



**THE TOHONO O'ODHAM NATION OF ARIZONA
TESTIMONY OF THE HONORABLE NED NORRIS, JR., CHAIRMAN**

**U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES
HEARING ON DESTROYING SACRED SITES AND ERASING TRIBAL CULTURE: THE TRUMP
ADMINISTRATION'S CONSTRUCTION OF THE BORDER WALL**

February 26, 2020

INTRODUCTION & HISTORICAL BACKGROUND

Good afternoon, Chairman Gallego, Ranking Member Cook and distinguished Members of the Subcommittee. It is an honor to have the opportunity to testify before you today on behalf of the Tohono O'odham Nation of Arizona. I also want to recognize and honor Chairman Grijalva, in whose district our Tribal Nation is located.

I am Ned Norris, Jr. and I am the Chairman of the Tohono O'odham Nation, a federally recognized tribe with more than 34,000 enrolled Tribal citizens. Our ancestors have lived in what is now Arizona and northern Mexico since time immemorial. With no consideration for our people or our sovereign and historical rights, the international boundary was drawn through our ancestral territory in 1854, separating our people and our lands. As a result, today our Main Reservation shares a 62-mile border with Mexico -- the second-longest international border of any tribe in the United States, and the longest on the southern border. Seventeen O'odham communities with approximately 2,000 members are located in our historical homelands in Mexico. O'odham on both sides of the border share the same language, culture, religion and history. Tribal members regularly engage in border crossings for pilgrimages and ceremonies at important religious and cultural sites on both sides of the border. We also cross the border to visit family and friends.

Today, only a portion of our ancestral territory is encompassed within the boundaries of our current Reservation. Our original homelands ranged well beyond these boundaries, and included what is now the Organ Pipe Cactus National Monument (adjacent to the western boundary of the Nation's Reservation and a UNESCO biosphere reserve),¹ the Cabeza Prieta National Wildlife

¹ Biosphere reserves are areas with unique ecosystems recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as special places for testing interdisciplinary approaches to managing social and ecological systems. Each reserve promotes

Refuge, and the San Bernardino National Wildlife Refuge to the east. The Nation has significant and well-documented connections to these lands and the religious, cultural and natural resources located there.



THE NATION SUPPORTS AND IS ACTIVELY ENGAGED IN BORDER SECURITY EFFORTS

The Nation has long been at the front lines of securing the border. Over the past decade the Nation has spent an annual average of **\$3 million of our own tribal funds** on border security and enforcement to help meet the United States' border security responsibilities. The Nation's police force typically spends more than a third of its time on border issues, including the investigation of immigrant deaths, illegal drug seizures, and human smuggling.

The Nation also has longstanding, positive working relationships with Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) and other federal law enforcement agencies. The Nation has entered into several cooperative agreements with CBP and ICE, and pursuant to numerous Tohono O'odham Legislative Council resolutions has authorized a number of border security measures on its sovereign lands to help CBP. Some examples include:

- **High Intensity Drug Trafficking (HIDTA) Task Force:** The Nation leads a multi-agency anti-drug smuggling task force staffed by Tohono O'odham Police Department

solutions reconciling the conservation of biodiversity and sustainable use.

<http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/>.

detectives, ICE special agents, Border Patrol agents, and the FBI. This is the only tribally-led High Intensity Drug Trafficking (HIDTA) Task Force in the United States. In 2018, the Nation's Task Force Commander W. Rodney Irby received an award recognizing him as the HIDTA National Outstanding Task Force Commander.

- **ICE office and CBP forward operating bases:** Since 1974, the Nation has authorized a long-term lease for an on-reservation ICE office. The Nation also approved leases for two CBP forward operating bases that operate on the Nation's lands 24 hours, 7 days a week.
- **Vehicle barriers on our lands:** CBP constructed extensive vehicle barriers that run the entire length of the Tribal border and a patrol road that parallels it.
- **CBP checkpoints on our lands:** The Nation has authorized CBP checkpoints on the Nation's major east-west highway to Tucson and the northern highway to Casa Grande.
- **Integrated Fixed Towers:** The Nation approved a lease of its lands to allow CBP to build an Integrated Fixed Tower (IFT) system that will include surveillance and sensor towers with associated access roads on the Nation's southern and eastern boundaries to detect and help interdict illegal entries.
- **Shadow Wolves, an ICE tactical patrol unit:** The Nation also has officers that are part of the Shadow Wolves, an ICE tactical patrol unit based on our Reservation which the Nation played a role in creating. The Shadow Wolves are the only Native American tracking unit in the country, and its officers are known for their ability to track and apprehend immigrants and drug smugglers, using traditional tracking methods. The Shadow Wolves have apprehended countless smugglers and seized thousands of pounds of illegal drugs.

ONGOING AND IMMINENT HARM TO SACRED SITES AND CULTURAL RESOURCES

Although the Nation has authorized these border security measures on our Tribal lands and we share the federal government's concerns about border security, we strongly oppose the construction of a border wall on our southern boundary. A wall is extremely expensive for the American taxpayer, is ineffective in remote geographic areas like ours, and is highly destructive to the religious, cultural and environmental resources on which our members rely and which make our ancestral lands sacred to our people. Ongoing construction of the wall already has and will continue to disturb and destroy culturally significant sites and cultural resources, tribal archeological resources, and sacred sites and desecrate human remains.

The Nation has detailed the negative impacts of the border wall construction that currently is underway in Arizona, which DHS is calling Tucson Sector Projects 1, 2 and 3, and Yuma Sector 3, in several amicus briefs that the Nation has filed in litigation challenging construction of the border wall.² Tucson Sector Projects 1 and 2 involve construction of a 43-mile long, 30-foot high concrete-

² See, e.g., *Sierra Club and Southern Border Communities Coalition v. Donald J. Trump*, No. 4:19-cv-00892-HSG, Amicus Curiae Brief of Tohono O'odham Nation in Support of Plaintiff's Motion for Supplemental Preliminary Injunction (June 18, 2019, N.D. Ca.) (Dkt. No. 172); Amicus Curiae Brief of Tohono O'odham Nation in Support of Plaintiff's Motion for Partial Summary Judgment (October 18, 2019) (Dkt. No. 215).

filled steel bollard fence (pedestrian barrier or wall) to replace existing vehicle barriers and pedestrian fencing near the Lukeville Port of Entry. The Yuma Sector Project contemplates over 30 additional miles, connecting with these projects, and extending through Cabeza Prieta National Wildlife Refuge and Organ Pipe Cactus National Monument, and ending less than two miles from the western boundary of the Nation's Reservation. Similar construction is moving forward to the east of the Nation's Reservation in Tucson Sector Project 3, which includes the San Bernardino National Wildlife Refuge. These projects have caused and will continue to cause significant and irreparable harm to cultural and natural resources of vital importance to the Nation, including damage to those resources from construction and associated impacts off the reservation, as well as damage caused by increased migrant traffic and interdiction on our Tribal lands.

The federal government itself acknowledged the importance of the Nation's interest in the areas now impacted by ongoing and contemplated wall construction for the Tucson and Yuma Sector Projects. For example, the National Park Service confirmed in its General Management Plan for the Organ Pipe Cactus National Monument the importance of Quitobaquito Springs to the Nation, which is located about 200 yards from the border and which is an important part of the O'odham salt pilgrimage every year:

There are 11 springs in the monument, eight of which are located at Quitobaquito, by far the largest source of water. The pond and dam at Quitobaquito were constructed in 1860, and the resulting body of water is one of the largest oases in the Sonoran Desert. The site is also sacred to the O'odham, who have used the water from this spring for all of their residence in the area.

...

There still exist sites within the monument which are sacred to the O'odham, including Quitobaquito Springs ... *Even to the present day, the O'odham continue to visit the monument to collect sacred water from the Springs, to gather medicinal plants, and to harvest the fruit of the organ pipe and saguaro cactus.*³

The Park Service also has recognized that there are O'odham burial sites within Quitobaquito.⁴ In October 2019, the National Park Service notified the Nation that it had found a human bone fragment near Quitobaquito Springs, underscoring that it is a resting place for our ancestors. Yet despite the federal government's documented recognition of Quitobaquito Springs as a site sacred to the Nation, and despite the Nation's longstanding relationship with CBP, federal contractors working on the Tucson Sector border wall recently bulldozed and bladed a large area near

³ U.S. National Park Service, *Organ Pipe Cactus National Monument, Final General Management Plan, Development Concept Plans, Environmental Impact Statement* (Feb. 1997), at 30, 33, available at <https://www.nps.gov/orpi/learn/management/upload/fingmp.pdf>.

⁴ *Id.* at 158, citing Anderson, Keith M., Bell, Fillman and Stewart, Yvonne G., *Quitobaquito: A Sand Papago Cemetery*, *Kiva*, 47, no 4 (Summer, 1982) at 221-22; *see also* Bell, Fillman, Anderson, Keith M. and Stewart, Yvonne G., *The Quitobaquito Cemetery and Its History*, U.S. National Park Service, Western Archeological Center (Dec. 1980), available at <http://npshistory.com/series/anthropology/wacc/quitobaquito/report.pdf>.

Quitobaquito Springs, destroying a burial site that the Nation had sought to protect and irreparably damaging the most unique and significant oasis in the Sonoran Desert. There was no advance consultation about the destruction of this site, no advance notice given, and no effort to mitigate or avoid the irreparable damage done to this sacred site.

Earlier this month, CBP contractors also conducted blasting in support of wall construction efforts at another culturally important site within Organ Pipe Cactus National Monument known as Monument Hill.⁵ Monument Hill was historically used for religious ceremonies by the Hia-C'ed O'odham (with whom the Nation has a shared ancestry). It is the site of historical battles involving the O'odham and Apache and is believed to be the final resting place for many tribal ancestors, as recovered bone fragments there attest. CBP undertook this action despite the fact that on multiple occasions last year the Nation expressed its concerns, and in December 2019, CBP and other federal officials met with the Nation's Tribal Historic Preservation Officer and staff, who explained the significance of Monument Hill and conveyed the Nation's concerns about damage from the planned wall construction. Nevertheless, CBP completely ignored the Nation's concerns and suggestions for mitigating potential impacts from the wall construction, and failed to even notify the Nation of its plans to blast Monument Hill until the day that the blasting occurred.

This disrespect for our sacred sites and their desecration at the hands of our federal government is deeply painful. These sites are not only sacred to the Nation – they are a part of our shared cultural heritage as United States citizens. As Americans, we all should be horrified that the federal government has so little respect for our religious and cultural values, and does not appear to have any intention of slowing down enough to understand or avoid the harm it is causing.

In response to the concerns raised in the press and by environmental groups about the blasting at Monument Hill, CBP stated that it had conducted unspecified “surveys” and found no cultural or historical sites within the project area (defined as the 60-foot wide area of land adjacent to the border called the Roosevelt Reservation)⁶ -- but this statement is entirely inconsistent with the information regarding bone fragments and the ceremonial significance of Monument Hill that was provided to CBP by the Nation's staff. CBP also said that it had an “environmental monitor” in attendance to ensure that work would stop if any “unidentified culturally sensitive artifacts” were found during the blasting. But the fact is that CBP has one monitor in place for the entirety of Organ Pipe Cactus National Monument, and there are multiple crews working on clearing and constructing the wall at different locations along the border within the Monument, making it extremely unlikely that one monitor can adequately cover all the locations. Nor is it clear that the monitor was aware of the significance of Monument Hill nor likely that he could identify human

⁵ See Firozi, Paulina, The Washington Post, *Sacred Native American Burial Sites are being Blown Up for Trump's Border Wall, Lawmaker Says* (Feb. 9, 2020), available at <https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites/>.

⁶ Carranza, Rafael, The Republic, *No Cultural Sites Found Where Crews are Blasting Sacred Mountain for Border Wall, Officials Say* (Feb. 13, 2020), available at <https://www.azcentral.com/story/news/politics/border-issues/2020/02/13/customs-border-protection-no-cultural-sites-near-blasting-border-wall-tohono-oodham-nation/4743103002/>.

bone fragments should any be recovered during the blasting -- bone fragments typically require additional testing to determine whether they are human or animal.

CBP's claims also are completely at odds with the results of a July 2019 National Park Service survey, which identified five new archeological sites (of pre-contact Native American artifacts) and a large number of additional archeological resources within the 60-foot wide federal easement along the border in Organ Pipe. The survey noted that many existing archeological sites will be impacted or destroyed by the border wall construction, and highlighted that many areas along the Organ Pipe border remain unsurveyed - making consultation and careful surveying critical before additional construction occurs.⁷

But such care and consultation seem extremely unlikely, as the federal government continues to plow full steam ahead with construction of the border wall, with no apparent concern for tribal culture or religious sites. Indeed, a similar fate likely awaits many other of the Nation's cultural and sacred sites, including a burial site immediately adjacent to the border and another site called Las Playas, both located in Cabeza Prieta National Wildlife Refuge.⁸ These and other sites of significance to the Nation, including some in the immediate vicinity of Tucson Sector Project 3 in the San Bernardino Valley, have been documented in other federal reports, although these areas are less well surveyed so the potential for destruction of cultural and natural resources by construction of a border wall is high.⁹ But there is little question that the ongoing construction of 30-foot high steel bollard wall in this area will have serious negative impacts, destroying tribal culture and sacred sites. Finally, while the focus of this hearing is on sacred sites, I must underscore as well the environmental damage that ongoing wall construction is wreaking on wildlife and trees, cacti, and

⁷ Veech, Andrew S., *Archeological Survey of 18.2 Kilometers (11.3 Miles) of the U.S.-Mexico International Border, Organ Pipe Cactus National Monument, Pima County, Arizona*, U.S. National Park Service, Intermountain Region Archeology Program (July 2019), available at <https://games-cdn.washingtonpost.com/notes/prod/default/documents/cbd7ef6a-3b5b-4608-9913-4d488464823b/note/7a429f63-9e46-41fa-afeb-c8e238fcd8bb.pdf> (discovery of five new archeological sites and 55 isolated finds; recommending additional evaluation of sites, noting that 17 identified archeological sites will be destroyed by the border wall construction, and that many areas along the border within the Monument remain unsurveyed).

⁸ Carranza, Rafael, The Republic, *Tohono O'odham Historic Sites at Risk as Border Wall Construction Advances in Arizona* (Jan. 20, 2020), available at <https://www.azcentral.com/story/news/local/pinal/2020/01/21/tohono-oodham-historic-sites-risk-over-border-wall-construction/4527025002/>.

⁹ Fish, Paul R.; Fish, Suzanne K.; Madsen, John H., *Prehistory and early history of the Malpai Borderlands: Archaeological synthesis and recommendations*, U.S. Department of Agriculture, Forest Service (2006) at 29-30, available at https://www.fs.fed.us/rm/pubs/rmrs_gtr176.pdf; U.S. Fish and Wildlife Service, *Cabeza Prieta National Wildlife Refuge: Comprehensive Conservation Plan, Wilderness Stewardship Plan and Environmental Impact Statement* (Aug. 2006) at 172, 586, available at <https://www.fws.gov/uploadedFiles/CPNWREIS.pdf>; U.S. Fish and Wildlife Service, *Environmental Assessment of the Malpai Borderlands Habitat Conservation Plan* (July 26, 2008) at 17, available at <https://www.fws.gov/southwest/es/arizona/Documents/HCPs/Malpai/MBHCP%20EA%20w%20FONSI.pdf>.

other plants of documented significance to the Nation. Also adversely affected are vitally important sources of water, and we are deeply concerned about flooding in those areas where construction occurs.¹⁰ All for the sake of a vanity project that will not effectively secure the border.

FORMAL GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH THE NATION IS REQUIRED

The federal government's actions are even more offensive because it has completely ignored its trust responsibility to tribes and its legal obligation to consult with the Nation regarding ongoing and planned construction of the border wall -- *before* decisions are made about construction that will impact tribal resources and lands. Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provides the Secretary of DHS with exceptionally broad authority to "waive all legal requirements" he determines are necessary to ensure expeditious construction of border barriers and roads. *See* 8 U.S.C. §1701 note. In 2008, DHS issued a waiver that covers a large portion of the southern border in California, New Mexico, Texas and Arizona, including the Tohono O'odham Nation's border with Mexico. *See* 73 Fed. Reg. 19087 (April 8, 2008) (correction). In 2019, DHS issued additional waivers covering the area of the border where the Tucson Sector Projects are underway. *See* 84 Fed. Reg. 21798 (May 15, 2019). In fact, this Administration has issued multiple waivers to facilitate construction of the border wall -- seventeen times in the last two and half years. As a result, DHS has been given a complete pass to entirely ignore virtually all potentially applicable federal environmental, cultural and religious protection laws, and all federal, state or other laws, regulations and legal requirements deriving from or related to the subject of those federal laws. *Id.* at 19080. As you know, with its aggressive raiding of other federal agency budgets, DHS is also now ignoring the budget limitations Congress placed on this construction.

However, IIRIRA also requires DHS to consult with Indian tribes, the Department of the Interior, state and local governments and property owners "to minimize the impact on the environment, culture, commerce and quality of life" of the construction of the border wall. IIRIRA Section 102(b)(1)(C). To date, DHS has not complied with this statutory directive, and has failed to engage in any formal government-to-government consultation with the Nation regarding the ongoing construction of the border wall and the serious harm that it is causing to the Nation. Although CBP has engaged in telephonic conversations and meetings with the Nation, primarily with the Nation's staff rather than its leadership, these actions do not constitute the government-to-government consultation that is required by law. The failure to engage in formal consultation with tribal governments before decisions are made that will affect tribal rights and interests violates not just IIRIRA, but Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments" (Nov. 6, 2000), and the DHS Tribal Consultation Policy (Sections II.B. and III.A), as well as the federal government's general trust obligation to respect tribal sovereignty and engage with tribes on a government-to-government basis.

In November 2019, the Nation wrote a letter to CBP requesting that CBP engage in the statutorily- and administratively-required consultation and proposed several mitigation measures (including a buffer zone around Quitobaquito Springs) to address the harms that were occurring to the Nation's resources as a result of the Tucson Sector wall construction. In its January 2020 response to the Nation's letter, CBP declined all of the Nation's requests -- for information, for a

¹⁰ *See Sierra Club, Amicus Curiae Brief of Tohono O'odham Nation at 7-8.*

schedule, and for mitigation.¹¹ In the letter, CBP also declined to engage in formal government-to-government consultation with the Nation prior to taking border wall construction actions impacting the Nation -- while at the same time suggesting that it valued the ongoing communication between the Nation and CBP. Those communications are valuable, but meaningful consultation must be a two-way street. CBP cannot simply ignore the Nation's concerns or proposed mitigation measures, and turn around and bulldoze sacred sites, destroy cultural resources, and deplete precious groundwater -- that is far from the consultation that is required by the law.

Furthermore, because the reprogrammed funding originally appropriated to the Department of the Defense (DOD) is being used to fund the ongoing construction in the Tucson and Yuma Sectors, additional consultation requirements are at issue. Section 8141 of the FY 2019 DOD Appropriations Act prohibits the use of funding made available under the Act in contravention of Executive Order 13175 (requiring tribal consultation) and the FY 2020 DOD Appropriations Act contains a substantively identical provision in Section 8129. In addition, DOD has its own tribal consultation policy pursuant to Executive Order 13175 that requires DOD to engage in meaningful consultation with tribes whenever an action has the potential to significantly affect Indian lands, tribal rights, and protected tribal resources (whether such resources are located on or off Indian lands), and requires that such consultation be completed before implementation of the proposed action impacting the affected tribe. DOD Instruction 4710.02 (Sept. 24, 2018).

In contravention of the FY 2019 and 2020 DOD Appropriations Acts and its own consultation policy, *to date DOD has not conducted any government-to-government consultation with the Nation*. On February 7, 2020, the Nation wrote a letter to Secretary of Defense Mark Esper requesting that DOD immediately engage in government-to-government consultation with the Nation consistent with the FY 2019 and FY 2020 DOD Appropriations Acts and the DOD tribal consultation policy and that no DOD funds be expended on border barrier construction impacting the Nation until consultation has occurred. We have not yet received a response.

DHS (and DOD) must engage in a more thorough and substantive consultation and review process that is respectful of our government-to-government relationship, and that recognizes the Tohono O'odham Nation's unique history and relationship to these lands and resources. Meaningful consultation requires DHS and DOD to consider the information provided by the Nation before proceeding to construct border barriers that damage and destroy our sacred sites and cultural resources, and before making any decision about what type of border security measures are most appropriate in and around our ancestral homelands. Although DHS has committed to "formal, government-to-government consultation with the Tohono O'odham Nation prior to taking actions that may impact the tribe and its members in Arizona" as required by the law and its tribal consultation policy, DHS currently is giving little more than lip service to consultation. DHS and DOD must engage in formal, government-to-government consultation before proceeding further with border wall construction that irreparably harms tribal cultural resources and sacred sites, and as a consequence, harms the O'odham and harms all of us, by losing part of our cultural heritage.

¹¹ CBP did agree not to drill any new wells within five miles of Quitobaquito, but the Nation remains concerned that the continued use of water in connection with construction of the border wall will deplete groundwater resources in the area on which the Nation relies.

CONCLUSION

Two things are clear to us about the law as it currently stands. One is that Congress must withdraw or at least better limit DHS's authority to unilaterally give itself waivers to circumvent every federal statute on the books -- this authority is dangerously broad, and has allowed DHS nearly unchallengeable, dictatorial authority to run roughshod over the rights of the Tohono O'odham and every other border community in the United States. The federal government has abused its authority, trampling the rights of local communities and local governments. This kind of non-challengeable authority may be tolerated in a totalitarian state, but it does not sit well among the statutes that are supposed to protect our freedoms in the United States of America.

The second is that Chairman Grijalva's introduction in the last Congress of legislation that would put into federal law meaningful consultation requirements through his proposed Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act (RESPECT Act), and this Subcommittee's hearing on similar draft legislation last April, is right on target and desperately needed. The fact is that while the federal agencies pay lip service to tribal consultation, there is precious little way for tribal governments to enforce current consultation policies when the agencies choose to ignore them. Enactment of a statutory consultation requirement would help put an end to the federal government ignoring our concerns, our expertise, and our right to self-determination. The federal government owes our government, and the governments of the local communities and states around us, more respect. *We want to thank Chairmen Grijalva and Gallego for their efforts to resolve this continuing problem.*

O'odham have lived in what is now Arizona and Mexico long before the border was drawn through our lands. It should be no surprise that we have deep religious, cultural and historic ties to these lands where we have so long lived. The federal government's continued destruction of sites and resources that have religious and cultural significance to our people amounts to the bulldozing of our church grounds and our civilian and military cemeteries. For us, this is no different than DHS building a 30 foot wall through Arlington Cemetery, through the grounds of the National Cathedral, or through George Washington's Mt. Vernon.

Preservation of the history and culture of the Tohono O'odham people is not just important to the Tohono O'odham Nation -- it is important to the preservation of the history and culture of the United States as a whole. As we preserve Lincoln's house in Springfield Illinois, as we preserve Civil War battlefields and cemeteries, and as we honor holy places of worship everywhere in the United States, we also must preserve and protect such places of significance to the O'odham, the first Americans in this part of our great country.

The Nation appreciates the Committee's interest in understanding more about the harms to our cultural resources and sacred sites that already have occurred, and that will continue to occur as the result of the construction of a border wall within our ancestral territory. We welcome a continued dialogue with the federal government on these issues, and we urge Congress to exert its authority to protect our sacred sites.