rules, as adopted in 1989 and amended in 1991 and 1995, require counties to provide a safe and sanitary water supply and sewage facilities to affected residential areas.¹⁴² The model rules further mandate that counties must prohibit future development of subdivisions with lots of five acres or less without adequate water and wastewater services.¹⁴³ Once a county adopts the model rules, it qualifies for state funding of environmental infrastructure development.¹⁴⁴ In addition, when a county adopts the model rules, the Colonias within that county become eligible for additional state financial assistance for the development of water and wastewater projects.¹⁴⁵ The solution appears simple—if an economically distressed area adopts the model

water and wastewater services to economically distressed areas where the present water facilities are inadequate to meet the minimal needs of residents”); TEXAS CTR. FOR POLICY STUDIES, *FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT CO-OPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBANK)* app. at 1 (1994) (noting that EDAP’s purpose is to provide water/wastewater services funding and project planning for Colonias).

141. See TEXAS WATER CODE ANN. § 16.343 (Vernon Supp. 1996) (outlining EDAP “model rule” requirements); TEXAS WATER DEV. BD., *ECONOMICALLY DISTRESSED AREAS PROGRAM 2* (1994) (specifying requirements to qualify for benefits under EDAP).

142. See TEXAS WATER CODE ANN. § 16.343(a)-(c) (Vernon Supp. 1996) (outlining “model rules” requiring counties to provide water and sewage facilities to economically distressed areas to qualify for state EDAP funds). Section 16.343 states in pertinent part:

The Texas Natural Resource Conservation Commission shall, in conjunction with the board and after consultation with the attorney general, prepare model rules to assure that minimum standards for safe and sanitary water supply and sewer services in residential areas of political subdivisions, including rules of any state agency relating to septic tanks and other waste disposal systems, are met. The model rules must . . . assure that adequate drinking water . . . [and] adequate sewer facilities are available to the residential areas

Id. § 16.343(a)-(b).

143. *Id.* § 16.343(d).

144. See *id.* § 16.342 (requiring counties to adopt model rules to become eligible for aid under EDAP); TEXAS WATER DEV. BD., *ECONOMICALLY DISTRESSED AREAS PROGRAM 2* (1994) (specifying requirements to qualify for benefits under EDAP); see also Philip True, *Trouble with Colonia Rules Cited, Border Officials Vow to Get Laws Changed to Grant Variances*, SAN ANTONIO EXPRESS-NEWS, Oct. 23, 1994, at A22 (indicating that adoption of model rules is prerequisite to funding under EDAP).

145. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/RCED-91-37, *REPORT TO THE CHAIRMAN, COMMITTEE ON AGRICULTURE, HOUSE OF REPRESENTATIVES, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER 5* (1990) (noting that eligibility for additional state financial assistance is restricted to counties that comply with EDAP model rules).

rules, it will be eligible for its share of over \$400 million.¹⁴⁶ In application, however, the solution is not so simple.

Several funding problems curtail the effectiveness of the EDAP. First, a 1993 study by the Office of the State Auditor noted that of the Texas Water Development Board's estimated EDAP funding requirements of \$696 million, only a little more than \$400 million had been appropriated,¹⁴⁷ and of that amount less than fifty percent has been spent or allocated to projects since the inception of the program.¹⁴⁸ Second, the EDAP only provides funding for projects to entire subdivisions, not to individual houses.¹⁴⁹ Therefore, Colonias residents require separate funding to connect their houses to water and wastewater services once the services are established for the subdivision.¹⁵⁰ While there are sepa-

146. See TEXAS WATER CODE ANN. § 16.343 (Vernon Supp. 1996) (discussing eligibility requirements for EDAP funds); OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 6 (Lawrence F. Alwin ed., 1993) (stating that there is approximately \$404 million available to Colonias for environmental infrastructure programs); see also Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (emphasizing funding requirements for Colonias infrastructure development), in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993).

147. OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 5 (Lawrence F. Alwin ed., 1993); see Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (stressing that underfunded water and wastewater projects need to budget funds), in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993).

148. OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 7 (Lawrence F. Alwin ed., 1993); see TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF TEXAS COLONIAS: UPDATE 12 (1995) (emphasizing that only \$205.3 million of appropriated \$404 million in EDAP funds has been spent or allocated for border projects).

149. OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993).

150. *Id.*; see TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBank) app. at 2 (1994) (explaining that under EDAP's funding scheme, water and wastewater projects get completed, but homeowners cannot afford to connect to services); see also OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993) (addressing issues relating to plumbing and connection of water and wastewater to Colonians' homes). The Lull Colonia Project in Edinburg, Hidalgo County, Texas, was recently completed under the EDAP; however, only 19% of the homes in that Colonia have hooked up to that system because of lack of resources. TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBank) app. at 2 (1994).

rate funding programs designed to deal with this particular problem, they only provide \$17 million of the estimated \$80 million needed for plumbing projects.¹⁵¹ This lack of adequate funding for connection and indoor plumbing will make any infrastructure development virtually useless to Colonias residents.¹⁵² Once Colonians pay their mortgages and other costs associated with infrastructure development, they are unlikely to have funds left over to pay for the costs of water and sewage connection and indoor plumbing.¹⁵³ Finally, the EDAP lacks sufficient funding for drainage projects.¹⁵⁴ Flooding is a severe problem in Colonias because many are constructed on flood plains.¹⁵⁵ During periods of heavy rain,

151. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993) (stressing inadequacy of funds under existing programs designed to provide financial assistance for plumbing connection services).

152. See *id.* (explaining that water and wastewater service is of little value to Colonias residents if they are unable to connect to that service); TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NAD BANK) app. at 2 (1994) (discussing Lull Colonia Project in Edinburg, which provided services to Colonias even though most residents were unable to connect).

153. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993) (noting that many Colonias residents have yearly income of between \$5,000 and \$10,000, which makes it virtually impossible for them to afford connection costs of \$917); TEXAS CTR. FOR POLICY STUDIES, FULFILLING PROMISES: IMPLEMENTATION OF THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NAD BANK) app. at 2 (1994) (addressing Lull Colonia Project case study evidencing that only 19% of residents have connected to available water supply because of costs of hooking up to supply); see also Chris Collins, *Coleman Proposes Federal Aid for Clean Water for Colonias*, GANNETT NEWS. SERV., Jan. 18, 1995 (noting that many Colonians are unable to pay back loans for plumbing connections), available in Westlaw, ALLNEWSPLUS Database.

154. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993) (stating that few funds are available to provide much needed drainage in Colonias); *Efforts for Colonias Fall Short of Goal*, HOUSTON CHRON., Nov. 5, 1993 (noting that "even though lack of proper drainage is a problem in many Colonias, few, if any funds exist to correct that problem"), available in Westlaw, ALLNEWSPLUS Database.

155. See, e.g., OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993) (referring to recent flood in Rio Grande Valley where homes had been built in areas that were really dried-up ponds); Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (noting that 93.3% of Colonias residents had reported flooding problems), in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993); ROBERT K. HOLZ & CHRISTOPHER S. DAVIES, THIRD WORLD COLONIAS: LOWER RIO GRANDE VALLEY, TEXAS 7 (Lyndon B. Johnson School of Public Affairs Working Paper No. 72, 1993) (describing factors contributing to flooding in Colonias); Philip True, *Colonias Places of*

the flooding, combined with the severe lack of adequate sewage disposal, causes fecal matter to flow into the streets and houses of the Colonias, creating third world health risks.¹⁵⁶

The lack of enforcement of the EDAP's model rules exacerbates the funding problems by allowing land developers to capitalize on the EDAP's loopholes.¹⁵⁷ One study indicated that of the counties included in the survey that had adopted the model rules, those with weak enforcement exhibited new Colonias growth, while those with strong enforcement showed no new growth.¹⁵⁸ The study further indicated that the lack of awareness, resources, authority, and confusion over the language of the model rules combined to contribute to the lax enforcement in counties where new Colonias are developing.¹⁵⁹ In practice, the EDAP is a well-intentioned program that constitutes a carrot without a stick:¹⁶⁰ it provides financial resources for economically distressed subdivisions—

Tar Paper and Dried-up Promises, SAN ANTONIO EXPRESS-NEWS, July 2, 1995, at A13 (explaining that many Colonias are located on land, such as floodplains, that is not suitable for housing).

156. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 8 (Lawrence F. Alwin ed., 1993) (stating that frequent flooding in Colonias causes raw sewage to wash into yards and water supplies); Robin Alexander, *Lower Rio Grande Valley: Neural Tube Defects* (asserting that poor sanitation causes contamination of air, food, and soil leading to third world health problems, and discussing combination of flooding and sewage problems in Colonias), in TEXAS RURAL LEGAL AID, ECONOMIC AND ENVIRONMENTAL CONDITIONS IN THE LOWER RIO GRANDE VALLEY ALONG THE TEXAS-MEXICO BORDER (1993); see also TEXAS DEP'T OF HUMAN SERVS., THE COLONIAS FACTBOOK: A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS COUNTIES 6-5 (1988) (identifying flooding as significant health problem in most Colonias).

157. See Allen R. Myerson, *Sewers and Clean Water a Must at Border Housing*, *Texas Says*, N.Y. TIMES, June 20, 1995, at 8 (claiming that loopholes in 1989 law allowed developers to continue development of substandard housing); see also OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 14 (Lawrence F. Alwin ed., 1993) (emphasizing relationship between lack of enforcement of EDAP rules and potential for new Colonias growth).

158. OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 14 (Lawrence F. Alwin ed., 1993).

159. See *id.* at 15 (addressing need to educate all eligible counties about benefits and services offered under EDAP, and stating that resources, authority, and confusion about Texas Government Code create problems with enforcement of EDAP). Lack of resources is an inherent problem in the border area, which is one of the poorest regions in the United States. *Id.* at 16. The State Auditor's office stated that "these counties often do not have the financial resources to employ full-time staff to scour the county in search of illegal subdivision development, nor do the poorer counties have the financial resources to prosecute all violators." *Id.*

160. See Press Release from Office of Attorney General, State of Texas, *Morales Announces "Colonias Strike Force" Sues Colonia Developers* (Sept. 21, 1993) (positing that lax enforcement allows developers to continue to jeopardize health of border residents by

the carrot—but it lacks strong enforcement—the stick—to either compel counties to adopt and abide by the EDAP regulations or to prevent developers from evading them.¹⁶¹

To improve enforcement of and compliance with the model rules, the 1993 Texas Legislature authorized the Texas Attorney General or local district attorneys to prosecute both the developers that violate the model rules and the counties that do not enforce them.¹⁶² Under the authority of House Bill 2079, the Texas Attorney General established the Colonias Strike Force to prevent future illegal developments and pursue legal redress against existing ones.¹⁶³ The Colonias Strike Force has initiated eighty-eight lawsuits and obtained millions of dollars in judgments.¹⁶⁴

building homes without basic necessities), in *PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY* 45, 45 (Lawrence F. Alwin ed., 1993).

161. See TEXAS WATER CODE ANN. § 16.343(g) (Vernon Supp. 1996) (requiring counties to adopt model rules to qualify for funds under program); OFFICE OF THE STATE AUDITOR, *PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY* 2 (Lawrence F. Alwin ed., 1993) (stressing need for counties to adopt model rules and enforce them to limit development). In the past, some counties have adopted the model rules but have permitted non-qualifying subdivisions to obtain EDAP funds anyway. See TEXAS WATER DEV. BD., *WATER AND WASTEWATER NEEDS OF COLONIAS: UPDATE 2*, at 16 (1995) (stating that although many counties have adopted model rules, they are only effective when counties have adopted rules and are enforcing them). Counties distributing EDAP funds to substandard subdivisions justify their actions by claiming that the model rules exclude some subdivisions that are in desperate need of resources. Philip True, *Trouble with Colonia Rules Cited—Border Officials Vow to Get Laws Changed in Order to Grant Variances*, SAN ANTONIO EXPRESS-NEWS, Oct. 23, 1994, at A23.

162. Act of June 12, 1993, 73d Leg., R.S., ch. 648, § 5, 1993 Tex. Gen. Laws 2430, 2431 (current version at TEX. LOC. GOV'T CODE ANN. § 232.037 (Vernon Supp. 1996)). Section 232.037 permits the attorney general, among others, to take any action to enjoin “violations or threatened violations” of EDAP model rules. *Id.*; Press Release from Office of Attorney General, State of Texas, *Morales Announces “Colonias Strike Force” Sues Colonia Developers* (Sept. 21, 1993) (discussing adoption of House Bill 2079 that provided attorney general with authority to prosecute violators of EDAP model rules), in *PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY* 45, 46 (Lawrence F. Alwin ed., 1993).

163. Press Release from Office of Attorney General, State of Texas, *Morales Announces “Colonias Strike Force” Sues Colonia Developers* (Sept. 21, 1993), in *PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY* 45, 46 (Lawrence F. Alwin ed., 1993); see JONATHAN S. GREEN, *ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE* 29 (National Association of Attorneys General 1995) (discussing creation of Strike Force and its objectives).

164. JONATHAN S. GREEN, *ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE* 30 (National Association of Attorneys General 1995); see Stephan Power, *Laxity on Border Housing Cited, AG Criticizes Lawmakers, Developers for Inaction on Colonias*, DALLAS MORNING NEWS, Mar. 12, 1995, at A30 (noting that since 1993, Texas Attorney General's Colonias Strike Force

In one suit, *In re D & A Realty, Inc.*,¹⁶⁵ an unscrupulous developer filed bankruptcy in an attempt to avoid liability for his substandard Colonias that were in violation of EDAP regulations.¹⁶⁶ Texas Attorney General Dan Morales submitted a reorganization plan whereby the developer's assets would be turned over to a nonprofit organization to benefit the developer's Colonias.¹⁶⁷ The organization purchased the developer's contracts-for-deed, which were converted into warranty deeds, and the developer's assets that were seized under the reorganization plan are now being used to provide much needed water and wastewater services.¹⁶⁸

The attorney general, however, has not always been successful.¹⁶⁹ For example, *State v. Blas Chapa*¹⁷⁰ resulted in an eleventh-hour settlement in which the developers agreed to pay \$21.6 million to a nonprofit organization, similar to the scheme applied in *In re D & A Realty, Inc.*¹⁷¹ The

has filed 80 lawsuits); see also *In re D & A Realty, Inc.*, 179 B.R. 831, 834-35 (Bankr. S.D. Tex. 1994) (allowing bankruptcy court to seize over \$3 million of developer's assets and funnel them into nonprofit organization for benefit of Colonias); Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 28 (noting that judgments against developers amount to roughly \$1 million).

165. 179 B.R. 831 (Bankr. S.D. Tex. 1994).

166. *In re D & A Realty, Inc.*, 179 B.R. at 832-33 (discussing debtor's attempt to avoid liability by filing bankruptcy).

167. *Id.* at 834; see JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE 31 (National Association of Attorneys General 1995) (discussing use of bankruptcy reorganization plan to solve Colonias problems); *Deadline Is Extended in Immigration Lawsuit*, AUSTIN AMERICAN-STATESMAN, Dec. 24, 1994, at B7 (noting that part of bankrupt developer's assets would be used to build wastewater treatment for two Laredo, Texas Colonias).

168. *In re D & A Realty, Inc.*, 179 B.R. at 834; see JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE 31 (National Association of Attorneys General 1995) (explaining how D & A Realty's assets have been used to benefit Colonias).

169. See Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 28 (noting that even though state and Colonias developers agreed on settlement, state has been unable to locate developers' assets); *Colonias Keep up the Pressure on the Colonia Kingpins*, DALLAS MORNING NEWS, Jan. 27, 1995, at A28 (suggesting that Texas Attorney General may be unsuccessful in getting assets for Colonias infrastructure as agreed in *Blas Chapa* case because several developers have filed bankruptcy).

170. See JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIA CONFERENCE 31-32 (National Association of Attorneys General 1995) (discussing suit against Colonias developer by Strike Force); John MacCormack, *Colonia Suit Against Starr Judge, Others Settled*, SAN ANTONIO EXPRESS-NEWS, Jan. 24, 1995, at B12 (noting case against Blas Chapa filed by Strike Force).

171. See JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE 31-32 (National Association of Attorneys General 1995) (addressing use of funds in *Blas Chapa* settlement); James E. Garcia, *Colonia Residents Look for Answers, Neighbors Wait for Solution*

money was to be used to provide Colonias with the infrastructure the developers failed to provide.¹⁷² Unfortunately, the attorney general has been unsuccessful in locating the assets of the developers.¹⁷³

While the attorney general has been at least modestly successful in attacking the Colonias problem, recent studies, as well as the *Blas Chapa* case, indicate that developers are continuing to evade the Colonias Strike Force.¹⁷⁴ Indeed, the problem with the Colonias Strike Force appears to be based in substantial part on politics.¹⁷⁵ Although the attorney gen-

that Attorney General Announced 6 Months Ago, AUSTIN-AMERICAN STATESMAN, July 4, 1995, at B1 (asserting that nonprofit corporation was to be set up with Blas Chapa's assets for benefit of Colonias).

172. See, e.g., JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE 31-32 (National Association of Attorneys General 1995) (discussing *Blas Chapa* settlement agreement whereby developer's assets were to be turned over to authorities for use in improving conditions in Colonias built by Blas Chapa and his Colonia development partners); James E. Garcia, *Colonia Residents Look for Answers, Neighbors Wait for Solution that Attorney General Announced 6 Months Ago*, AUSTIN-AMERICAN STATESMAN, July 4, 1995, at B1 (noting settlement reached in *Blas Chapa* case whereby developers were to give assets to aid Colonias); *Colonia Owners to Lose Property: Settlement Calls for Developers to Pay for Upgrades to Substandard Subdivisions*, AUSTIN AMERICAN-STATESMAN, Jan. 24, 1995, at B1 (noting last-minute settlement in *Blas Chapa* case).

173. See Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 1, 28 (asserting that attorney general has been unable to locate assets of Colonia developers); see also JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE 32 (National Association of Attorneys General 1995) (suggesting that developer's assets have not been made available for nonprofit organization as agreed in settlement).

174. See TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF COLONIAS: UPDATE 16-17 (1995) (suggesting that attorney general's office is making progress, but that Colonias continue to develop); Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 1 (discussing acknowledgment by Colonias Strike Force that despite its efforts, Colonias developers continue to get away with substandard developments). But see Dan Morales, *Ivins Ignores Facts Concerning Colonias*, AUSTIN AMERICAN-STATESMAN, Oct. 19, 1995, at A15 (asserting that Colonias Strike Force is actively pursuing legal action against developers of Colonias along Texas-Mexico border).

175. See Molly Ivins, *Help Colonias Now, Take the Credit Later*, AUSTIN AMERICAN-STATESMAN, Oct. 15, 1995, at D3 (suggesting that Attorney General Dan Morales's recent appearance on *60 Minutes* was political ploy to take credit for more work than he has actually done); see also James E. Garcia, *Colonia Residents Look for Answers, Neighbors Wait for Solution that Attorney General Announced 6 Months Ago*, AUSTIN-AMERICAN STATESMAN, July 4, 1995, at B1 (noting that attorney general's office announced settlement in January 1995, yet as of July 4, 1995, Colonias residents had not heard anything from attorney general). It may have been more important to the attorney general's office to discuss the settlement with the press than it was to work out details to benefit the Colonias. See James E. Garcia, *Colonia Residents Look for Answers, Neighbors Wait for Solution that Attorney General Announced 6 Months Ago*, AUSTIN-AMERICAN STATESMAN, July 4, 1995, at B1 (noting that attorney general's office announced settlement before details were com-

eral's office publicly claims that the Strike Force is solving border problems, in reality, little is being done.¹⁷⁶

The most recent state efforts to help bring relief to Colonias residents were enactments of the 74th Legislature.¹⁷⁷ The 74th Legislature promulgated laws concerning specialized issues such as water and wastewater planning for El Paso County,¹⁷⁸ as well as general restrictions against the development of Colonias.¹⁷⁹ Of particular importance to existing Texas Colonias is Senate Bill 1509, which establishes Colonia self-help centers in El Paso, Hidalgo, Webb, Cameron, and Starr counties.¹⁸⁰ The purpose of the self-help centers is to provide financial services to individuals and

plete). The Garcia article stated that "residents of 13 Colonias involved complain that state attorneys have never briefed them on the [announced] settlement and have not responded to their questions about the nonprofit association," which should have been established with settlement assets for the benefit of the 13 Colonias. *Id.*

176. See James E. Garcia, *Colonia Residents Look for Answers, Neighbors Wait for Solution that Attorney General Announced 6 Months Ago*, AUSTIN-AMERICAN STATESMAN, July 4, 1995, at B1 (noting that attorney general was quick to announce settlement in Colonias case, but that residents were given "cold shoulder" by Strike Force officials when they demanded answers as to why nothing was being done to remedy their situation); cf. JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF COLONIAS CONFERENCE 32 (National Association of Attorneys General 1995) (positing that Strike Force asserts it is remedying Colonias problem by bringing suit against unscrupulous developers, but that it has been unsuccessful in collecting on judgments); Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 1, 28 (stating that Strike Force has filed many suits but few judgments have been rendered, and of those rendered, few have been collected). If the Strike Force cannot collect on its judgments, then its goal of using developer's assets for infrastructure development as in *In re D & A Realty* cannot be achieved. See James E. Garcia, *Colonia Residents Look for Answers, Neighbors Wait for Solution that Attorney General Announced 6 Months Ago*, AUSTIN-AMERICAN STATESMAN, at B1 (discussing how Attorney General claimed in public announcement that settlement had been reached with Colonias developer and assets would be used to benefit Colonias).

177. See, e.g., Act of June 16, 1995, 74th Leg., R.S., ch. 979, §§ 1-33, 1995 Tex. Gen. Laws 4895-912 (codified as an amendment to TEX. LOC. GOV'T CODE ANN. § 232 (Vernon Supp. 1996)) (regulating low-income housing developers); TEX. GOV'T CODE ANN. § 481.143 (Vernon special pamphlet 1996) (relating to review and approval of Colonia housing permits); TEX. GOV'T CODE ANN. §§ 2306.581-589 (Vernon special pamphlet 1996) (establishing Colonias self-help centers in certain counties); see also *New Law Can Halt Colonias' Spread*, SAN ANTONIO EXPRESS-NEWS, July 8, 1995, at C6 (discussing 1995 laws aimed at stopping proliferation of Colonias).

178. See Act of May 1, 1995, 74th Leg., R.S., ch. 69, §§ 1-4, 1995 Tex. Gen. Laws 448-51 (codified as an amendment to TEX. HEALTH & SAFETY CODE ANN. § 361 (Vernon Supp. 1996)) (establishing water and wastewater planning scheme for El Paso County).

179. See TEX. LOC. GOV'T CODE ANN. §§ 232.001-.042 (Vernon Supp. 1996) (providing building requirements and restrictions for subdivision developers).

180. See TEX. GOV'T CODE ANN. § 2306.582 (Vernon special pamphlet 1996) (authorizing creation of self-help centers for Colonias). The Cameron County center would assist residents of Cameron and Willacy counties. *Id.*

families living in economically distressed subdivisions.¹⁸¹ In actuality, however, the self-help centers will not be able to provide such services to Colonias residents because Senate Bill 1509 denies financial services to residents of Colonias unless water service and wastewater disposal is *already* available.¹⁸² This prohibition will exclude almost all Colonians from obtaining financial services through a self-help center because virtually no Colonias have wastewater disposal already available.¹⁸³ Spurious legislation such as this only exacerbates the Colonias problem with false hopes in empty promises.

2. Attempts to Preclude New Colonias Development

Notwithstanding the problems associated with Texas legislation aimed at addressing the condition of existing Colonias, the Texas Legislature has attempted to preclude the development of new Colonias. In 1995, the Texas Legislature passed House Bill 1001, which amended chapter 232 of the Local Government Code to include subchapter B, specifically outlining guidelines and restrictions for subdividers of land in economically distressed areas.¹⁸⁴ House Bill 1001 is an attempt to stop the proliferation of

181. *Id.* Section 2306.586 states that the purpose of self-help centers is to assist individuals and families of low income and very low income to finance, refinance, construct, improve, or maintain a safe, suitable home in the Colonias' designated service area. . . .

. . . .
A self-help center may serve individuals and families of low income and very low income by: providing assistance in obtaining loans or grants to build a home; . . . providing credit and debt counseling related to home purchase and finance; applying for grants and loans to provide housing and other needed community improvements; . . . [or] providing assistance in obtaining loans or grants to enable an individual or a family to acquire fee simple title to property that originally was purchased under a contract for a deed, contract for sale, or other executory contract.

Id.

182. *See id.* § 2306.586(d) (stating that self-help centers cannot provide financial assistance to Colonias residents if "water service and suitable wastewater disposal are not available").

183. *See* TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF COLONIAS 4 (1992) (noting that 1190 of 1193 Colonias did not have adequate wastewater disposal available as of 1992); *COSSMHO: Congress Acknowledges Plight of Texas Colonias*, PR Newswire, July 14, 1995 (asserting that 99.7% of Colonias do not have adequate wastewater treatment), available in Westlaw, ALLNEWSPLUS Database; *see also* TEXAS WATER DEV. BD., WATER AND WASTEWATER NEEDS OF COLONIAS: UPDATE 10-15 (1995) (positing that some wastewater projects are planned, but that deficiency is still enormous problem).

184. *See* TEX. LOC. GOV'T CODE ANN. §§ 232.021-.042 (Vernon Supp. 1996) (establishing subdivision platting requirement for "economically distressed areas" to prevent Colonias development).

Colonias¹⁸⁵ by imposing stricter requirements on the development and sale of rural subdivisions,¹⁸⁶ while increasing the punishment for violators of the restrictions.¹⁸⁷ For example, House Bill 1001 imposes heightened platting requirements on developers.¹⁸⁸ The new law requires a plat to be

185. *See id.* (stating that its purpose is to regulate growth of Colonias); *Colonia Law: New Legislation Is a Positive Step*, DALLAS MORNING NEWS, Nov. 7, 1995, at A16 (discussing passage of House Bill 1001, which is intended to stop further development of Colonias). The legislative findings specifically address the proliferation of Colonias. Act of June 17, 1995, 74th Leg., R.S., ch. 979, § 1, 1995 Tex. Gen. Laws 4895-96 (codified as an amendment to TEX. LOC. GOV'T CODE ANN. § 232.021 (Vernon Supp. 1996)). In making these findings, the legislature stated in pertinent part:

- (1) economically distressed subdivisions commonly called "Colonias" are found throughout the affected counties;
- (2) in recent years, the number of people living in these economically distressed subdivisions in the affected counties has increased;
- (3) due to implementation of the North American Free Trade Agreement (NAFTA), the General Agreement on Tariffs and Trade (GATT), other economic incentives, and the increasingly robust economic development along the Texas-Mexico border, the population in economically distressed subdivisions in the affected counties will continue to increase;

-
- (9) the location, proliferation, and conditions of these economically distressed subdivisions pose a clear and substantial threat to the environment of the border region, as well as to all Texas;

....
Id.

186. *See* TEX. LOC. GOV'T CODE ANN. §§ 232.023-.034 (Vernon Supp. 1996) (imposing restrictions on platting of subdivisions, advertising sales in subdivisions, and sales contracts for subdivisions). This new legislation imposes a number of additional guidelines for subdividers in building rural subdivisions intended to curb the growth of Colonias. *See id.* §§ 232.040-.042 (promulgating rules for developers planning to build rural low-income housing).

187. *See id.* §§ 232.035-.038 (establishing civil and criminal penalties for violations of regulations for economically distressed subdivisions).

188. *Compare* TEX. LOC. GOV'T CODE ANN. § 232.001(a) (Vernon Supp. 1996) (requiring landowner outside of municipality who subdivides land and lays out public areas to file plat with county) *with* TEX. LOC. GOV'T CODE ANN. § 232.023 (Vernon Supp. 1996) (requiring subdivider to prepare plat if land is simply subdivided into lots). The primary difference between the above cited sections lies in the ability of a landowner to avoid filing a plat with the county if he does not plan to lay out public areas under § 232.001. *See* *Elgin Bank of Tex. v. Travis County*, 906 S.W.2d 120, 125 (Tex. App.—Austin 1995, writ denied) (holding that under Local Government Code § 232.001(a), plat is only required if developer plans to subdivide and lay out public areas such as streets or roads). Section 232.023 requires any subdivision in an "affected county" to be platted. TEX. LOC. GOV'T CODE ANN. § 232.023 (Vernon Supp. 1996). For purposes of § 232.023, an affected county is a county

that has a per capita income that averaged 25 percent below the state average for the most recent three consecutive years for which statistics are available and an unemployment rate that averaged 25 percent above the state average for the most recent

filed with the county if an individual, corporation, firm, or other legal entity subdivides a parcel of land into lots for sale or lease.¹⁸⁹ Approval of the plat depends on whether it complies with the subdivision requirements established to prevent unscrupulous developers from creating more Colonias.¹⁹⁰

On its face, House Bill 1001 appears to be solid state legislation that could finally halt the spread of Colonias.¹⁹¹ Like all legislation, however, it is subject to interpretation, which can create loopholes.¹⁹² For example, House Bill 1001, while imposing strict standards requiring developers to provide the essential services that Colonias have been deprived of for decades, allows exceptions.¹⁹³ Specifically, the new law provides for the granting of extensions and variances that, in effect, allow developers to

three consecutive years for which statistics are available; and any part of which is within 50 miles of an international border.

Id. § 232.021(1)(A)-(B). A subdivision is "an area of land that has been subdivided into lots for sale or lease." *Id.* at § 232.021(14).

189. TEX. LOC. GOV'T CODE ANN. §§ 232.021-.023 (Vernon Supp. 1996).

190. *See id.* § 232.024 (stating that commissioners must not grant approval of plats that do not meet requirements prescribed in § 232.023). Section 232.023 requires, among other things:

[certification that] water and sewer service facilities proposed under subdivision (6) are in compliance with the model rules adopted under § 16.343, Water Code, and a certified estimate to install water and sewer service facilities; [provisions] for drainage in the subdivision . . . ; certification that the subdivider has complied with the requirements of § 232.032 and that: the water quality and connections to the lots meet, or will meet, the minimum state standards; sewer connections to the lots or septic tanks meet, or will meet, the minimum state standards; electrical connections provided to the lot meet, or will meet, the minimum state standards; and gas connections, if available, provided to the lot meet, or will meet, the minimum state standards; . . .

Id. § 232.023.

191. *See Colonia Law: New Legislation Is a Positive Step*, DALLAS MORNING NEWS, Nov. 7, 1995, at A16 (addressing way in which House Bill 1001 promises to end proliferation of Colonias along border between Texas and Mexico); *New Law Can Halt the Colonias' Spread*, SAN ANTONIO EXPRESS-NEWS, July 8, 1995, at C6 (asserting that new legislation intended to stop development of substandard subdivisions along Texas-Mexico border may be able to achieve its purpose).

192. *See Colonia Profiteering, Its Time to Toughen the Laws Again*, DALLAS MORNING NEWS, Mar. 22, 1995, at A24 (indicating that developers have been able to develop substandard housing in spite of laws forbidding it); *see also* Philip True, *Colonias Places of Tar Paper and Dried-up Promises*, SAN ANTONIO EXPRESS-NEWS, July 2, 1995, at A13 (observing that unscrupulous developers still buy cheap land to develop substandard housing).

193. *See* TEX. LOC. GOV'T CODE ANN. § 232.026 (Vernon Supp. 1996) (allowing commissioner's court to extend date by which water and wastewater service must be provided as specified in plat); *id.* § 232.027 (specifying bond requirements for persons who do not provide service facilities as required under § 232.023); *id.* § 232.040 (permitting subdividers to avoid replatting under certain circumstances); *id.* § 232.042 (granting subdividers delays or variances from compliance with platting requirements).

subdivide, develop, and sell lots that do not have water, sewage, roads, or drainage.¹⁹⁴ While extensions and variances are not indefinite, upon expiration, the developer will likely have sold all the lots in the subdivision and be gone.¹⁹⁵ These exceptions may prove to be the downfall of House Bill 1001 because they permit subdividers to evade the platting requirements and continue to build substandard housing.¹⁹⁶

Section 232.026 of House Bill 1001 illustrates a loophole created by extensions.¹⁹⁷ Section 232.026 permits the commissioner's court to extend the date the developer must have water and wastewater services operable beyond the date indicated on the plat, so long as the commissioner finds that the extension is reasonable and not contrary to public interest.¹⁹⁸ Section 232.026 forbids the commissioner's court from granting an extension if it would result in an occupied residence being without water or wastewater service.¹⁹⁹ The key word is "occupied" because if this section is interpreted literally,²⁰⁰ it allows a developer to subdivide and sell

194. See TEX. LOC. GOV'T CODE ANN. § 232.026 (Vernon Supp. 1996) (noting that commissioners may grant extensions to developers who are unable to provide service facilities in timely manner); *id.* § 232.042 (allowing developers variances from platting requirements).

195. See *id.* § 232.026(b) (indicating that extensions are available only if residence is not occupied). The limitations on extensions do not prevent a developer from selling substandard lots. See *id.* (imposing limitation only if residence is occupied); see also *id.* § 232.042(b) (stating that delay is permissible for initial two-year period with two-year renewal); cf. Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 1 (stating that attorney general's office, which is prosecuting unscrupulous developers for violations of EDAP model rules, has difficulty locating developers' assets). Moreover, developers many times effectively evade prosecution for violating EDAP provisions by dissolving the company through bankruptcy. *Id.*; see Philip True, *Trouble with Colonia Rules Cited, Border Officials Vow to Get Laws Changed to Grant Variances*, SAN ANTONIO EXPRESS-NEWS, Oct. 23, 1994, at A22 (noting that developers often disappear or file bankruptcy to avoid having to provide services for which they are responsible). This ploy makes locating the developer or his assets an onerous, if not impossible, task. See Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 1 (asserting that locating Colonias developers' assets may be impossible).

196. See TEX. LOC. GOV'T CODE ANN. § 232.026 (Vernon Supp. 1996) (permitting exceptions to platting requirements that will allow subdividers to sell lots lacking infrastructure required by law); *id.* § 232.042 (granting subdividers delays or variances from compliance with platting requirements that will give developers four-year opportunity to legally sell substandard lots).

197. See *id.* § 232.026 (allowing for extensions when developers are unable to provide water and wastewater treatment as required in subdivision plat).

198. *Id.*

199. *Id.* § 232.026(b).

200. See *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969) (stating that words in common use should be interpreted as having their ordinarily understood meaning). The word "occupied" ordinarily means "to take possession of." WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1237 (2d ed. 1983). Therefore, if a developer were to restrict occu-

his land without meeting mandatory water and wastewater requirements so long as he restricts occupancy.²⁰¹ Once the developer sells all or a substantial number of the lots, he can remove the restrictions and allow residents to move onto their land.²⁰²

While section 232.026 of House Bill 1001 contains an extension loophole, section 232.042 illustrates a loophole created by variances. Section 232.042 permits a delay or variance from compliance with replatting requirements when infrastructure changes occur during subdivision development.²⁰³ The delay or variance may be granted upon request by the subdivider or resident purchaser if the delay is for the installation of utilities and the subdivider (1) identifies the affected utility providers, (2) provides the conditions and terms whereby service may be provided, and (3) supplies a certified letter from the utility providers that have the right to serve and will serve the area.²⁰⁴ Additionally, section 232.042 allows a delay or variance if the developer can show that compliance would be "impractical."²⁰⁵ A showing of impracticality will likely not be a significant burden for developers who have powerful ties to local government.²⁰⁶ Moreover, unlike extensions, delays and variances are not

pancy or possession until he had sold all or a substantial number of lots, he could do so without meeting water and wastewater service requirements. *See* TEX. LOC. GOV'T CODE ANN. § 232.026 (Vernon Supp. 1996) (allowing developers to obtain extensions on water and sewer deadline dates).

201. *See* TEX. LOC. GOV'T CODE ANN. § 232.026 (Vernon Supp. 1996) (providing that commissioner's court should not grant extension if occupied residence will go without water or sewer service).

202. *See id.* (suggesting that if developer does not allow residence to be occupied while it is without services, then he can sell lots freely without water or wastewater restrictions).

203. *Id.* § 232.042.

204. *Id.* The fact that the subdivider or the resident purchaser can request the delay illustrates the sacrifices that many residents will make to find affordable housing. *Id.* § 232.042(a).

205. TEX. LOC. GOV'T CODE ANN. § 232.042(c) (Vernon Supp. 1996).

206. *See 60 Minutes: The Other America* (CBS television broadcast, Oct. 8, 1995) (noting that Deborah Kastrin, Clinton appointee to BECC, is also Colonias developer, and quoting Texas Attorney General as claiming that many Colonias developers are "rich powerful people [such as] judges, county commissioners, and other state political leaders"); *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (asserting that camaraderie between developers and local officials allows developers to slip through loopholes), available in Westlaw, ALLNEWSPLUS Database; *see also* Allen R. Myerson, *This Is the House That Greed Built: Texas Developers Profit from Squalor*, N.Y. TIMES, Apr. 2, 1995, § 3, at 14 (commenting that Blas Chapa, former Starr County Judge turned Colonias developer, approved substandard subdivisions during his tenure on bench).

constrained by occupancy restrictions.²⁰⁷ Finally, once the variance expires the developer is obligated to provide water and wastewater services; however, requiring developers to retroactively provide these services is a questionable tactic because the Colonia will already be established and a developer can evade enforcement.²⁰⁸

Proponents of House Bill 1001 would likely argue that Section 232.027, requiring a bond for developers who do not install water and wastewater services, operates as a safeguard against unscrupulous developers using extensions and variances to create more Colonias.²⁰⁹ Section 232.027 states in pertinent part:

Unless a person has completed installation of all water and sewer service facilities required by this subchapter on the date that person applies for final approval of a plat under section 232.024, the commissioner's court shall require the subdivider of the tract to execute and maintain in effect a bond . . . in an amount the commissioner determines will ensure compliance with this subchapter.²¹⁰

However, this section also contains a potential loophole. It grants the commissioner's court wide discretion in determining the amount of the bond.²¹¹ Section 232.027 allows the commissioner's court to set the bond amount based on what it determines to be sufficient to ensure compliance

207. See TEX. LOC. GOV'T CODE ANN. § 232.042 (Vernon Supp. 1996) (allowing residents to live in substandard subdivisions if developer is granted variance, and authorizing commissioner's courts to grant delays or variances to platting requirements, thereby allowing developers to build and sell lots that do not meet minimum standards). Section 232.042(e) requires a developer granted a delay to provide 25 gallons of potable water per day to each resident and adequate temporary sanitary wastewater disposal facilities; however, it does not expressly provide for penalties or revocation of the variance in the event the developer fails to provide these services. *Id.* § 232.042(e). Without enforcement, it is very unlikely that developers will comply with these requirements. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 2 (Lawrence F. Alwin ed., 1993) (asserting that lax enforcement is primary reason developers continue to build substandard subdivisions).

208. Cf. Philip True, *Nowhere to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L5 (commenting that many Colonias developers disappear after they sell their lots); Philip True, *Trouble with Colonia Rules Cited, Border Officials Vow to Get Laws Changed to Grant Variances*, SAN ANTONIO EXPRESS-NEWS, Oct. 23, 1994, at A22 (claiming that once developers sell lots in Colonias, they often disappear); *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (asserting that retrofitting Colonias with water and sewer systems is extremely burdensome task, available in Westlaw, ALLNEWSPLUS Database).

209. See TEX. LOC. GOV'T CODE ANN. § 232.027 (Vernon Supp. 1996) (establishing bond requirements for persons who do not install necessary services).

210. *Id.*

211. *Id.*

with the rules governing plat requirements.²¹² This discretion, combined with the close relationships many developers have with the commissioner, could result in inadequate bonds that have little force to compel developers to adhere to the regulations.²¹³

V. A PROPOSAL: PARTNERSHIP BETWEEN STATE AND FEDERAL COLONIAS PROGRAMS

NAFTA, the 1992 Border Plan, the Environmental Side Agreement, and the BECC/NADBank Agreement appear unlikely to solve the Colonians' problems. Likewise, state programs such as the EDAP seem inadequate to offer hope for resolving the Colonias dilemma. What Colonians need is a carrot—an incentive for developers to build appropriate housing along the border—and a stick—punishment for those developers who force border residents into the squalid conditions of the Colonias. Combining efforts in a state and federal partnership would give the Colonians hope for the future.

A. *The Carrot—Incentives to Build Above-Standard Affordable Housing*

Colonias exist because poor people along the border aspire to the same American dream that most citizens strive for—to own their own home.²¹⁴ The Colonias problem is based on simple supply-and-demand economics—the border population explosion over the last thirty-five years created the demand for affordable housing in conjunction with a limited supply.²¹⁵ As a result, unscrupulous developers stepped in to fill the void by offering substandard housing at prices that low-income wage earners

212. *Id.*

213. See *Colonia Profiteering: It's Time to Toughen the Laws Again*, DALLAS MORNING NEWS, Mar. 22, 1995, at A24 (asserting that relationships between elected officials and Colonias developers undermine efforts by state to stop Colonias development); *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (discussing close association between local officials and developers that allows things “to pass through when they really shouldn’t”), available in Westlaw, ALLNEWSPLUS Database; see also *Colonia Law: New Legislation Is a Positive Step*, DALLAS MORNING NEWS, Nov. 7, 1995, at A16 (stating that “developers, county officials and state legislators too often have been in bed with one another”).

214. See Philip True, *Colonias: Places of Tar Paper and Dried-up Promises*, SAN ANTONIO EXPRESS-NEWS, July 2, 1995, at A13 (quoting one Colonian woman as stating that Colonias property is for Colonian children to avoid the struggle of their parents); cf. *60 Minutes: The Other America* (CBS television broadcast, Oct. 8, 1995) (commenting that Colonias exist as first step in quest for American dream).

215. See Philip True, *Nowhere to Go: As New Colonias Are Outlawed, Where Will the Poor Live?*, SAN ANTONIO EXPRESS-NEWS, Nov. 5, 1995, at L5 (asserting that Colonias are result of housing shortage in border region).

could afford.²¹⁶ The solution to this problem is simple—reduce the demand for substandard housing by increasing the supply of adequate, affordable housing.²¹⁷ The \$64 million question, of course, is how to provide adequate, affordable housing.

The answer lies in the recent developments of the United States Department of Housing and Urban Development (HUD).²¹⁸ HUD has joined with the AFL-CIO Housing Investment Trust in a coordinated effort to clean up substandard housing along the Texas-Mexico border by building new affordable housing.²¹⁹ The effort is a pilot program using the following procedure: (1) HUD subsidizes a portion of the home cost; (2) a private lender makes a loan for the remaining amount, which is guaranteed by Fannie Mae; and (3) the AFL-CIO Trust then purchases the mortgage-backed securities.²²⁰ This is a win-win proposal for both organizations because HUD can leverage its small budget to provide much needed housing and the AFL-CIO Trust can get a safe return on its investment.²²¹

216. *Id.*; see J. Michael Kennedy, *Teeming 'Colonias' Border Has Worst of Both Worlds*, L.A. TIMES, Oct. 2, 1989, at 1 (indicating that Colonians are victims of unscrupulous developers who made promises they never intended to keep); *60 Minutes: The Other America* (CBS television broadcast, Oct. 8, 1995) (addressing Colonia owner's assertion that developers are simply providing only land Colonians can afford). Ms. Deborah Kasstrin is part of a family business that has owned or currently owns at least nine Colonias outside of El Paso, Texas. *Id.* Ms. Kasstrin claims that "her customers are simply buying the only property they can afford and . . . if all they can afford is a piece of land without drinkable water or sewage, so be it." *Id.*

217. *Cf. Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (noting that above-standard, low-income housing built by reputable developers is purchased as quickly as homes in Colonias, and claiming that Colonians are willing to pay more for better housing), available in Westlaw, ALLNEWSPLUS Database.

218. See, e.g., Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?*, 22 FORDHAM URB. L.J. 1, 43 (1994) (discussing partnership between HUD and AFL-CIO designed to develop affordable housing); Angela D. Chatman, *Labor, HUD Unite to Offer Low-Income Project Funds*, PLAIN DEALER, Feb. 12, 1994, at 9 (explaining program whereby HUD and AFL-CIO have joined to develop inner-city affordable housing); Tara P. Pope, *Fund Sees Promise in Bleak Borderland*, WALL ST. J., Feb. 9, 1994, at T3 (reporting that new program announced by HUD may solve Colonias housing and infrastructure dilemma).

219. Tara P. Pope, *Fund Sees Promise in Bleak Borderland*, WALL ST. J., Feb. 9, 1994, at T3.

220. See *id.* (discussing possible plan for AFL-CIO/HUD joint-housing venture).

221. See *id.* (suggesting that although HUD's lower budget would have detrimental effect on state's plans for Colonias, AFL-CIO funds may help, and indicating that AFL-CIO trust will benefit by investing in secure, liquid securities). An added benefit to the AFL-CIO is that the joint efforts with HUD will increase jobs for union members in the construction industry. See Angela D. Chatman, *Labor, HUD Unite to Offer Low-Income*

To remedy the Colonias dilemma, HUD and local housing officials should utilize the benefits of the AFL-CIO program to encourage more private-sector financiers, such as mutual fund managers,²²² to invest in affordable housing.²²³ Under an expanded HUD partnership program, HUD would guarantee a minimum rate of return, provided by subsidies, to private-sector investors who invest in affordable housing.²²⁴ With HUD's guarantee of loans, developers would be more willing and able to undertake low-income housing projects in compliance with Texas's development requirements.²²⁵ Consequently, purchasers would not be forced to buy substandard housing because above-standard housing would be available at comparable prices.²²⁶ The net effect would increase the

Project Funds, PLAIN DEALER, Feb. 12, 1994, at 9 (describing how HUD/AFL-CIO program will provide union jobs).

222. See U.S. GEN. ACCOUNTING OFFICE, PRIVATE PENSION PLANS—EFFORTS TO ENCOURAGE INFRASTRUCTURE INVESTMENT 27-8 (Sept. 8, 1995) (proposing that mutual funds are likely candidates for investment in affordable low-income housing), available in Westlaw, GAO-RPTS Database.

223. See Leslie J. Bobo, Comment, *Nontraditional Investments of Fiduciaries: Re-examining the Prudent Investor Rule*, 33 EMORY L.J. 1067, 1082 (1984) (suggesting that there is interest in investing pension funds and other investment moneys in socially useful projects such as affordable housing); Tara P. Pope, *Fund Sees Promise in Bleak Borderland*, WALL ST. J., Feb. 9, 1994, at T3 (suggesting that more private-sector lenders would help Colonias get necessary funds to build much needed infrastructure); cf. Neal R. Peirce, *New Pension Fund Proposals Sabotage Social Investment*, SACRAMENTO BEE, June 26, 1995, at B5 (noting that AFL-CIO has been pooling pension funds for housing since 1965).

224. See *AFL-CIO Investment Program Announces Recipients of the AFL-CIO Housing Investment Trust National Housing Partners Program*, PR Newswire, May 22, 1995 (indicating that private funds can earn highly competitive returns by investing in housing), available in Westlaw, ALLNEWSPLUS Database; Guy Gugliotta, *Shallow Pockets and Big Needs Prod Small Thinking at HUD*, WASH. POST, July 13, 1993, at A6 (discussing HUD's initiative, which uses federal guarantees to encourage private-sector investment in affordable housing).

225. See *Targeted Pension Fund Investment for Economic Growth and Development: Hearings Before the U.S. Joint Economic Comm. Facilitating Pension Investments for Economic Growth and Development*, 103d Cong., 2d Sess. 62, 64-65 (1994) (statement of Stephen Coyle, Chief Executive Officer, AFL-CIO Housing Investment Trust) (positing that with HUD's assistance, investment incentives such as guarantees and subsidies, liquidity, and investment intermediaries are available to fund initiatives of AFL-CIO affordable housing program); John A. Farrell, *Clinton Looks in on South Florida, Defends Handling of Economy As He Vows Help to Communities Hit by Andrew*, BOSTON GLOBE, Sept. 7, 1993 (National/Foreign), at 3 (noting that Fannie Mae will guarantee AFL-CIO investments in affordable housing), available in Westlaw, ALLNEWSPLUS Database; Guy Gugliotta, *Shallow Pockets and Big Needs Prod Small Thinking at HUD*, WASH. POST, July 13, 1993, at A6 (emphasizing that HUD's participation will likely increase investment in program by reputable developers).

226. See Tara P. Pope, *Fund Sees Promise in Bleak Borderland*, WALL ST. J., Feb. 9, 1994, at T3 (stating that subsidized loans under partnership program will provide homes costing \$150 to \$200 per month). This benefit of HUD financing suggests that many

availability of above-standard, affordable housing, thereby decreasing the demand for substandard housing.

Opponents of partnership programs claim that they are just another example of the "spend now, pay later" mentality indicative of the Clinton administration.²²⁷ What this criticism neglects to consider are existing financial commitments being made toward Colonias programs at both the state and federal level.²²⁸ Partnership programs utilize existing budgets to achieve more with less money,²²⁹ which is critical when considering the magnitude of the Colonias problem. Recent estimates to provide adequate infrastructure to the border region approach \$2 billion.²³⁰ The

Colonias residents would be able to afford housing under a partnership program. *Id.*; see *Texas Works to Improve Living Conditions for 300,000* (National Public Radio broadcast, Dec. 15, 1994) (stating that when reputable developers sell improved subdivisions, low-income purchasers buy lots as quickly as unimproved lots in Colonias), available in Westlaw, ALLNEWSPLUS Database.

227. See *Hearings Before the Joint Economic Committee*, 104th Cong., 1st Sess. (1995) (statement of Sen. Connie Mack, Chairman, Joint Economic Comm.) (claiming that HUD/AFL-CIO programs are "spend now, pay later" programs), available in LEXIS, Nexis Library, CURNWS File.

228. See OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 1-2 (Lawrence F. Alwin ed., 1993) (discussing state and federal funding for Texas Colonias projects); *Senate Spending Bill Includes \$100 Million for Colonias*, Associated Press Pol. Serv. (Sept. 27, 1995) (indicating budget for Colonias housing and environmental programs), available in Westlaw, ALLNEWSPLUS Database. The following federal and state organizations have made financial commitments in the form of loans and grants toward remedying the Colonias problem: the U.S. Farmers Home Administration, the U.S. Rural Development Administration, the U.S. Department of Housing and Human Development, the U.S. Environmental Protection Agency, and the Texas Water Development Board. OFFICE OF STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 6 (Lawrence F. Alwin ed., 1993). These organizations have allocated approximately \$404 million for Colonias assistance programs. *Id.*

229. Cf. Peter W. Salsich, Jr., *Homelessness at the Millennium: Is the Past Prologue?*, 23 STETSON L. REV. 331, 391 (1994) (discussing HUD/AFL-CIO program that allows HUD to leverage its \$100 million against the investments of \$660 million by AFL-CIO). By leveraging HUD's budget with private funds, taxpayers' dollars will buy more affordable housing per dollar spent. *Id.* The AFL-CIO's investment will further help leverage an additional \$550 million, bringing the total to \$1.2 billion with only \$100 million in taxpayer dollars. *Id.*; see Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution*, 22 FORDHAM L.J. 1, 43 (1994) (describing HUD/AFL-CIO program of investment in affordable housing).

230. See, e.g., Janin Friend, *The Colonias, Shantytowns on Mexico Border, Are Focus of Talk, Some Action by Texas, U.S.*, BOND BUYER, Oct. 14, 1993, at 1 (stating that Texas Water Development Board (TWDB) estimates that border infrastructure could cost \$1 billion); Jim Nesbitt, *Border Development Leaves Impoverished in the Dust*, PORTLAND OREGONIAN, Feb. 21, 1993, at A14 (asserting that border water and wastewater development is estimated at \$9 billion border-wide and \$2 billion for Texas); *60 Minutes: The*

Texas EDAP has appropriated only about \$404 million²³¹ and NADBank, while funded, is just beginning to develop plans for funding border projects.²³² On the flip side, pension funds account for almost \$4.8 trillion, one-third of all financial assets in the United States,²³³ and these funds make \$1 trillion in new investments each year.²³⁴

B. *The Stick—Enforcement of Restrictions Against Building Substandard Housing and Assisting Existing Colonias*

Part IV of this Comment illustrated the deficiencies in Texas's House Bill 1001 and Senate Bill 1509. To effectuate changes in Colonias, both of these bills should be amended to eliminate the loopholes. Sections 232.026 and 232.042 of House Bill 1001 allowing extensions and variances from platting requirements should be repealed. By repealing these sections, loopholes will be eliminated and, consequently, unscrupulous developers will not be permitted to force low-income wage earners to live in such atrocious conditions.²³⁵ Moreover, section 2306.586(D) of Senate

Other America (CBS television broadcast, Oct. 8, 1995) (noting that to bring services to all Colonias could cost \$2 billion).

231. OFFICE OF THE STATE AUDITOR, PROVIDING WATER AND WASTEWATER SERVICE TO THE COLONIAS: A SHARED RESPONSIBILITY 6 (Lawrence F. Alwin ed., 1993).

232. See Gregg Cooke, *Development Bank Vital to Free Trade*, DALLAS MORNING NEWS, October 11, 1995, at A13 (commenting that first infrastructure projects were sent to NADBank for financing in late September 1995); Telephone Interview with Annie Alvarado, Community & Government Affairs Officer, North American Development Bank (Aug. 13, 1995) (stating that NADBank had not yet funded projects as of August 13, 1995); see also *U.S.-Mexico Agency Making Project Loans*, Engineering News-Record, Oct. 16, 1995 (noting that NADBank was developing plans for its initial funding of environmental infrastructure projects in poverty-stricken Colonias), available in Westlaw, ALLNEWSPLUS Database.

233. See *Targeted Pension Fund Investment for Economic Growth and Development: Hearings Before the U.S. Joint Economic Comm. Facilitating Pension Investments for Economic Growth and Development*, 103d Cong., 2d Sess. 62, 64 (1994) (indicating magnitude of investment potential for pension funds); *HUD and Six Pension Fund Investors Forge Partnership; Union to Create Affordable Rental Housing Nationwide*, PR Newswire (Aug. 2, 1994) (discussing assets controlled by pension funds in United States), available in LEXIS, Nexis Library, CURNWS File.

234. *Testimony of Stephen Coyle, Chief Executive Officer, AFL-CIO Housing Investment Trust, Before the U.S. Joint Economic Committee Facilitating Pension Investments for Economic Growth and Development*, June 22, 1994, available in LEXIS, Nexis Library, CURNWS File.

235. Cf. TEX. LOC. GOV'T CODE ANN. §§ 232.026, .042 (Vernon Supp. 1996) (allowing exemptions and variances to platting requirements that are intended to eliminate development of Colonias). Allowing these sections to stand permits developers to evade compliance with the rules, but repealing them makes compliance with platting rules mandatory. *Id.* Further, these provisions remove discretion from the commissioner's courts where corruption is presumed to exist. See *60 Minutes: The Other America* (CBS television broad-

Bill 1509, which excludes Colonias without available water and wastewater treatment from receiving financial assistance services, must be repealed. Repealing section 2306.586(D) will permit self-help centers to be established in accordance with the intent of Senate Bill 1509 for the assistance of Colonias and their residents.²³⁶ Additionally, the legislature should amend section 232.030 to impose strict monetary penalties for noncompliance.²³⁷ As the statute is written today, if a county that has adopted the model rules does not enforce them, the county merely loses funding for infrastructure projects.²³⁸ However, the county would have more of an incentive—a stick—to adhere to the rules, if a monetary penalty were imposed.

The enforcement mechanism for subdividers should also be amended to force developers to adhere to the regulations. Currently, developers can be prosecuted by the attorney general for violations of the model rules.²³⁹ However, as is seen by the *Blas Chapa* case, developers can easily hide their assets to evade enforcement.²⁴⁰ Section 232.037 of the Texas Local Government Code should be amended to mandate that the attorney general enforce settlements and judgments by contempt. This would deter developers such as Blas Chapa from hiding assets after a settlement or judgment and would make those assets available for infrastructure projects as intended.²⁴¹ The closing of loopholes, combined

cast, Oct. 8, 1995) (suggesting that fight against Colonias is difficult because of relationships between developers and authorities responsible for enforcement of rules).

236. See TEX. GOV'T CODE ANN. § 2306.586(D) (Vernon special pamphlet 1996) (exempting from assistance Colonias that do not have water and wastewater treatment available). Repealing this section would allow self-help centers to be established in any Colonia that needs financial and housing assistance. *Cf. id.* at § 2306.586 (explaining purpose and function of self-help center is to help families and individuals in Colonias establish safe, suitable housing).

237. See TEX. LOC. GOV'T CODE ANN. § 232.030 (Vernon Supp. 1996) (allowing TWDB only to revoke funding, rather than impose monetary sanctions).

238. See *id.* (stating that counties "shall" adopt model rules to be eligible for EDAP funds); see also Philip True, *Trouble with Colonia Rules Cited—Border Officials Vow to Get Laws Changed in Order to Grant Variances*, SAN ANTONIO EXPRESS-NEWS, Oct. 23, 1994, at A23 (noting that TWDB may only revoke financial assistance eligibility for model rules violations by counties).

239. See TEX. LOC. GOV'T CODE ANN. § 232.037 (Vernon Supp. 1996) (permitting attorney general to prosecute developers who violate model rules).

240. See Robert Elder, Jr., *AG Uses Bankruptcy to Help Residents*, TEX. LAW., Jan. 30, 1995, at 1 (commenting that, in spite of settlement agreement between developers and attorney general's office, state has been unable to locate Colonia developers' assets); *Colonias Keep up the Pressure on the Colonia Kingpins*, DALLAS MORNING NEWS, Jan. 27, 1995, at A28 (asserting that attorney general may be unable to locate assets of bankrupt Colonias developers).

241. See JONATHAN S. GREEN, ON THE ROAD TO HEALTH AND A CLEANER ENVIRONMENT: REPORT ON THE CHILDREN OF THE COLONIAS CONFERENCE 31 (National As-

with the implementation of a HUD partnership program to provide financing for affordable housing and infrastructure, is the most effective way to provide positive change for Colonias and their residents.

VI. CONCLUSION

Colonias have historically been ignored, with Colonians left to eke out an existence as best they can. These are proud people, not looking for a handout, but for fairness and equity. Just like most Americans they are attempting to realize the American Dream. President Clinton promised that NAFTA and the Environmental Side Agreement would bring new environmental prosperity to the border region. They have not. Texas promised that the EDAP would stop unscrupulous developers from taking advantage of the poor and desperate laborers along the border. It has not. In 1995, Texas passed further legislation to curb the proliferation of Colonias, but loopholes allow developers legal means to force poor Colonians to live in squalor. Enough is enough. It is time for Texas to take a real stand to eliminate the third world conditions along the Texas-Mexico border. To do so, Texas should repeal sections 232.026 and 232.042 of House Bill 1001, repeal section 2306.586(D) of Senate Bill 1509, amend section 232.030 of House Bill 1001, and amend section 232.037 of the Texas Government Code. Finally, HUD should institute a partnership program whereby private investors would be encouraged to invest in low-income housing, and Texas should combine the EDAP efforts with those of HUD to more efficiently provide solutions to Colonias problems.

sociation of Attorneys General 1995) (discussing how assets of developers are being used to fund infrastructure for Colonias); *State Briefs, Deadline Is Extended in Immigration Lawsuit*, AUSTIN AMERICAN-STATESMAN, Dec. 24, 1994, at B7 (addressing seizure of unscrupulous developer's assets to improve conditions in Colonias).