

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

January 7, 2020

The Hon. Chad F. Wolf
Acting Secretary
Office of the Executive Secretary
MS 0525
Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC 20528-0525

Dear Secretary Wolf:

I am writing to express serious concerns regarding border wall construction in the Tohono O'odham Nation. The Tohono O'odham Nation's reservation is located within my district, along 62 miles of the U.S.-Mexico border. Members of the Tohono O'odham Nation recently informed me that the Department of Homeland Security (DHS) is not respecting tribal lands and sacred sites as they proceed with border wall plans and construction. I strongly urge DHS to conduct meaningful government-to-government consultation with the Tohono O'odham Nation about the DHS's planned border wall construction.

As outlined in Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments,"¹ regular and meaningful tribal consultation is essential to maintaining and strengthening government-to-government relationships with tribes. Consultation also helps to ensure that federal projects do not harm important natural or cultural resources. DHS's own Tribal Consultation Policy² reiterates these principles.

Pursuant to the REAL ID Act of 2005, the DHS Secretary has the authority to waive "all legal requirements," like tribal consultation, when constructing the border wall and roads. This broad, sweeping authority provisioned to a single member of the executive branch has been highly debated and even deemed unconstitutional.³ Nevertheless, this administration continues to use its waiver authority at an unprecedented and irresponsible rate; of the 21 times the waiver has been enacted since 2005, 16 of those instances have occurred in the last two and a half years. Using this

¹ Executive Office of the President, Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," (Nov. 6, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

² U.S. Department of Homeland Security, "Tribal Consultation Policy," (Last published date May 9, 2019), https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consultation%20Policy%20Final%20PDF_0.pdf

³ Jenny Neely, "Over the line: Homeland Security's unconstitutional authority to waive all legal requirements for the purpose of building border infrastructure," ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY, (May, 11, 2011).

waiver to avoid essential federal government responsibilities to tribes is unnecessary, reckless, and counter to the Department's own policy.

The Tohono O'odham Nation existed long before the U.S.-Mexico border was established and has deep historical ties to the region, along with cultural ties to the land, plants, cultural relics and sacred animals within it. Given the immense cultural significance of these lands and the importance of maintaining strong government-to-government relations with the Nation, any proposed border wall construction must include regular and meaningful tribal consultation that addresses, at a minimum, the following issues:

- **Location and Schedule for Border Wall Construction.** The Department of Homeland Security has repeatedly recognized that the wildlife refuges and wilderness areas impacted by border wall construction are extraordinarily environmentally sensitive, as well as rich with archaeological and cultural resources. It is my understanding that the Tohono O'odham Nation has requested, but has not yet received, information about the location of and schedules for the planned border wall construction. Given the value of the irreplaceable resources in the area, and the tribe's connection to them, meaningful government-to-government consultation with the Nation must include construction plans including the precise location and timing of planned construction.
- **Quitobaquito Springs Buffer Zone.** The planned border wall construction runs within a few hundred feet of the Quitobaquito Springs in Organ Pipe Cactus National Monument, one of the only sources of freshwater in the Sonoran borderlands region. Quitobaquito Springs is within the Tohono O'odham Nation's original aboriginal territory, and is of significant religious, culture and historical importance to the Nation. Meaningful government-to-government consultation with the Nation must include the potential use of buffer zones as alternatives to wall construction, the use of additional resource monitors, and limitations on right-of-way grading in the area.
- **Groundwater Protection.** Water resources are vital to the sensitive Sonoran ecosystem, particularly at Quitobaquito Springs. In addition, the U.S. federal government is trustee to significant groundwater resources underlying the Tohono O'odham Nation's reservation, adjacent to the ongoing construction. It is my understanding that DHS is allowing the withdrawal of thousands of gallons of groundwater per day on federal lands in Arizona in order to facilitate border wall construction. Indeed, recent reports show video of a truck drilling for groundwater in close proximity to Quitobaquito Springs even after the U.S. Fish and Wildlife Service recommended not to drill within 10 miles east of the Springs.⁴ Meaningful government-

⁴ Ariana Brocious, "Video shows groundwater pumping for border wall near Quitobaquito Springs," ARIZONA PUBLIC MEDIA, (Dec. 17, 2019), <https://news.azpm.org/p/news-topical-nature/2019/12/17/163197-video-shows-groundwater-pumping-for-border-wall-near-quitobaquito-springs/>.

to-government consultation with the Nation must include data on the federal government's groundwater use, as well as potential alternative off-site sources of water.

- **Wildlife migration issues.** The planned border wall construction will hinder or eliminate longstanding wildlife migration patterns, including species of significant cultural importance to the Tohono O'odham Nation. Current border wall designs only provide small openings, preventing migration of larger animals such as jaguar, deer, and pronghorn antelope. Meaningful government-to-government consultation with the Tohono O'odham Nation must include border wall designs and construction as they pertain to wildlife migration.

Regular and meaningful consultation with the Tohono O'odham Nation on the construction of a border wall and other issues identified by the tribe is essential to maintaining strong government-to-government relationships and fulfilling the federal government's trust responsibility. Please provide an update on the issues raised in this letter, including DHS's efforts to consult with the Nation and ensure protections for their natural and cultural resources by January 28, 2020. If you have any questions about this request, please contact our Professional Staff in the Subcommittee for Indigenous Peoples of the United States at (202) 225-6065.

Sincerely,



Raúl M. Grijalva
Chairman
House Committee on Natural Resources

Enclosed:

1. Letter from the Tohono O'odham Nation to the U.S. Border Patrol, Tucson Sector



Tohono O'odham Nation
Office of the
Chairman and Vice Chairwoman



November 13, 2019

VIA EMAIL

Roy Villareal, Chief Patrol Agent
U.S. Border Patrol, Tucson Sector
Roy.D.Villareal@cbp.dhs.gov

Re: Follow up to the October 25, 2019 conference call with the Tohono O'odham Nation

Dear Chief Villareal,

As Chairman of the Tohono O'odham Nation, I write to thank you for participating in the conference call on Friday, October 25, 2019, with officials from the Nation, USCBP, USACE and DHS to hear the Nation's concerns about the ongoing and planned construction of a 30-foot-tall barrier along the U.S.-Mexico boundary in Organ Pipe Cactus National Monument, the Cabeza Prieta National Wildlife Refuge, the San Bernardino National Wildlife Refuge and the Barry M. Goldwater Range. As we expressed during the call, and as the Nation has repeatedly argued in court filings and in other forums, the Nation categorically opposes the barrier construction projects, because they directly harm and threaten both the lands currently reserved for the Nation (which include 62 miles of the international boundary) and its ancestral lands that extend along the international boundary in Arizona from the San Bernardino National Wildlife Refuge to the Colorado River. In addition to expressing the Nation's general opposition to the projects, we also asked specific questions and made detailed requests for adjustments to the projects to mitigate the damage that the projects will cause. The staff members from CBP, USACE, and DHS who were on the call did not have the authority to answer those questions or respond to the requests made by the Nation. Accordingly, I am restating the requests made by the Nation during the October 25 conference call, and requesting a response, because we did not receive a response from those on the call.

- 1. The Nation requests a map showing the specific lands that are subject to the waivers issued pursuant to IIRIRA and related statutes.**

Under the Native American Graves Protection and Repatriation Act (NAGPRA), the federal government is required to notify the Nation concerning the discovery of cultural items, including

human remains, consult with the Nation concerning the disposition of such items, and is prohibited from excavating or removing items in contravention of the Act. The Secretary of Homeland Security has purported to waive, for the purpose of border wall construction, the applicability of NAGPRA, the Archaeological Resources Protection Act (ARPA), and other federal statutes pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as amended, within certain "project areas," which are defined with linear metes and bounds descriptions using Border Monument references, but without any further geographical description. The federal government readily acknowledges that the national monuments and wildlife refuges, as well as Goldwater Air Force Range, that are subject to border barrier construction are saturated with archaeological, cultural, and historic resources. The federal government further acknowledges the Nation's significant interest in these resources. Because the IIRIRA waiver implicates the Nation's rights to protect its ancestral lands and resources under NAGPRA, ARPA, and other federal statutes and regulations, it is critical to the Nation to know exactly where those rights purportedly have been waived, and where they have not been waived.

The construction activities in Organ Pipe Cactus National Monument already have resulted in the inadvertent discovery of human remains that would otherwise be protected by NAGPRA, ARPA, and other federal statutes and regulations. Attached is a copy of the October 24, 2019, notice that the Nation received from Organ Pipe National Monument Superintendent about that discovery, which describes bone material situated near Quitobaquito Spring, both within the 60 foot Roosevelt Reservation and outside of that reservation. The October 24 notice appears to assume that the "project area" comprises the Roosevelt Reservation. However, when the Nation asked participants in the October 25 conference call to confirm the geographical extent of the IIRIRA waiver and its applicability to existing or future funerary or cultural item discoveries (and requesting a map showing exactly where the waiver is operative), the Nation was surprised to learn that no such map exists. Instead, CPB repeatedly reiterated its vague position that the waiver operates not only east-west along the international boundary between the points described in the notice, but also "in the vicinity" (and to the north) of those points. CBP, DHS nor USACE were able to identify for the Nation to what area "in the vicinity" actually refers.

As you are aware, in June the National Park Service prepared a report of an archaeological survey of a little over eleven miles of the southern boundary of Organ Pipe National Monument. The survey discovered five new archaeological sites, as well as more than fifty "isolated" finds outside of these concentrated areas, revealing evidence of historic or pre-contact habitation. The report recommends two of these sites for listing on the National Register of Historic Places (NRHP) due to their integrity and their ability to yield important information about trade patterns and inhabitation of the region. Per the report, additional evaluation of the other sites is needed before an NRHP recommendation can be made. Importantly, the report notes that while some areas within the Monument were previously surveyed, many areas remain unsurveyed and unexplored, and that significant previously unrecorded archeological resources will be destroyed by border wall construction. These findings are consistent with earlier federal reports that note that significant portions of Organ Pipe National Monument, Cabeza Prieta National Wildlife

Refuge, and the Malpai Borderlands area of the San Bernardino Valley are un- or under-surveyed.

As construction activities move west from Lukeville, road access for CBP's contractors becomes another major issue that is not addressed in the IIRIRA waiver notices. In Cabeza Prieta and the BMGR there are few, if any, access roads to the border from the north. The Nation has not received any information about CBP's plans for road access to construction sites in that area, but the potential impacts of new road construction or road improvements on cultural resources are of great concern. The few archaeological surveys that have been performed in this region show that cultural resources are present throughout the entire region.

Given the extent of the planned construction, future discovery of cultural items impacted by this construction is inevitable. It is therefore imperative for both the Tohono O'odham Nation and federal agencies to know which laws apply to which land along the border. Accordingly, the Tohono O'odham Nation requests a map of the project areas within Arizona showing exactly where the IIRIRA waiver operates. If such a map cannot be immediately provided, the Nation requests that construction cease and that no additional ground-disturbing activities take place until the Department identifies where the waiver operates.

2. The Nation requests that "buffer areas" be created around Quitobaquito and other significant cultural sites and that cultural resources not be destroyed for road-widening within the Roosevelt Reservation.

During the October 25 conference call, the Nation proposed mitigation strategies to avoid or reduce impacts to cultural sites. The agency participants who remained on the call at that time did not have the authority to respond to the Nation's requests. As we have made clear, the construction of a 30-foot wall through the Quitobaquito area of Organ Pipe Cactus National Monument is a direct assault on a sacred site of the Nation. Sites of similar importance are located along the U.S.-Mexico boundary. There simply is no way that a 30-foot wall can be constructed at these sites without destroying their essential character. The Nation accordingly requests that the plans for construction be modified to create buffer zones of at least one mile east and west of Quitobaquito, Las Playas, Pinta Sands, the Tinaja Atlas mountains, the San Pedro river riparian area, and the San Bernardino National Wildlife Refuge, within which alternative security measures, rather than wall construction, will be used. The Nation believes that avoidance of these sites is the only acceptable mitigation strategy.

Likewise, CBP's current plans include blading and grading the entire 60 foot width of the Roosevelt reservation. Currently, there is only a 22-foot-wide dirt road throughout most of the Roosevelt reservation. In Organ Pipe Cactus National Monument alone, 8 archaeological sites and 29 isolated artifacts already have been identified within the Roosevelt Reservation. CBP's current plan is to perform limited surface data recovery prior to blading and grading, destroying the sites and ignoring the subsurface resources. The Nation requests that CBP adopt a different mitigation plan. More specifically, in the areas where archaeological sites and isolated occurrences are present, CBP should utilize the existing 22 foot road in place to avoid ground

disturbing activities. This will better protect cultural resources and not disturb existing vegetation.

The Nation is also concerned about the monitoring of construction activities for impacts on archaeological and cultural resources. Currently, the Nation is aware of one archaeological monitor who is assigned to the Lukeville area who partially monitors construction. However, the Nation is also aware that construction activities are occurring simultaneously at multiple sites, leaving many sites unmonitored for extended periods of time. The Nation requests that the number of monitors be increased to insure that an archaeological resources monitor is present at each location where and when ground-disturbing activities are taking place, and that qualified members of the Nation be employed as monitors.

3. The Nation requests that CBP stop using groundwater for wall construction.

During the October 25 conference call, the Nation learned that 84,000 gallons of groundwater per day is being used to construct wall segments in the San Bernardino National Wildlife Refuge, and the Nation understands that similar amounts are being used in Organ Pipe Cactus National Monument and will be required in Cabeza Prieta and in the BMGR. CBP cannot continue to allow such a massive waste of the region's most precious resource to occur.

Before the conference call, the Nation had not received any information from CBP suggesting that the wall construction projects would require groundwater in quantities of that magnitude. Although Director Paul Enriquez verbally assured the Nation that no wells will be drilled within 5 miles of Quitobaquito, the Nation is deeply concerned about the regional impacts that these projects will have on groundwater resources.

In the Sonoran desert nothing holds more value than water, and groundwater is the most important source of water. The Nation, therefore, asks that CBP immediately cease using local wells for construction of the projects and direct its contractors to identify and use an acceptable off-site source of water.

4. The border barrier must allow for wildlife migration.

In addition to the destruction of cultural resources and the depletion of groundwater, the Nation also is deeply concerned about the impacts of the barrier on wildlife, include species of cultural importance to the Nation such as the jaguar, deer and pronghorn antelope. As currently designed, the barrier will only include some small openings that may permit small mammals, rodents and reptiles to pass through the barrier. Larger animals will have their territories and migration routes entirely cut off. The region-wide impacts to wildlife will be severe and unacceptable. CBP can mitigate these impacts by engineering wildlife crossings as part of the barrier project. If the buffer zones around cultural sites requested by the Nation are agreed to, the potential impacts to wildlife migration will be significantly mitigated, requiring fewer wildlife crossings in other areas. The Nation requests that CBP address the impacts to wildlife by, at a minimum, designing and constructing the barriers to include wildlife crossings for large animals.

5. The Nation requests a construction schedule.

Finally, during the October 25 conference call the Nation asked for a copy of the construction schedule for the projects so that we can know where and when construction activities will be taking place. This information is important to the Nation not only for purposes of monitoring construction but also for working with the Nation's members who use border areas for cultural practices. A representative from USACE stated that a schedule is in the process of being developed to share with affected partners. The Nation would like to have such a schedule available as soon as is possible, and we are surprised that no such schedule exists even though construction has already commenced.

6. The Nation requests formal consultation.

Finally, and as you are aware, CBP has a legal obligation to consult with the Nation regarding the ongoing and planned construction of the border wall in Organ Pipe, Cabeza Prieta, San Bernardino National Wildlife Refuge and the Barry M. Goldwater Range, and that obligation has not been fulfilled. IIRIRA Section 102(b)(1)(C) provides that DHS *shall* consult with Interior, Indian tribes, state and local governments and property owners to minimize impacts on the environment, culture, commerce and quality of life for those living near the border. The DHS tribal consultation policy, issued pursuant to Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments" (Nov. 6, 2000), requires that DHS, to the greatest extent practicable, engage in consultation with affected tribal governments prior to adopting policies or taking actions that have tribal implications, *i.e.*, a substantial direct effect on the trust interests or other rights of the tribe, and will incorporate the input received from tribal governments into its decision-making process. While CBP has solicited input from the general public on the Arizona border infrastructure project, and has engaged in limited email and telephonic discussions with the Nation (primarily with staff), these actions do not constitute government-to-government consultation with the Nation's leadership as required by the statutory and administrative authorities just cited, particularly in light of the potentially serious harms to the Nation's resources that will result from construction of a border wall. Post-decisional communications between DHS and the Nation about construction in progress do not satisfy the requirement for consultation. Nor do such actions constitute the formal consultation that DHS headquarters repeatedly has promised would occur before border wall construction would be undertaken in areas that affect the Nation and its resources. The failure to engage in formal consultation with the Nation and other tribal governments before decisions are made that will affect tribal rights and interests violates not just IIRIRA, Executive Order No. 13175, and the DHS Tribal Consultation Policy, but also runs afoul of the federal government's general trust obligation to respect tribal sovereignty and engage with tribes on a government-to-government basis.

The Nation appreciates its longstanding relationship with CBP, and the Nation will continue to work with CBP to use reasonable, cost-effective means to protect and secure the international boundary. But the Nation also strongly believes that a one-size-fits-all approach will not work in the border areas discussed in this letter. Accordingly the Nation asks that you consider and respond to the requests made herein in consideration of the Tohono O'odham

Nation's ancient relationship to this land, and in consideration of its historical relationship with CBP -- one that will continue well into the future.

I look forward to receiving your responses to the Nation's requests.

Sincerely



Ned Norris, Jr., Chairman
Tohono O'odham Nation

cc:

Tim Quinn, Executive Director, CBP Intergovernmental Public Liason
David Munro, Director, DHS Tribal Governmental Affairs
Paul Enriquez, Director, CBP Border Wall Program Management Office
Mr. Scott Stonum, Superintendent, Organ Pipe National Monument
Bill Radke, Refuge Manager, San Bernardino National Wildlife Refuge
Sid Slone, Refuge Manager, Cabeza Prieta National Wildlife Refuge
Chas Buchanan, Director, 56th Range Management Office, Luke Air Force Base