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DESTROYING SACRED SITES AND ERASING TRIBAL CULTURE: THE TRUMP ADMINISTRATION'S CONSTRUCTION OF THE BORDER WALL

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

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OVERSIGHT HEARING ON DESTROYING SACRED SITES AND ERASING TRIBAL CULTURE: THE TRUMP ADMINISTRATION'S CONSTRUCTION OF THE BORDER WALL

Wednesday, February 26, 2020
U.S. House of Representatives
Subcommittee for Indigenous Peoples of the United States
Committee on Natural Resources
Washington, DC

The Subcommittee met, pursuant to notice, at 3:06 p.m., in room 1324, Longworth House Office Building, Hon. Ruben Gallego [Chairman of the Subcommittee] presiding.

Present: Representatives Gallego, Soto, Haaland, García, Grijalva, Neguse; Bishop and Gosar.

Mr. GALLEGO. Thank you for everyone being here. We will start with opening statements on my behalf, and we will not move to any type of questions until our Ranking Member shows up out of respect for the process here. And I am sure they will be joining us soon.

STATEMENT OF THE HON. RUBEN GALLEGO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GALLEGO. Good afternoon. Today's oversight hearing is entitled, "Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall." Before I begin, I want to thank our witnesses here today for taking time to testify about the reckless, harmful destruction of sacred places along our southern border. As we will learn today, this Administration has blasted and bulldozed multiple sites, including burial grounds, along the southern border that are sacred to the religion and culture of the Tohono O'odham Nation without any kind of meaningful tribal consultation, and often without advanced notice.

So far in my tenure as Chairman of the Subcommittee, I have been appalled at the utter lack of regard this Administration has for upholding our legal trust responsibilities to Indian tribes to protect their sovereignty, their way of life and, yes, their sacred sites.

Today, we have reached a new low. Not only has this Administration been negligent in its trust responsibility by destroying sacred sites, but DHS and the White House refused our invitation to be here today to explain their actions. In fact, we only learned at 5 p.m. last night, less than 24 hours in advance, that the Interior Department would be sending a witness today.

According to the testimony received last night, the Interior Department will, in part, argue today that blasting sacred sites and cutting down hundred-year-old Saguaro cacti to build a border wall will actually "help us maintain the character of these lands and resources." The Administration's gaslighting argument of "we

have to destroy it in order to protect it" is as plainly ridiculous as it is offensive. It is insult to this Committee and to the tribal leaders and advocates who have traveled here today to testify.

This Administration apparently has no shame for the damage that it is causing to tribal burial grounds. For the Tohono O'odham Nation, this is the equivalent of bulldozing through parts of Arlington National Cemetery. They are so shameless that, as we speak, CBP is holding a press event in Arizona entitled, "Monument Hill Controlled Detonation and Briefing," which features a briefing from CBP personnel and a live detonation on Monument Hill.

So, rather than sit before this Subcommittee, the Department of Homeland Security is detonating sacred burial grounds for a captive audience. I want to be clear—when sacred cultural sites are destroyed in international conflict, it is considered a war crime.

Earlier this year, we saw President Trump repeatedly threaten to destroy sacred sites in Iran, to the condemnation of many, including myself, in this country.

Well, today, as we speak, this White House is doing just that on American soil. Places like Monument Hill and the Quitobaquito Springs have been held sacred by the O'odham people since before the United States existed. You will hear from experts and the Tribe itself today that these physical places are critical to their culture and religion. It is not enough to do a survey of a cultural site only to blast it away. It is not enough to remove bone fragments that are found and return them to the Tribe when the burial site itself is being destroyed. And it is not enough to shoot an e-mail to Chairman Norris mere hours before you bulldoze a site his people have held sacred since time immemorial.

These actions are disgusting as well as a flagrant violation of the requirement to consult tribes before decisions are made and to hold in trust the interests and well-being of tribal nations. This behavior is not reflective of the America I have fought for, and I cannot imagine what I would do if I knew that anyone was desecrating the burial grounds of the men and women I fought with at Arlington.

It is this Committee's mission to shine a light on these atrocities and fight like hell to prevent them from continuing. That is why I am grateful to have legal experts, tribal leaders, and advocates here today. I greatly look forward to your testimony.

[The prepared statement of Mr. Gallego follows:]

PREPARED STATEMENT OF THE HON. RUBEN GALLEGO, CHAIR, SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

Good afternoon. Today's oversight hearing is entitled "Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall."

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According to the testimony we received last night, the Interior Department will, in part, argue today that blasting sacred sites and cutting down hundred-year-old Saguaro cacti to build a border wall will actually, "help us maintain the character of these lands and resources." The Administration's gaslighting argument of "we have to destroy it, in order to protect it" is as plainly ridiculous as it is offensive. It is insult to this Committee, and to the tribal leaders and advocates who traveled here today to testify.

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These actions are disgusting as well as a flagrant violation of the requirement to consult with tribes before decisions are made and to hold in trust the interest and well-being of Tribal Nations. This behavior is not reflective of the America I have fought for, and I cannot imagine what I would do if I knew that anyone was desecrating the burial grounds of the men and women I fought with at Arlington Cemetery.

It is this Committee's mission to shine a light on these atrocities and fight like hell to prevent them from continuing. That's why I am grateful to the legal experts, tribal leaders, and advocates here today.

I greatly look forward to your testimony.

Mr. GALLEGO. I now recognize the Ranking Member, Representative Gosar, for any opening remarks.

STATEMENT OF THE HON. PAUL A. GOSAR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Dr. GOSAR. Thank you, Mr. Chairman. I have stated before that the most important task of the Federal Government is to keep its citizens safe. The flow of drugs and people across our southern border is extremely dangerous, and our Border Patrol is stretched too thin after years of neglect by the previous administrations.

I know too well that violence in countries south of us drives illegal migration, but those who promote open borders here are doing a favor to the drug cartels, terrorists, and human traffickers.

I have supported legislation that provides comprehensive border security by fully funding a border wall and ensuring that we are not only stopping dangerous criminals from coming here illegally, but we are also bringing criminals to justice that are already here.

I do, however, believe that we should always be respectful in cases where border security interests intersect with tribal interests.

No one in this room believes that there should ever be a desecration of cultural artifacts or remains. I am disappointed when illegal activities have caused cultural sites to be lost.

As has been mentioned, broad waiver authority has been exercised in certain circumstances with the construction of the border wall, but the Department of the Interior has still been using and adhering to processes found in the Native American Graves Protection and Repatriation Act or NAGPRA.

Information from the Department of the Interior shows that two bone fragments to date have been discovered in the project area, dating from the Archaic to Historic time periods. Both are in the process of being returned to the nearest tribe, the Tohono O'odham. It is my understanding that the water monitoring systems have been put in place to ensure levels remain the same at Quitobaquito Springs.

Mr. GALLEGO. I think you did pretty good. Yes, I am impressed.

Dr. GOSAR. I had one try at that.

Illegal migration and the flow of drugs has a monumental impact on our communities. We must work together to help stop the harm to tribes, the American people, and to the environment.

I want to thank the witnesses for being here today and look forward to their testimony, especially the Chairman. We just saw each other earlier last week so 2 weeks in a row.

[The prepared statement of Dr. Gosar follows:]

PREPARED STATEMENT OF THE HON. PAUL A. GOSAR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Thank you, Mr. Chairman.

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Illegal migration and the flow of drugs has a monumental impact on our communities. We must work together to help stop the harm to tribes, the American people, and the environment.

I want to thank the witnesses for being here today and look forward to their testimony.

Thank you, Mr. Chairman.

Dr. GOSAR. With that, I yield back to you, Mr. Chairman.

Mr. GALLEGO. Thank you, Ranking Member. I now yield time to Chairman Grijalva for opening remarks.

STATEMENT OF THE HON. RAÚL M. GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Thank you very much, Mr. Chairman, and Ranking Member for this important hearing and also thanking the witnesses for traveling here today and I am going to echo the sentiments of Chair Gallego by expressing my deep disappointment that the White House and the Department of Homeland Security did not send representatives in a timely manner and did not respond early enough to this hearing.

Last month, on Martin Luther King Jr. Day, the Tohono O'odham Nation Chairman Norris led me on a tour of sacred sites located in the Organ Pipe National Monument. These sites were areas of significant cultural and historic importance to the Nation, including other tribes in the state of Arizona. As I speak, you will see photos from our visit.

The first site we visited was Monument Hill. This is an area sacred to the O'odham people because it is a place where they respectfully placed Apache warrior remains following a raid. This hill is first documented and mentioned in Father Kino's letters when there was nothing there, no communities, nothing, except the O'odham people.

To my knowledge, the Tribe notified the Administration that this area was of cultural significance, yet the grading and widening of the road was still conducted, as you can see in this photo. DHS mentioned that they would back off on developing the hill, but the work is still being done. Two weeks following the visit at Monument Hill on February 6, 2020, I received word that the Department of Homeland Security began using explosives on the hill to construct its wall, and we have a video of that as well.

[Video shown.]

Mr. GRIJALVA. The second place we visited was Quitobaquito Springs, an area mentioned in historic papers as early as the 17th century. Not only does this area host sacred spring water, it is also the location of a village and burial grounds of ancestral O'odham people. Tribal archaeologists showed me bone fragments in this area.

On January 27, 2020, just 7 days following the visit, the Department of Homeland Security bulldozed the artifacts area that held sacred seashells, bone fragments, and pottery fragments. Thousands of years of history and cultural significance disappeared.

Since my visit, 50 percent of the sacred sites identified by the Nation have been destroyed. The fact that the Federal Government has continued to blast this area with human bone fragments of several tribes in the 21st century is, quite frankly, barbarous.

What would normally be considered a war crime for destroying cultural sites in another country is now considered status quo of this President and his administration and this needs to stop. In fact, just last week, the Department of Homeland Security spokeswoman stated, "The United States is in a border emergency. We

are building more wall faster than ever before." The Department is not consulting the Tribe faster than it did before.

It is clear this Administration will not uphold its trust responsibility to tribes. We see that with the inconsistencies with each agency's tribal consultation policy and their lack of implementing some form of communication with tribes, especially when it comes to major projects that drastically impact sacred sites.

As a country, we should be completely appalled by the steps this Administration has taken to desecrate the sacred sites. And it has been completed when this hideous wall is being erected.

I look forward to hearing from our witnesses today, Mr. Chairman, and getting some answers as to why this Administration continues to treat tribes as second-class citizens on the lands they have owned and lived on before the very development of this country.

[The prepared statement of Mr. Grijalva follows:]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, CHAIR, COMMITTEE ON NATURAL RESOURCES

Good afternoon, everyone.

I'd like to thank our witnesses for traveling here today and echo the sentiments of Chair Gallego by expressing my deep disappointment that the White House and the Department of Homeland Security did not send representatives to answer the most important question for this hearing and future hearings involving Indian Country—When will you stop destroying sacred sites?

Last month, on Martin Luther King, Jr. Day the Tohono O'odham Nation Chairman Norris led me on a tour of sacred sites located in Organ Pipe National Monument. These sites were areas of significant cultural and historical importance to the Tohono O'odham people including other tribes in the state of Arizona. As I speak, you'll see photos from our visit.

The first site we visited was Monument Hill. This is an area sacred to the O'odham people because it is a place where they respectfully placed Apache warriors following a raid. This hill is first documented and mentioned in Father Kino's letters when there was no Sonoita.

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The second place we visited was just outside Quitobaquito Springs, an area mentioned in historical papers as early as the 17th century. Not only does this area host sacred spring water, it was also the location of a village and burial grounds for the Hia-C'ed O'odham. Tribal archeologists showed me bone fragments in this area.

On January 27, 2020—just 7 days following my visit the Department of Homeland Security bulldozed the artifacts area that held sacred seashells, bone fragments, and pottery fragments. Thousands of years of history and cultural significance gone.

Since my visit, 50 percent of the sacred sites identified by the Nation has been destroyed. The fact that the Federal Government is continuing to blast this area with human bone fragments of several tribes in the 21st century is barbarous.

What would normally be considered a war crime for destroying cultural sites in another country is NOW considered the status quo of this President and his Administration. This needs to stop. In fact, just last week the Department of Homeland Security spokeswoman stated, "The United States is in a border emergency, we are building more wall faster than ever before." The Department is not consulting the Tribe faster than it was before.

It is clear this Administration will not uphold its trust responsibility for tribes. We see that with inconsistencies with each agency's tribal consultation policy and their lack of implementing some form of communication with tribes especially when it comes to major projects that drastically impact sacred sites.

As a country we should be completely appalled by the steps this Administration has taken to ensure the desecration of sacred sites is completed before its hideous wall is erected.

I look forward to hearing from our witnesses today and getting some answers to why this Administration continues to treat tribes as second-class citizens in the lands they owned before the very development of this country.

Thank you.

Mr. GRIJALVA. With that, Mr. Chairman, I yield back and appreciate the time.

Mr. GALLEGO. Thank you, Mr. Chairman. We will now turn to our witnesses. I would like to transition to our first panel of witnesses for today. Under our Committee Rules, oral statements are limited to 5 minutes, but you may submit a longer statement for the record if you choose.

When you begin, the lights on the witness table will turn green. After 4 minutes, the yellow light will come on. Your time will have expired when the red light comes on, and I will ask you to please wrap up your statement. I will also allow the entire panel to testify before we question the witnesses. The Chair now recognizes the Hon. Ned Norris, the Chairman of the Tohono O'odham Nation of Arizona.

STATEMENT OF HON. NED NORRIS, JR., CHAIRMAN, TOHONO O'ODHAM NATION, SELLS, ARIZONA

Mr. NORRIS. Good afternoon, Chairman Gallego, Ranking Member Cook, and distinguished members of this Subcommittee. It is an honor to have been invited to testify before you today. It is my great honor also to recognize Committee Chairman Raúl 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 tribal citizens.

We have lived in what is now Arizona and Northern Mexico since time immemorial. With no consideration for our sovereign rights or the welfare of our people, the international boundary was drawn through our ancestral territory in 1854, separating our people and our lands. As a result, our reservation shares a 62-mile border with Mexico, the longest along the southern border of any tribe in the United States.

Seventeen O'odham communities with approximately 2,000 tribal citizens are still located in our historical homelands in Mexico. O'odham on both sides of the border share the same language, culture, religion, and history. Our citizens cross to participate in pilgrimages and ceremonies at important religious and cultural sites on both sides of the border to visit family and friends and to pay respects to love ones buried in cemeteries on either side.

Today, only a portion of our ancestral territory is encompassed within the boundaries of our current reservation. Originally, our homelands ranged well beyond these boundaries and included what is now Organ Pipe Cactus National Monument, Cabeza Prieta National Wildlife Refuge, and the San Bernardino National Wildlife Refuge.

The Nation has significant and well-documented connection to these lands and the religious, cultural, and natural resources

located there, including at Quitobaquito Springs and at Monument Hill. The National Park Service, the Federal agency with management authority at the Organ Pipe National Monument, has acknowledged that Quitobaquito Springs is sacred to the Nation.

Nevertheless, CBP contractors working on the border wall recently bulldozed a large area near Quitobaquito Springs, destroying burial grounds. Another culturally important site is Monument Hill, which is the final resting place for many of our ancestors, as recovered bone fragments from these show. Earlier this month, CBP contractors conducted blasting there, notifying the Nation of its plans only the day the blasting occurred. And I am sorry to report that just 2 hours ago, CBP conducted another controlled detonation at Monument Hill, the Federal Government's continued destruction of our religious and cultural resources and nothing less but bulldozing of our church grounds and our cemeteries. For us, this is no different from DHS building a 30-foot wall along Arlington Cemetery or through the grounds of the National Cathedral. These destructive actions would not have occurred without the waiver provision in Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act.

That allows DHS to waive any law it wishes in order to expedite border barrier construction. We urge Congress to withdraw or at least limit DHS waiver authority that is dangerously broad and has allowed DHS nearly dictatorial authority to run roughshod over the rights of the Tohono O'odham and other border communities in the United States. There is no acceptable reason why border communities should not be protected by the same laws and have the same ability to challenge agency action as Americans living in every other part of the United States.

Making matters worse for us is the lack of an enforceable tribal consultation requirement. While agencies pay lip service to consultation, tribal governments have little ability to enforce consultation polities when Federal agencies choose to ignore them. A statutory consultation requirement would help put an end to the frequent disregard for our concerns, our expertise, and our right to self-determination. The Federal Government owes our government and the governments of local border communities more respect. We wish to thank Chairman Grijalva and Subcommittee Chairman Gallego for their efforts to resolve this continuing problem with their introduction in the last Congress of the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act and for recently holding a hearing on similar draft legislation.

Preservation of history and culture of O'odham 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 we preserve Civil War battlefields and cemeteries and honor holy places of worship everywhere in the United States, we also must preserve and protect such places of significance to the O'odham and first Americans in this part of our country. The Nation thanks you for shining a light on an ongoing destruction of our cultural resources and sacred sites. I am happy to answer any questions.

[The prepared statement of Mr. Norris follows:]

PREPARED STATEMENT OF THE HONORABLE NED NORRIS, JR., CHAIRMAN, THE TOHONO O'ODHAM NATION OF ARIZONA

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 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.

[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 solutions reconciling the conservation of biodiversity and sustainable use. http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/.

The Nation also has long-standing, 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 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-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 2 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

[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).

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, 8 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.
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> . . .
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> 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 long-standing relationship with CBP, Federal contractors working on the Tucson Sector border wall recently bulldozed and bladed a large area near 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.

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[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.

[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/.

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 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 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.

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[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/.

[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 5 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.

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

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—17 times in the last 2½ 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 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 ground water—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 consulta-

[11] CBP did agree not to drill any new wells within 5 miles of Quitobaquito, but the Nation remains concerned that the continued use of water in connection with construction of the border wall will deplete ground water resources in the area on which the Nation relies.

tion 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.

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.

QUESTIONS SUBMITTED FOR THE RECORD TO THE HONORABLE NED NORRIS, JR., THE TOHONO O'ODHAM NATION

Questions Submitted by Representative Grijalva

Question 1. You mention the connections that the Nation continues to have with its ancestral homelands in Mexico, despite the presence of the border.

1a. Has the border ever prevented tribal members from returning to these homelands or engaging in ceremonies?

Answer. Yes, tribal members have been detained and deported by Border Patrol for attempting to travel through our traditional lands, as part of cultural and religious traditions. Federal authorities also have prevented tribal members from transporting raw materials and goods essential to our spirituality, economy, and traditional culture, and have confiscated cultural and religious items, such as feathers, pine leaves or sweet grass.

Question 2. In your testimony you mention my bill, the RESPECT Act. In your opinion, how would laws like the RESPECT Act prevent situations like this from occurring again in the future?

Answer. Laws like the RESPECT Act would help to prevent the destruction of sacred sites from occurring again in the future by mandating meaningful, government-to-government consultation with tribal nations and further clarifying what that consultation should look like. The Act expresses the sense of Congress that effective and meaningful consultation requires a "two-way exchange of information", consideration "of each other's opinions", and "seeking of agreement on how to proceed concerning the issues at hand"; and that consultation "constitutes more than simply notifying an Indian Tribe about a planned undertaking." The Act also would require that consultation be completed before any Federal funds are expended for activities that may have substantial direct impacts on tribal lands or interests, including tribal cultural practices or areas of cultural or religious importance. In addition to requiring consultation, the Act would provide a judicial remedy in the event a Federal agency fails to engage in meaningful consultation with tribal governments.

With respect to the ongoing border wall construction, the Federal Government has not engaged in meaningful government-to-government consultation with the Nation, nor does there appear to be an effective remedy to address the Federal Government's complete disregard of the Nation's sovereignty, cultural resources and sacred sites. The RESPECT Act, or similar laws, would be an important first step in requiring the Federal Government to live up to its trust responsibility and its legal obligation to consult with the Nation (and other affected tribes), consider the Nation's concerns and reach agreement on how to address and mitigate those concerns before undertaking actions that destroy tribal culture, archeological resources, and sacred sites, as well as harming the environment and natural resources.

Questions Submitted by Representative Gallego

Question 1. Your testimony begins with a reflection upon the rich history of the Tohono O'odham Nation and its pre-existence to the U.S.-Mexico border.

1a. What difficulties were created when the international boundary was drawn through your ancestral homelands in 1854?

Answer. When the international boundary was drawn through the Nation's ancestral lands in 1854, there was no consideration of the Nation's sovereign or historical rights or the interests of our people. The boundary separated our lands and our people—separating us from other tribal members who share the same language, history and religion. Although the border initially was not strictly enforced, it created a colonial obstacle to our traditional way of life, interfering with our ability to collect traditional foods and materials important to our culture, and to visit family members and participate in ceremonies and pilgrimages that take place at sacred

sites in Mexico. The division of O'odham lands also resulted in an artificial division of O'odham society, and the O'odham bands are now broken up into four federally recognized tribes: the Tohono O'odham Nation, the Gila River Indian Community, the Ak-Chin Indian Community and the Salt River (Pima Maricopa) Indian community, which are politically and geographically distinct.

1b. How does the border impact the daily lives of the Nation's members?

Answer. The border impacts the daily lives of the Nation's members in many significant ways. Vehicle barriers and a road runs along the border for the entire 62 miles of the reservation border, which is patrolled by the U.S. Border Patrol. O'odham members must produce border identification cards to cross into the United States. On many occasions, Border Patrol has detained and deported Tohono O'odham members for attempting to travel through our traditional lands, engaging in migratory traditions that are an important part of our culture, religion and economy. The border is an artificial barrier to our freedom to traverse our lands, and makes it more difficult to visit family and friends who live in Mexico, and participate in pilgrimages and ceremonies at important cultural and religious sites in Mexico.

The border also impairs our ability to collect traditional foods and materials needed to sustain our culture. U.S. Customs has prevented tribal members from transporting raw materials and goods essential to our spirituality, economy, and traditional culture, and has confiscated cultural and religious items, such as feathers, pine leaves or sweet grass. The vehicle barriers prevent cattle from grazing or reaching watering holes across the border, and increased Border Patrol traffic often results in our livestock being hit and killed, as well as increased damage to our roads, which BIA does not have the funding to repair.

Finally, our members who live near the border are directly affected by border-related criminal activity, including drug trafficking and human smuggling. Particularly in remote areas, our Tohono O'odham Police Department (TOPD) officers are the first and often the only responders to border-related crime on the reservation. TOPD spends about a third of its budget on border security, and the Nation spends more than $3 million annually to help meet the United States' border security responsibilities. There is limited Federal funding available to assist with these responsibilities, and the Nation is responsible for investigating immigrant deaths and funding autopsies at a cost of $2,600 per autopsy, plus supplies and detective investigative hours, with no assistance from DHS. The Nation also absorbs the cost of reclaiming damages to its natural resources, including vehicles and trash abandoned by smugglers, and the control of wildland fires resulting from cross-border illegal activity.

Question 2. If possible, can you also speak to the success and resiliency of the Nation's High Intensity Drug Trafficking (HIDTA) Task Force and Shadow Wolves?

2a. Would you agree that the establishment of these unique and successful programs speak to the importance of tribal self-governance?

Answer. The TOPD-led HIDTA Task Force is a multi-agency drug smuggling task force—the only tribe-led HIDTA Task Force in the country—and is staffed by TOPD detectives, ICE special agents, Border Patrol agents, and the FBI. The Task Force has been extremely successful in combatting drug smuggling on the Nation's lands, and is responsible for seizing huge quantities of drugs, most recently methamphetamine and counterfeit Oxycodone pills containing Fentanyl. In 2018, the Nation's Task Force Commander W. Rodney Irby received an award as the HIDTA National Outstanding Task Force Commander.

The Shadow Wolves, which Congress established in 1972, is an ICE tactical patrol unit based on our Reservation, which the Nation played a role in creating. The Shadow Wolves is the only Native American tracking unit in the country, and has members from Tohono O'odham as well as other tribes. The Shadow Wolves are known for their ability to track and apprehend immigrants and drug smugglers, using traditional tracking methods. The unit has apprehended countless smugglers and seized thousands of pounds of illegal drugs.

The creation and success of both the TOPD-led High Intensity Drug Trafficking (HIDTA) Task Force and the Shadow Wolves illustrate the importance of tribal self-governance, as well as the importance of listening to the voices and experience of tribal citizens and including them in border security efforts.

2b. Considering the Nation's extensive work with border patrol initiatives, how effective do you believe this new border wall will be?

Answer. Based on our long-standing experience on the front lines of border security, the new border wall is not an effective way to secure the border. Building

a wall (also called pedestrian fencing) is impractical or impossible in many areas where there are natural boundary features that already prevent or make border crossing extremely unlikely. In areas where the border wall has been constructed, migrants have cut through, climbed over and tunneled under the wall. This is particularly likely in remote areas. The barrier is not a barrier at all—it is merely an obstacle that can be overcome with household tools found at retail stores or rope. Recently, in late January, during construction of a portion of the wall, a gust of wind blew the wall over into the Mexico side of the border. Border wall construction near the Lukeville port of entry also has resulted in dangerous flooding and the build-up of debris and environmental damage during monsoon season. Federal funding (and taxpayer dollars) would be much better spent on technology-based solutions and additional tribal and Federal law enforcement personnel and equipment (such as Integrated Fixed Towers, which we recently have permitted to be installed on the reservation along the border).

Question 3. Please provide a record of communications and meetings between the United States Customs and Border Protection (CBP) and the National Park Service (NPS) with the Tohono O'odham Nation regarding the border wall construction activities within Organ Pipe National Monument, including the activities on Monument Hill and Quitobaquito Springs.

Answer. Below is a list of the communications and meetings between CBP/DHS, NPS and Tohono O'odham Nation leadership regarding border wall construction within Organ Pipe National Monument. There were additional communications between the Nation's staff and CBP and NPS personnel which are not included below. We do not consider staff communications or the communications listed below to be the kind of meaningful government-to-government consultation with consideration of tribal input that is required by IIRIRA Section 102(b)(1)(C), by the DHS tribal consultation policy, by Executive Order No. 13175, and by the Federal Government's trust obligation to respect tribal sovereignty and engage with tribes on a government-to-government basis. That is clear from the fact that despite these communications, CBP ignored the Nation's concerns and proposed mitigation measures (as well as a July 2019 NPS survey noting that existing archeological sites will be impacted or destroyed by the planned border wall construction in Organ Pipe), bulldozing the area at Quitobaquito and blasting Monument Hill. The Nation has requested formal consultation on multiple occasions, including in its November 2019 letter to CBP (see below). Those requests have been declined.

1. October 25, 2019—Conference Call Meeting with the Nation and representatives from DHS, CBP, and Army COE regarding the border wall. Federal representatives were not authorized to respond to requests or answer most questions posed by the Chairman.
2. November 13, 2019—Chairman Norris letter to CBP, Chief Patrol Agent, Roy Villareal (cc's: DHS, CBP, NPS, FWS, USAF) as follow up to October 25 meeting, making requests in writing and requesting formal consultation.
3. November 25, 2019—E-mail containing short letter from Villareal acknowledging relationship with the Nation, notifying us that a response to the November 13 letter is being prepared.
4. January 10, 2020—CBP letter in response to the November 13 letter from the Chairman, reiterating waiver of various laws, effectively denying most of the requests made in Chairman's letter except for an agreement not to drill any new wells within 5 miles of Quitobaquito.
5. November 21, 2019—Letter from NPS to provide notice of bone fragments that must be removed immediately due to the likelihood of area being disturbed as soon as December 6, 2019 due to construction-related activity.
6. February 4, 2020—E-mail from CBP Agent Rafael Castillo, notifying the Chairman that blasting within Roosevelt Reservation at Monument Mountain would begin "today."
7. February 4, 2020—Chairman response to R. Castillo e-mail informing him that this is the first time we have been notified by Castillo that this would be taking place and we did not have notice of the blasting that occurred or the blading (bulldozing) that occurred at Quitobaquito earlier. [No response received from Castillo]
8. February 7, 2020—Letter from the Chairman to Department of Defense regarding tribal consultation required under DOD Appropriations Act. [No response]

9. February 12, 2020—Chairman Norris meeting with Tim Quinn, Mary Hyland, Bronia Ashford, CBP Intergovernmental Affairs re: concerns about destruction of cultural resources at Quitobaquito Springs and Monument Hill, and lack of consultation (Washington, DC).

Meetings with CBP not specifically related to the border wall:

1. July 2, 2019—Meet and Greet with R. Castillo.
2. October 16, 2019—Tucson Sector Border Patrol meeting.
3. March 4, 2020—CBP meeting with Chief Villareal and R. Castillo.

Questions Submitted by Representative Soto

Question 1. Your testimony references Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the waiver authority granted to DHS within it.

1a. How would the Nation's sacred sites be better protected if the laws waived by DHS were still applicable? For example, would your sacred sites be better protected if NEPA and NAGPRA still held authority?

Answer. The Nation's sacred sites would be better protected if the 40-plus environmental laws that have been waived by DHS in the Tucson Sector were still applicable because such laws provide processes that Federal agencies must follow when Federal actions impact tribal nations, their lands, and their cultural and natural resources, and these processes protect these lands and resources from such impacts. For example, NEPA requires the Federal Government to thoroughly consider and assess the potential impacts of proposed Federal actions on the human environment, as well as a reasonable range of alternatives and practicable mitigation measures that would avoid or limit potential harms to the environment, before deciding which action to take and what mitigation measures will be implemented. NAGPRA protects burial and archaeological sites on Federal and tribal lands and includes requirements for the treatment, repatriation, and disposition of remains, funerary and sacred objects, and objects of cultural patrimony. NAGRPA is intended to ensure that Federal agencies provide written documentation of cultural items and consult with tribes to repatriate cultural items. NAGPRA protects Native American burial sites (such as Quitobaquito Springs and Monument Hill) and prevents the removal of cultural items without proper review and permitting.

The Nation's sacred sites would have received greater protection if DHS would have been required to comply with NEPA and NAGPRA, because these statutes would have required a thorough review of existing archeological and cultural resources and sacred sites, including tribal consultation and participation, an evaluation of impacts to those resources, and consideration of practicable mitigation measures before construction activities were undertaken, as well as a process for consultation with the Nation and repatriation of any remains found during construction activities. Other statutes like the National Historic Preservation Act would have provided additional protections for cultural and natural resources.

1b. Do you believe border communities are being treated as second-class citizens, less protected by the laws of the United States than American citizens living in other parts of the Country?

Answer. Yes. The DHS authority to waive any and all laws to facilitate border barrier construction contained in IIRIRA Section 102(c) is far too broad, and allows DHS to ignore all potentially applicable Federal environmental, cultural and religious protection laws, as well as all Federal, state or other laws related to such laws. The over-reach of the law is further exacerbated by its severe limitation on the ability of those affected to challenge the waiver, limiting claims to those alleging a violation of the Constitution, which must be brought within a very short time period. As a result, DHS has virtually unchallengeable, dictatorial authority to run roughshod over the rights of the Tohono O'odham and every other border community in the United States. For that reason, we do believe that border communities are being treated as second-class citizens, and are less protected by the laws of the United States than American citizens living in other parts of the Country. No other segment of the United States population has been forced to surrender these legal rights and protections or live under these circumstances. For that reason, we strongly urge Congress to strike or at least seriously limit the waiver provision in the current law, and at a minimum, to require DHS to engage in a more thorough, meaningful consultation process that includes consideration of tribal input and mitigation.

Questions Submitted by Representative García

Question 1. Since the destruction of the Nation's sacred sites have been made public, have you received support from outside organizations or other tribal nations?

Answer. The Nation has received expressions of support from multiple tribal leaders, as well as the National Congress of American Indians (NCAI). After the Subcommittee hearing on February 26, NCAI issued a statement condemning the recent destruction of culturally significant sacred sites in Arizona resulting from border wall construction activities.

Mr. GALLEGO. Thank you, Chairman.

The Chair now recognizes the gentleman from Colorado, Mr. Neguse, so that he may introduce our next witness.

Mr. NEGUSE. Thank you, Mr. Chairman, for the opportunity to be able to introduce a constituent and a former professor of mine, Professor Sarah Krakoff, who is a professor at the University of Colorado School of Law, my alma mater. She is the Schaden Chair for Experiential Learning.

Her expertise in American Indian law, natural resources and public land law, as well as environmental justice is well-known. She has been a prolific writer on any number of those topics. She is a Yale and Berkeley graduate who clerked on the Ninth Circuit Court of Appeals, previously led the University of Colorado Law School's American Indian Law Clinic, and I can certainly attest to her leadership and passion on these issues.

And as a former student of hers, just very grateful for her to be here and offer her testimony. I am fairly certain I did well in her class, but I will let her clarify the record if that is not the case. So, thank you so much, Professor Krakoff, for joining us.

STATEMENT OF SARAH KRAKOFF, MOSES LASKY PROFESSOR OF LAW, UNIVERSITY OF COLORADO SCHOOL OF LAW, BOULDER, COLORADO

Ms. KRAKOFF. Thank you, Chairman Gallego, Ranking Member Gosar, members of the Subcommittee, and also Representative Neguse for that overly generous introduction. I hope you don't get me back with a few key questions like I did, perhaps, to you in law school.

I am really honored to be able to testify at this important hearing. My name is Sarah Krakoff, and I am a law professor at the University of Colorado. I hope my remarks will be of use to the Committee.

As Chairman Norris described, construction crews are blasting in Organ Pipe National Monument and have already destroyed Indigenous burial grounds. Many additional sites are at risk along the more than 1,900 miles of the U.S.-Mexico border. I would like to make two points about this. First, the Administration's approach to building the wall has disproportionate impacts on American Indian tribes because of their unique ties to Federal public lands.

Second, the damage is avoidable but is a predictable consequence of the Administration's sweeping waivers of Federal laws which deprive the Federal agencies, the tribes, and the American public of the information necessary to decide whether the benefits of the wall outweigh its human and environmental costs. With regard to the first point, tribes' historic territories extended well beyond their

current reservation boundaries. Tribes, therefore, have religious, cultural, and historic sites throughout Federal public lands. Hundreds of treaties, Federal laws, and executive orders recognize this by affirming that tribes have rights that extend beyond their current reservation boundaries.

Specific laws and policies would normally protect tribal rights on Federal public lands, including the following: the American Indian Religious Freedom Act which states that it is the policy of the United States to protect American Indians' inherent right of freedom to exercise their traditional religions, including access to sacred sites; the National Historic Preservation Act which protects traditional and cultural properties on Federal public lands; the Archaeological Resources Protection Act which requires permits for excavation or destruction of archaeological resources on public lands; and the Native American Graves Protection and Repatriation Act which provides protections for Native American burial and archaeological sites on public lands.

Two bedrock environmental statutes, the National Environmental Policy Act and the Endangered Species Act, would also normally protect tribes' and the public's interest in public lands. This leads to the second point. Why, despite all of these laws, are construction crews blasting in national monuments and wildlife preserves?

The answer is that the Secretary of Homeland Security has waived the application of dozens of laws, including all of those mentioned above. The Secretary's power comes from Section 102 of the REAL ID Act of 2005 which authorized the waiver of all laws that could impede the expeditious construction of barriers and fences. Initially, despite the breadth of the waiver power, the Secretary's authority was somewhat bounded by the fact that in the Secure Fence Act of 2006, Congress only authorized expenditures for roughly 700 miles of fences and barriers.

The Secretary's waivers could only extend to the areas that Congress had specifically authorized for construction. This is not to understate the human, environmental, and cultural impacts that resulted from those initial stretches of a border fence. They were considerable, including flooding of Nogales and other areas, deaths of rare and protected wildlife, and destruction of wildlife migration quarters.

But impacts from the pre-existing border fence will pale in comparison to the effects of the current Administration's indiscriminate use of waivers. For context, the Bush administration exercised the waiver four times for five projects. The Obama administration did not exercise the waiver at all. The Trump administration, acting without congressional authorization for its border wall, has already exercised the waiver provision 15 times. The waivers have covered between 29 and 37 statutes, including all of those listed above, as well as the Antiquities Act, the Wilderness Act, and the Federal Lands Policy and Management Act.

To summarize, the Administration is heedlessly destroying irreplaceable resources in which Native nations have unique interests by setting aside all of the legal protections that were carefully designed to protect tribes and all other Americans. None of this is necessary. Even if a border-long barrier were an important goal, it

could be completed without suspending all of our environmental and other protective laws, but it could not be completed on the Administration's political timetable.

The Federal Government has long recognized that its broad powers in Indian affairs are or should be accompanied by a corresponding solemn obligation to honor the rights and interests of the peoples who preceded us on the continent. Instead of furthering this trust obligation, the Administration is exercising its executive power in derogation of tribal rights. Thank you for the opportunity to testify. I look forward to any questions you may have.

[The prepared statement of Ms. Krakoff follows:]

PREPARED STATEMENT OF SARAH KRAKOFF, MOSES LASKY PROFESSOR, UNIVERSITY OF COLORADO LAW SCHOOL[1]

I would like to thank Chairman Grijalva, Chairman Gallego, and the members of the House Committee on Natural Resources and the Subcommittee for Indigenous Peoples of the United States for inviting me to testify at this important hearing on Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall. I am a law professor at the University of Colorado and I write and teach in the areas of public land law, American Indian law and natural resources law. I hope my remarks will be of use to the Committee.

As we speak, the Trump administration is pushing hard to construct as many miles of a border wall with Mexico as it can in advance of the presidential election in the fall. The costs of this headlong rush are significant. Construction crews are heedlessly blasting in Organ Pipe National Monument and have already destroyed burial grounds and archaeological sites. Many additional sites—including Quitobaquito Springs, a freshwater source that is on the Tohono O'odham Nation's sacred Salt Trail—are at risk. The National Park Service has documented at least 20 archeological sites in Organ Pipe National Monument that are vulnerable to the blasting and construction, and the Tohono O'odham Nation has confirmed that explosives would irrevocably harm sites sacred to the Tohono O'odham and other tribes.

These and other harms were avoidable. The Tohono O'odham Nation and other affected tribes have a myriad of legal rights to prevent just this sort of careless destruction. Before listing the laws and policies that apply specifically to the border wall context, I want to provide some general background about the legal status and rights of Native American nations, or American Indian tribes. There are 574 federally recognized tribes in the United States[2] that have direct government-to-government relationships with the Federal Government. As unique sovereigns under U.S. law, tribes have their own laws, their own legal systems, and a variety of unique rights that stem from their treaties and their historic status as governments that pre-dated the United States.[3] Any time we think about the rights of Native people and Native nations, we have to think about this unique body of law. Tribes have the right to govern their members and their territories. Hundreds of treaties, Federal laws, and executive orders also recognize that tribes have rights and interests that extend beyond their current reservation boundaries. The United States was once all Indian Country, and tribes therefore have sites of religious, historic, archeological, cultural, and spiritual significance on Federal public lands that are no longer within their current borders. This is true of the three tribes that straddle the U.S.-Mexico border—the Tohono O'odham Nation, the Kickapoo Traditional Tribe of Texas, and the Cocopah Indian Tribe—as well as many other tribes whose aboriginal lands comprise the U.S.-Mexico border territory.

In terms of laws and policies that would normally protect tribes from destruction of their religious, sacred, historic, and cultural sites, I will describe just a few prominent ones. The American Indian Religious Freedom Act, enacted in 1978, provides that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their

[1] Affiliation for identification purposes only; the views herein are my own and do not represent those of the University of Colorado.

[2] *See* Indian Entities Recognized by and eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 30, 2020).

[3] For a broad overview of tribal sovereign status and powers, *see* Cohen's Handbook of Federal Indian Law, Chs. 3–4 (2012 ed.)

traditional religions.], including . . . but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rights."[4] In 1996, to further the purposes of the Act on public lands specifically, President Clinton issued an executive order requiring all Federal lands agencies to "accommodate access to and ceremonial use of Indian sacred sites" and "avoid adversely affecting the physical integrity of such sacred sites."[5]

The National Historic Preservation Act[6] provides protection to tribes' traditional and cultural properties on Federal public lands and requires tribal consultation and intergovernmental partnerships to protect them. The Archaeological Resources Protect Act[7] requires permits for the excavation, removal, alteration, or destruction of archeological resources on public and tribal lands and facilitates intergovernmental coordination about archaeological resources. The Native American Graves Protection and Repatriation Act[8] provides protections for Native American burial and archaeological sites on Federal public and tribal lands, and includes rights regarding treatment, repatriation, and disposition of remains, funerary and sacred objects, and objects of cultural patrimony.

In addition, general environmental laws would, in normal circumstances, also require the Federal Government to consider and assess impacts of its proposed actions on the environment under the National Environmental Policy Act[9] and modify its actions so as to avoid harm to endangered and threatened species under the Endangered Species Act.[10]

So why, despite all of these laws and policies, are construction crews barreling and blasting through protected public lands, including wildlife refuges and national monuments, even as Tohono O'odham Nation Chairman Ned Norris Jr. stands by pointing to where the sites, springs, and sacred objects are? The answer is that the Secretary of Homeland Security has waived the application of dozens of Federal laws, including all of those mentioned above. The Secretary's power derives from section 102 of the Real ID Act, passed in 2005, which authorized the Secretary to waive all legal requirements that could impede the "expeditious construction" of barriers and limited the scope of judicial review to claims alleging constitutional violations.[11] The Secretary's waiver power, though substantively very broad, was nonetheless initially somewhat bounded by the fact that Congress only authorized expenditures for construction of roughly 700 miles of border fences and barriers in the Secure Fence Act of 2006.[12] The Secretary's waiver authority, in other words, could only extend to areas that Congress had specifically authorized and funded for barrier or fence construction. This is not to understate the unnecessary human, environmental, and cultural impacts that resulted from those initial stretches of a border fence. They were considerable, including flooding of Nogales and other areas, deaths of rare and protected wildlife, destruction of wildlife migration corridors, and severance of the homelands of Indian nations, including the Tohono O'odham and the Kickapoo.[13]

Still, those impacts might pale in comparison to the effects of the Trump administration's indiscriminate use of waivers to construct its wall. For context, the Bush administration exercised the waiver on four separate occasions to construct barriers and fences.[14] The Obama administration did not exercise the waiver at all. President Trump's executive order—supporting a wall across all 1,954 miles of the southern border—was signed on January 25, 2017, shortly after his inauguration.[15] Congress never authorized the wall's construction nor the funding for it. Instead the

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[4] 42 U.S.C. § 1996.

[5] Executive Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

[6] 16 U.S.C. § 470 et seq.

[7] 16 U.S.C. § 470aa et seq.

[8] 25 U.S.C. § 3001 et seq.

[9] National Environmental Policy Act, 16 U.S.C. §§ 1531–1544.

[10] Endangered Species Act, 42 U.S.C. §§ 4321–4370h.

[11] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109–13, 119 Stat. 302, § 102(c). The secretarial waiver was first enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 102(c) (September 30, 1996). The earlier version authorized the Attorney General to waive the Endangered Species Act and the National Environmental Policy Act. The Real ID Act substituted the Secretary of Homeland Security for the Attorney General and authorized the vastly expanded broader waiver.

[12] Pub. L. No. 109–367, 120 Stat. 2638.

[13] *See Environmental Impacts on the Border Wall*, David Roche, et al., 47 Envt'l. L. Rep. News & Analysis 10477 (2017).

[14] *See* Kenneth D. Madsen, *Department of Homeland Security Border Barriers Legal Waivers*, Available at: https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/2/14781/files/2019/10/waivers-DHS-poster_v306.pdf.

[15] Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

Trump administration unilaterally diverted defense spending to pay for the wall. Lawsuits challenging the diversion of funds have so far failed and the Administration is charging ahead without congressional approval or any apparent limitations or restraints of any kind. Since January 2017 the Trump administration has exercised the waiver provision 15 times. The waivers have covered lands in California, New Mexico, Texas, and Arizona, and typically apply to between 29 and 37 statutes, including all of those listed above as well as the Antiquities Act, the Wilderness Act, and the Federal Lands Policy & Management Act.[16]

In short, the Administration's fervor to get its wall in place has two destructive aspects. First, the Administration is blasting through all of the legal protections that were carefully designed to protect the rights and interests of tribes as well as all other Americans. And second, the Administration is heedlessly destroying irreplaceable cultural, spiritual, archeological, and ecological resources in which Native nations have unique interests, and that implicate all of us. None of this is necessary; there is no emergency rush to complete the wall across all 1,954 miles of the southern border. Even if a border-long barrier were an important and consensus-based goal, it could be completed without suspending all of our environmental and other protective laws. It just cannot be completed—consistent with the rights of American Indian tribes and many protective laws and policies—on the Administration's political timetable. It is not too late, however, to re-engage with the Tohono O'odham and other tribes and conduct serious government-to-government consultations that would avert further devastation to cultural, spiritual, and archeological sites. The extensive legal framework that recognizes the rights of Native nations is there; the Administration just has to choose not to eviscerate it.

QUESTIONS SUBMITTED FOR THE RECORD TO SARAH KRAKOFF, PROFESSOR OF LAW, UNIVERSITY OF COLORADO LAW SCHOOL, BOULDER, COLORADO

Questions Submitted by Representative Grijalva

Question 1. Your testimony states that this Administration's border wall project could very well be completed without "suspending all of our environmental and other protective laws."

1a. In your opinion, why might the Administration have chosen this destructive route for the wall's construction?

Answer. My best educated guess is that the Administration feels political pressure to complete at least portions of the wall before the 2020 election.

1b. Why waive these protective laws in the first place?

Answer. The reason to waive Federal laws that are designed to protect our heritage, resources, and environment is that it is faster to do so and it deprives opponents of the opportunity to obtain information about the negative impacts of a wall that might further slow or stall the process.

Questions Submitted by Representative Gallego

Question 1. You mention that this Administration is sidestepping tribal legal protections in its construction of the border wall and that this has implications for all Americans.

1a. Can you elaborate on that? What legal precedent is this Administration setting?

Answer. The Administration is exercising sweeping waivers of statutes that protect the rights of American Indian tribes specifically as well as the interests of all Americans in that the Administration has decided not to apply dozens of Federal laws to its process of siting and constructing the border wall. These laws include, but are not limited to: The National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, among others.[1] The Administration's use of the waiver, which derives from section 102 of the Real ID Act,[2] sets a dangerous prece-

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[16] *See id.*

[1] For a chart listing all waivers and all laws to which they have applied, see Kenneth D. Madsen, *Department of Homeland Security Border Barriers Legal Waivers*, Available at: https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/2/14781/files/2019/10/waivers-DHS-poster_v306.pdf.

[2] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109–13, 119 Stat. 302, § 102(c). The secretarial waiver was

Continued

dent because it is outside of any congressional authorization to construct the wall and therefore has no parameters. The Administration is acting on solely on its own accord, without congressional support, buy-in, or limitations, and is doing so in a manner that allows for little to no assessment or accountability of its actions that effect the environment, the Native Nations on the border, or even the cost-effectiveness of this massive construction project.

Questions Submitted by Representative Haaland

Question 1. Your testimony references legislation that is currently in place to protect the cultural rights of Tribal Nations, such as the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA).

1a. Based on these laws, would you say that tribal consultation is an accepted precedent in this country?

Answer. Yes, the Federal Government's obligation to consult with tribes is recognized in many statutes as well as several executive orders. (Executive Order 13,175, to list just one example, requires consultation with tribes on any Federal policy that has tribal implications.) Tribal consultation is a well-established precedent based on many specific sources of law as well as the United States' trust obligation to American Indian tribes, which extends back to the formation of the republic.

1b. How does the Administration's use of the REAL ID Act of 2005's waiver authority compare to this precedent?

Answer. The Administration's sweeping and unprecedented use of the Real ID Act's waiver is novel and lacks public vetting as well as congressional support. It is an expedient exercise of executive power as compared to a long-standing Federal obligation.

Questions Submitted by Representative García

Question 1. Based on your experience in the legal and academic fields, what solutions are needed to prevent situations like this from occurring again?

Answer. The solution is fairly simple: do not waive dozens of Federal laws when engaging in massive and expensive construction projects on Federal public lands. Follow existing laws requiring: meaningful tribal consultation; environmental impact assessment; archeological, historic, and cultural site review; and protection of endangered and threatened species.

Mr. GALLEGO. Thank you. The Chair now recognizes Ms. Shannon Keller O'Loughlin, the Executive Director of the Association on American Indian Affairs.

STATEMENT OF SHANNON KELLER O'LOUGHLIN, EXECUTIVE DIRECTOR, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, ROCKVILLE, MARYLAND

Ms. O'LOUGHLIN. Good afternoon, Chairman Gallego, and the distinguished members of the Subcommittee. Thank you for allowing the Association on American Indian Affairs to testify today. I am Shannon Keller O'Loughlin, the Executive Director and the Attorney for the Association, and I am a citizen of the Choctaw Nation of Oklahoma.

Since its founding in 1922, the Association on American Indian Affairs has been protecting sacred sites all over Indian Country. Sacred sites and ceremonial grounds are found everywhere in this Nation that we share together. Some are within the exterior bound-

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first enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 102(c) (September 30, 1996). The earlier version authorized the Attorney General to waive the Endangered Species Act and the National Environmental Policy Act. The Real ID Act substituted the Secretary of Homeland Security for the Attorney General and authorized the vastly expanded broader waiver.

aries of tribal reservations, but most are located on Federal, state, and privately-owned lands.

Sacred sites include areas commemorating important tribal events and tribal people, much like the Jefferson Memorial, or burial areas like the Arlington Cemetery or a church cemetery, and other sites where the presence of our creators live and speak to us, just like your brick-and-mortar churches. In the first 150 years of U.S. governance, political leaders understood that in order to assimilate and civilize Indian tribes that you must separate us from our sacred places, from our beliefs, and outlaw our languages and our cultural and religious practices. And you did that. You criminalized our religious and traditional practices and even held back rations if we were caught practicing our dances.

The United States also allowed its officials and others to take over our homelands, to desecrate burial and ceremonial places, steal our ancestors' remains and their burial belongings and take important cultural patrimony and sacred objects. Despite more than a century of this religious persecution, we continue our ceremonial lives at sacred sites all over this shared country. And the ability to do so stems from the perseverance of tribes and their citizens and the Federal Government's ongoing recognition of its legal and moral responsibilities to protect sacred sites and American Indian religious freedoms.

Congress investigated the United States' attack on Indian religious freedom back in 1978 and declared then a policy to protect and preserve our inherent rights of freedom of belief and exercise of religion, including the protection and access to our sacred sites. Since then, the Federal Government has taken a multitude of actions demonstrating that its Federal trust responsibility includes the consideration and protection of sacred sites in Federal decision making. You have passed numerous bipartisan laws. Presidents have issued Executive Orders. Federal agencies have developed MOUs, reports, action plans. And the courts have recognized that the Federal trust responsibility includes consultation with Indian tribes when Federal actions threaten sacred sites.

The Federal Government has unquestionably assumed the legal and moral responsibility to protect our sacred sites. Any departure from this policy flies in the face of established political and societal norms and violates our civil and human rights, not to mention our own tribal laws, customs, and traditions.

Today, we stand together with the Tohono O'odham Nation and many other tribal nations who aren't here today who are fighting against this current Administration's failure to include our sovereign governments in any action that has the potential to affect our environmental, cultural, and religious rights and freedoms. Since Day 1 of this Administration, it has chosen to act unilaterally on Indian affairs and remove even the bare minimum procedures of our government-to-government relationship.

We have not only had the ground fall out from beneath us at Standing Rock, at Bears Ears with BLM land management decisions in Alaska and elsewhere and at the Tohono O'odham sacred areas at Monument Hill and Organ Pipe, but now the processes under the National Environmental Policy Act are also being threatened by new proposed regulations from the CEQ, further eroding

tribal consultation, eliminating cumulative and indirect impacts from environmental review and taking away our ability to provide less destructive options for development.

I am sure this Subcommittee fully understands the devastating statistics in Indian Country, our children's suicide rates, our heart disease rates, the numbers of our women, children, and men raped, murdered and trafficked. Then you must understand how important, how absolutely necessary our cultural and religious practices are to our healing.

We cannot recover from centuries of trauma and dispossession unless we can protect and maintain the places where we go to become whole again. The Association fully supports Congress in its effort to investigate and cure Indian sacred site destruction and religious freedom violations at the border wall and elsewhere. And I thank you for your time and attention.

[The prepared statement of Ms. O'Loughlin follows:]

PREPARED STATEMENT OF SHANNON KELLER O'LOUGHLIN, EXECUTIVE DIRECTOR & ATTORNEY FOR THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS

On behalf of the Association on American Indian Affairs ("Association"), please accept this written testimony for the House Natural Resources Committee's Subcommittee on Indigenous Peoples of the United States' February 26, 2020 hearing: "Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall."

The Association is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth and building Tribal capacity.[1] The Association was formed in 1922 to change the destructive path of Federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout its 98-year history, the Association has provided national advocacy on watershed issues that support sovereignty and culture, while working at a grassroots level with tribes to support the implementation of programs that affect real lives on the ground.

The Association's vision: *to create a world where diverse Native American cultures and values are lived, protected and respected*, has demanded that the Association dedicate significant resources to protecting Native American cultural and religious practices connected to important land areas across the United States. These special land areas are often called "sacred sites," but are used by tribes and their citizens in a variety of ways—and always as places that must be protected and secured in consultation with tribal governments.

Since its founding, the Association has provided legal and other advocacy assistance to protect sacred sites. In the 1920s, it fought to end the takings of Pueblo lands in New Mexico, worked to advocate against the building of dams on tribal lands, and fought against laws that outlawed the practice of tribal cultures and use of lands for those purposes. For 20 years, the Association has provided legal assistance to tribes seeking to protect Medicine Wheel in Wyoming. As the result of these efforts, Medicine Wheel is a National Historic Landmark and an Historic Preservation Plan was developed to ensure its continued protection. The Association has also helped tribes fight the development of lands that would adversely impact sacred sites, such as the San Francisco Peaks, Bear Lodge, Bear Butte, Medicine Lake, Pyramid Lake, Taos Blue Lake and many others. We stand alongside with the Water Protectors at Standing Rock and elsewhere, as well as with efforts to protect all of Bears Ears National Monument, and with the Tohono O'odham Nation

[1] The Association was created by an amalgamation of several non-profit Indian organizations that emerged in the early 1920s. The Eastern Association on Indian Affairs and the New Mexican Association on American Indian Affairs were the first of the predecessor groups to formally organize in 1922. The EAIA and NMAAI were made up of affluent non-Natives, most of whom owned land in Santa Fe and wanted to protect Pueblo culture. The American Indian Defense Association, headed by John Collier, formed to fight against the Bursum Bill and the Leavitt Bill, both bills seeking to end Pueblo ties to their lands, and outlaw cultural practices. These groups merged in the 1930s and eventually consolidated under the name the Association on American Indian Affairs. Today, the Association has an all-Native Board of Directors and Executive Director.

today in their advocacy to protect burial and sacred areas that have been or are threatened to be destroyed due to unilateral acts taken to build the border wall.

Tribal sacred sites have never had the same protections as non-Indian cemeteries, war memorials, churches and other western institutions—though tribal cultural and sacred sites serve the same purposes as those western institutions. Even with current laws, as explained below, tribal sacred sites are often seen as an impediment to developers and government agencies because there is no holistic national policy that acknowledges the significance of maintaining these special places. The use by the current administration of the Real ID Act of 2005 to build the border wall to protect against terrorism eliminates any and all protection, right of tribal consultation and public involvement and leaves no right of action to challenge agency determinations.

Below, we have described: the importance of sacred sites to diverse Native American religious practices and the Federal Government's role in the sacred site protection; how the Trump administration's ongoing construction of the border wall represents an imminent threat to sacred sites; and the existing Federal laws that may be used to protect them.

THE INTERSECTION OF INDIAN RELIGION, LAND, AND THE FEDERAL GOVERNMENT

Place-based religious practice is common of all religions and for religious followers across the world. For many, pilgrimage to sites like the Wailing Wall, Mecca, or Mt. Sinai is a religious mandate. These experiences also provide stability, connection, and reassurance in a chaotic and uncontrollable world. These sites provide healing, community, empowerment and unity. Yet, the importance of sacred sites among Native American cultural and religious practices has not been treated as legitimate and worth protecting compared to other world cultural and religious practices. The primary reason for this is that the tenets and practice of Native American cultures and religions are inextricably tied to the land and tribes have been removed from their places of worship.

Although typically hidden from plain view, sacred sites and ceremonial grounds abound across the United States. Some are within the exterior boundaries of tribal reservations, but most are located on Federal, state, and privately owned lands. "Earth is a living, conscious being that must be treated with respect and care"[2]—a failure to recognize this results in sickness, destruction, and death for all mankind. Accordingly, ceremonies must be performed at certain locations, unmolested and free from the observance of outsiders. The medicine gathered to bless and protect those participating in ceremonies must be taken from the earth in a specific manner, from predetermined places, and must be completely free from pollutants or genetic alteration. These beliefs and practices are not relics of the past and have continued, even when the Federal Government has outlawed such practices and has not yet established strong legislation to protect tribes in their cultural and religious freedoms.

Early United States political leaders and Federal officials understood the important role that sacred sites played in Indian life: they incorporated Indian separation from sacred sites, and therefore the destruction of traditional Indian religious practice, into Federal Indian policy. The United States' official policy to Christianize Indians synchronized with the passage of laws that removed Indians from their homelands and confined them to reservations. During that time, Federal officials also promulgated regulations like the Indian Religious Crimes Code and the Rules for Indian Courts, which criminalized traditional dances, feasts, medicine men, and barred many Indians from leaving reservations without superintendence.[3] At best, the punishment for visiting a sacred site or practicing one's traditional religion was imprisonment. At worst, it was slaughter. Moreover, the United States allowed its officials and others to enter tribal lands to desecrate burial and ceremonial places, steal Ancestral remains and their burial belongings, and take important cultural patrimony and sacred objects.

Despite more than a century of religious persecution, Indian communities have continued ceremonial life at sacred sites today, and the ability to do so stems from the perseverance of tribes and their citizens, and the Federal Government's recognition of its moral and legal responsibility to protect sacred sites and American Indian religious freedoms. Beginning in 1978, Congress took notice of the United States' continued attack on Indian religious freedom and conducted an "extensive

[2] Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 Vermont L. Rev. 225, 274 (1996).

[3] Lee Irwin, Freedom. Law, and Prophecy: A Brief History of Native American Religious Resistance, 21 Am. Indian Quarterly, 35 (1997).

investigation" that detailed how "Indian religious practices were often unnecessarily disrupted by state and Federal laws and activities."[4] This led to the American Indian Religious Freedom Act (AIRFA), a joint resolution that declared a policy "to protect and preserve for Native Americans their inherent right of freedom of belief, and exercise of traditional religions . . . including but not limited to sacred sites . . . ."[5]

Since AIRFA, the Federal Government has taken a multitude of actions demonstrating that its Federal trust responsibility includes the consideration and protection of sacred sites in Federal decision making. Congress has passed numerous, bipartisan laws requiring Federal agencies to consult with Indian tribes before they undertake any action that may threaten a sacred site or other Indian interests.[6] Presidents have issued executive orders prohibiting Federal actions that destroy sacred sites and mandating that Indians be given access to sacred sites.[7] Likewise, Federal agencies have worked together to develop a memorandum of understanding, reports, and action plans regarding the protection of sacred sites.[8] The Ninth Circuit has also recognized that the Federal trust responsibility includes consultation with Indian tribes when Federal actions threaten sacred sites.[9] Thus, the Federal Government has unquestionably assumed the moral and legal responsibility to protect sacred sites and any departure from this policy flies in the face of established political norms, and civil and human rights.

THE DESTRUCTION OF SACRED SITES

Regrettably, although President Trump has explicitly stated that he "remains committed" to "protecting prayer in public schools"[10] and to providing Federal funding to religious groups, his administration has given virtually no weight to concerns that Indian communities have with regard to their sacred sites. For example, the Administration has taken action to reduce the size of the Bears Ears National Monument over tribal objections, as well as push through the Dakota Access Pipeline and other pipelines across the country. Similarly, there has been a disregard of tribal concerns with regard to immigration and border security policies. Border patrol officials have "forcibly ripped apart" a sacred deer mask when an Indian tribal member crossed the southern border to participate in a traditional religious ceremony, desecrating it and rendering it completely unusable for future ceremonies.[11] Federal officials have also harassed tribal citizens who have treaty and statutory rights to freely cross the southern border to participate in religious ceremonies.[12] And, in January 2020, sacred sites were destroyed as part of border wall construction, including the blasting of Monument Hill—sacred land for the Tohono O'odham Nation located in the Organ Pipe Cactus Monument.[13] These actions are unlawful and morally wrong, violating the Federal trust responsibility to Indian tribes, and Federal policies reflecting that obligation that have been incorporated into numerous Federal statutes (see discussion immediately below).

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[4] Stephen L. Pevar, The Rights of Indians and Tribes 225 (2012).

[5] 42 U.S.C.S. 1996 (1978).

[6] *See* infra Section III.

[7] Exec. Order 13007: Indian Sacred Sites, 61 Fed. Reg. 26771 (1996); Exec. Order 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (2001).

[8] Dep't of Defense et al., Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (2012); Dep't of Defense et al., Action Plan to Implement the MOU Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (2013); Dep't of Defense et al., Progress Report on the Implementation of the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (2014); Dep't of Defense et al., Policy Statement on the Confidentiality of Information about Indian Sacred Sites (2015); Dep't of Defense et al., Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites: Policy Review Report (2013).

[9] *Pit River Tribe v. Bureau of Land Management*, 469 F.3d 768, 788 (9th Cir.2006), on remand, 2008 WL 5381779 (E.D. Cal. 2008).

[10] Whitehouse.gov, *President Donald J. Trump is Safeguarding the Right to Religious Freedom for Students and Organizations* (Jan. 16, 2020), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-safeguarding-right-religious-freedom-students-organizations/.

[11] Tribal Border Alliance, *Tribal Border Alliance Proposal* (last visited Feb. 22, 2020), https://www.tribalborderalliance.org/wp-content/uploads/2019/03/Tribal-Border-Alliance-Proposal-on-Letterhead-compressed.pdf.

[12] *Id.*

[13] Paulina Firozi, *Sacred Native American burial sites are being blown up for Trump's border wall, lawmaker says,* Wash. Post (Feb. 9, 2020), https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites.

In contrast, after Secretary Bernhardt toured Chaco Canyon in New Mexico, where he hiked with tribal leaders, he put in place a temporary development ban pending further discussions. If more officials visited more of these sites, and consulted more closely with tribal officials, we believe and hope that they would seek to protect them, rather than consider them inconvenient or insignificant impediments to other goals.

EXISTING FEDERAL LAWS AND POLICIES PROVIDE FOR THE PROTECTION OF INDIAN SACRED SITES AND SHOULD NOT BE DISREGARDED

Reflecting respect for tribal values and tribal culture, over the years the Congress and the executive branch have enacted and implemented a range of Federal statutes requiring the Federal Government to engage in consultation with Indian tribes when undertaking actions that may harm sacred sites and to either desist or mitigate those actions. Those laws, described below, should not now be abandoned; rather, they should be expanded upon.

National Historic Preservation Act

The National Historic Preservation Act (NHPA) was signed into law in 1966. The purpose of the Act is to "foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."[14] Accordingly, the Federal Government must "contribute to the preservation of both federally owned and nonfederally owned historic property"[15] and must consider historic properties in agency decision making. Demonstrating Congress's commitment to the protection of sacred objects and sacred sites, NHPA's 1992 amendments provide that sites with religious and cultural significance to Indian tribes could be eligible for listing on the National Register of Historic Places. Further, under Section 106 of the Act, Federal agencies must consult with Indian tribes when taking into account the effects that a Federal action may have on an historic property that is listed or eligible for listing on the National Register.[16]

National Environmental Policy Act

In 1970, Congress enacted the National Environmental Policy Act (NEPA) to "encourage productive and enjoyable harmony between man and his environment [and to] promote efforts which will prevent or eliminate damage to the environment."[17] NEPA, and its current regulations, ensure that Federal agencies incorporate the appropriate level of environmental review when considering proposed actions. NEPA is often the only statute that allows tribes to meaningfully participate in the Federal decision-making process because it acts as a mechanism for sacred site protection and helps tribes enforce their off-reservation treaty rights like hunting, fishing, and gathering—all activities essential to traditional Indian religious practice.

Archaeological Resources Protection Act

Enacted in 1979, the Archaeological Resources Protection Act (ARPA) protects archaeological resources on Federal and Indian lands.[18] Indian lands are lands held in trust for tribes by the Federal Government or lands that are subject to restrictions against alienation.[19] Archaeological resources include material remains of past human life or activities that are of archaeological interest and are at least 100 years old.[20] To comply with ARPA, parties must receive a Federal permit prior to excavation, and Federal agencies must provide notice to tribes prior to the issuance of a permit that may adversely affect a sacred site.

Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted on November 16, 1990 (and will be 30 years old this year) and protects cultural items like Indian Ancestral remains and their burial belongings, sacred objects, and items of cultural patrimony.[21] The purpose of the law is twofold. First, it is meant to ensure that agencies and institutions receiving Federal funds inventory and provide written accounts of cultural items. In addition, Federal agencies

[14] 54 U.S.C. § 300101(1).
[15] 54 U.S.C. § 300101(4).
[16] 54 U.S.C. § 300308.
[17] 42 U.S.C. § 4321.
[18] 16 U.S.C. §§ 470aa–470mm.
[19] *Id.* at § 470(bb)(4).
[20] *Id.* § 470bb(1).
[21] 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170.

and institutions must consult with tribes to repatriate cultural items. Second, the law is meant to provide significant protection for Native American burial sites. The Act prohibits the removal of cultural items from Tribal or Federal land without proper permitting.[22] Additionally, it prohibits selling, purchasing, and transportation for sale of cultural items obtained in violation of NAGPRA.[23]

Religious Freedom Restoration Act

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which provides that the Federal Government cannot substantially burden religious exercise without a compelling interest.[24] It is distinguishable from the aforementioned statutes because it grants a private right of action against the Federal Government for religious freedom violations and places the burden of proof on the government to demonstrate that it has a compelling interest in doing so. While RFRA does not explicitly mention Indians or sacred sites, the protection of Indian religious practice is at its core. Congress enacted RFRA in response to the 1990 Supreme Court case, *Employment Division v. Smith*, where two Native American Church practitioners filed a First Amendment free exercise claim against Oregon's unemployment office after they were denied unemployment benefits based on their sacramental use of peyote.[25] The Court held that neutral laws of general applicability that do not expressly target religious practice were constitutional. The decision shocked lower courts and legal scholars, and provoked significant protest from religious rights groups and civil liberties organizations.

EO 13007: Indian Sacred Sites

Issued in 1996, Executive Order 13007: Indian Sacred Sites mandates that Federal land management agencies must "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" and must avoid adversely affecting the physical integrity of such sacred sites."[26] Under the order, sacred sites are identified by tribes and Federal agencies must actively provide notice to tribes of any actions that may adversely affect a sacred site and consult with them to resolve the issue. It also established a system for holding Federal agencies accountable for their actions.[27] It requires the head of each executive branch agency that has the responsibility for managing lands to report to the President.[28] These reports must address changes necessary to accommodate access to and ceremonial use of Indian sacred sites, those changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites, and procedures implemented or proposed to facilitate consultation with Indian tribes.

EO 13175: Consultation and Coordination with Tribal Governments

Issued in 2000, Executive Order 13175, Consultation and Coordination with Tribal Governments, articulated the administration's establishment of "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications . . . ."[29] Policies with tribal implications are defined as "regulations, legislative comments or proposed legislation, or other policy statements or actions that have substantial direct effects on one or more Indian tribes . . . ."[30] Under the order, Federal agencies must respect tribal sovereignty and grant tribes "the maximum administrative discretion possible."[31]

CONCLUSION

Felix S. Cohen, known as the father of Federal Indian law, served the Association as its General Counsel in the 1940–50s. He is well known for the following quote from 1953:

> "It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift

[22] 25 U.S.C. § 3002(c); *see also id.* § 3002(a).
[23] 18 U.S.C. § 1170.
[24] 42 U.S.C. § 2000bb–1.
[25] *Employment Div. v. Smith*, 494 U.S. 872 (1990).
[26] Exec. Order 13007: Indian Sacred Sites, 61 Fed. Reg. 26771 § 1(a) (1996); Exec. Order 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (2001).
[27] *Id.* at § 2(a).
[28] *Id.* at § 2(b).
[29] Exec. Order 13175: Consultation and Coordination with Tribal Governments, 65 Fed. Reg. 67249 (2001).
[30] *Id.* at § 1(a).
[31] *Id.* at § 3(a), (b).

from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."

The Association fully supports Congress in its effort to correct the direction of our democratic faith and investigate Indian sacred site destruction and religious freedom violations with respect to the construction of the border wall. Our expertise in successfully advocating for sacred site protection has taught us that this is an ongoing issue with the current Administration and that Federal agencies and officers must fully realize their moral and legal responsibility to protect sacred sites and consult with sovereign tribal governments. Thank you for the opportunity to submit this testimony.

QUESTIONS SUBMITTED FOR THE RECORD TO MS. SHANNON KELLER O'LOUGHLIN, EXECUTIVE DIRECTOR, ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Thank you for your invitation to testify and provide further comment on the important and serious topic of the protection of Native American sacred places, religious practices and cultural heritage. Tribal Nations and their citizens cannot recover from centuries of trauma and dispossession caused by assimilative Federal policy, unless we can protect and maintain the places where we can go to become whole again.

In addition, with these responses, we respectfully request that the Subcommittee do their best to stop the Council on Environmental Quality from proceeding with their proposed update to the regulations implementing the National Environmental Policy Act, Docket CEQ–2019–0003–0001 that will extinguish many Tribal Nation rights of consultation to protect cultural heritage sites. I have attached the Association's comments to public comment on the rulemaking.

Below are the responses from the Association on American Indian Affairs to questions from Representatives Grijalva, Haaland and Garcia.

Questions Submitted by Representative Grijalva

Question 1. Based on your organization's experience, can you speak to any examples where tribal consultation was utilized successfully?

Answer. The Association on American Indian Affairs does not often hear about the successes in consultation—we hear from tribes that need assistance or who have not been properly consulted. But there are successes, and they are more often than not reliant on the quality of the relationship between the Tribe and the Federal agency staff involved in the project.

Often, successful consultation with tribes is dependent on the Federal agency staff involved in the consultation because there are no consistent tribal consultation policies throughout the Federal system. Where Federal agency staff understand how to work respectfully with tribes and the importance of protecting Native American cultural heritage, then there can be successful consultation. Unfortunately, tribal consultation is dependent on an agency's consultation policy developed out of Executive Order 13175—and Federal agencies differ on the robustness of their consultation policies, and they are horribly inconsistent between agencies when compared.

Congress can support the success of tribal consultation with a progressive piece of legislation that sets forward a process that all executive agencies must follow consistently for tribal consultation when a Federal action has the potential to affect a Tribal Nation. Consultation must be redefined to be substantive and implement the U.N. Declaration on the Rights of Indigenous Peoples. In addition, Congress could put "teeth" in current legislation—such as the National Environmental Policy Act, the National Historic Preservation Act, and the Native American Graves Protection and Repatriation Act—that establishes a priority and supremacy for the protection of tribal cultural heritage, religious practices and environmental protection over destructive development that harms those interests.

Question 2. Would you say that tribal consultation can be of benefit to agencies that are striving to create programs and projects that positively affect all Americans?

Answer. Absolutely. Tribal Nations are the first protectors of the environment and often base decision making on long-term benefits, versus short-term benefits. By consulting tribes, Federal agencies will avail themselves of unique benefits stemming from Native American belief, experience, and expertise. For example, many

Tribal Nations value their obligations to the next seven generations, a belief that supports sustainability not only for Tribes and Nations, but for everyone. In partnership with tribes, the Federal Government can better serve all Americans and develop long-term sustainability into projects.

Land development in the United States seeks quick short-term economic rewards only, which often causes substantial harm to future sustainability, environmental health and cultural resource protection. Tribal consultation that is substantive and not merely a box to check, can support sustainable planning. The United States must amend its current policies for land development and create legislation that mandates sustainability and environmental protection—not just when it is convenient but consistently and all-of-the-time. Land and resource development must be sustainable and prioritize long-term environmental protection over short-term economic reward. No waivers.

Questions Submitted by Representative Haaland

Question 1. Your testimony mentions Secretary Bernhardt's recent visit to Chaco Canyon and the temporary development ban that resulted from his discussions with tribal officials. Based on your experience, what solutions are needed to better protect tribal sacred sites?

Answer. When Federal officials engage with tribes on the ground and experience firsthand the importance of sacred sites to the Tribal Nations that revere them, all parties benefit. Direct, in-person involvement by U.S. government decision makers exposes them to information that then can be used to adopt policies that better serve the public, and provides sustainability prioritizing long-term environmental protection over short-term economic reward. The case of Secretary Bernhardt's visit to Chaco Canyon is a clear example of the value to U.S. officials of connecting in person with Native Americans about Native American sacred sites and culture—all Federal officials that make decisions affecting Tribal Nations should be mandated to visit the communities their decisions affect.

Of course, in-person visits are one tool to safeguard tribal sacred sites today and for successive generations. Additional tools must include:

- A clear and consistent U.S. policy statement that prioritizes long-term planning and protection over short-term economic rewards, and prioritizes American Indian religious freedom, and the Federal Government's responsibility to protect sacred sites, water, and the environment;
- The adoption of new Federal legislation that clearly and consistently requires substantive tribal consultation, which implements the U.N. Declaration on the Rights of Indigenous Peoples and free, prior and informed consent principles, and prioritizes long-term planning and protection for cultural heritage, sacred sites, and a clean environment.
- Legislation that clearly states that tribal consultation requirements cannot be waived, as the government-to-government relationship and the U.S. trust responsibility requires tribal consultation in all circumstances. No waivers for tribal consultation.

Questions Submitted by Representative García

Question 1. Can you elaborate on the importance of place-based spiritual practices to Tribal Nations and their citizens?

Answer. Traditional religious and ceremonial practices of Native Americans are often inseparably bound to specific areas of land. Much of that sacred land today is outside of tribal jurisdiction and is located on Federal, state and private lands—and is protected in a checkerboard fashion. Regarding the border wall, migrations between places have always occurred and the area has a rich history that will be forever destroyed with the wall. Such is not sustainable and makes all efforts for consistent protection of sacred places untenable. Moreover, the failure of a consistent environmental policy regarding any land development means that sacred places and cultural heritage are not protected, and threatens the long-term sustainability for all of us.

Late Native American theologian Vine Deloria, Jr. contrasts western religion's temporal framework with Native American religious beliefs' spatial framework: "The vast majority of Indian [T]ribal religions [. . .] have a sacred center at a particular place, be it a river, a mountain, a plateau, valley, or another natural feature. This center enables the people to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, and

to accept responsibility for it. Regardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding."

Question 2. In what ways has the Federal trust responsibility evolved to include the consideration and protection of tribal sacred sites?

Answer. In exercising its authority over American Indian and Alaska Native affairs, there is a "distinctive obligation of trust incumbent upon the [Federal] Government that involves moral obligation of the highest responsibility." *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942). The basis for this special legal relationship between Indian people and the Federal Government is found directly in the Constitution and memorialized in treaties. This trust relationship applies to all Federal agencies and to all actions that may potentially affect Tribal Nations.

This responsibility has also been affirmed by statute to apply to the protection of religion and sacred sites. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), which includes the declaration that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Ekimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship though ceremonials and traditional rites." Unfortunately, AIRFA was found by the courts to be unenforceable and not much more than a policy statement, leaving tribes and their citizens with no way to protect sacred sites.

The legislation that applies to the protection of sacred sites, which includes but is not limited to the National Environmental Policy Act, the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act, only provides for a procedural right for tribal consultation. This legislation does not prioritize the long-term sustainability of resources and the environment, and does not prioritize leaving sacred sites and archaeological areas alone. Instead, they allow tribes to be heard and their positions to be considered, but the Federal agency can act however it would like if it follows those procedures, as long as it is not arbitrary and capricious.

If Congress established strong policy and legislation that prioritized long-term environmental protection over short-term economic reward, implemented the U.N. Declaration on the Rights of Indigenous Peoples and required the free, prior and informed consent of tribes where sacred, archaeological or other environmental areas were affected, then the environmental and preservation laws would actually mean something. And please, no waivers for tribal consultation.

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ATTACHMENT

ASSOCIATION ON AMERICAN INDIAN AFFAIRS
ROCKVILLE, MARYLAND

March 10, 2020

Edward A. Boling
Associate Director for the National Environmental Policy Act
Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Re: Demand for Tribal Consultation on proposed update to the regulations implementing the National Environmental Policy Act, Docket CEQ–2019–0003–0001

Dear Associate Director Boling:

The Association on American Indian Affairs ("Association") submits the following comments on the Council on Environmental Quality's (CEQ) proposed changes [Docket No. CEQ–2019–0003–0001] to the implementing regulations for the National Environmental Policy Act (NEPA) at 40 CFR 1500–1505 and 1507–1508.

The Association is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth and building Tribal capacity. The Association was formed in 1922 to change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout its 98-year history, the Association has provided national

advocacy on watershed issues that support sovereignty and culture, while working at a grassroots level with Tribes to support the implementation of programs that affect real lives on the ground.

The Association's vision: *to create a world where diverse Native American cultures and values are lived, protected and respected,* has demanded that the Association dedicate significant resources to protecting Native American cultural, religious, and sacred places. These special land areas are often called "sacred sites," but are used by Tribes and their citizens in a variety of ways—and always as places that must be protected and secured in consultation with Tribal governments.

What the CEQ has called for in its proposed regulatory changes are the result of a misguided reform effort whose ultimate outcome would be heavily biased in favor of development interests and would both undermine protections for our irreplaceable cultural and environmental resources and fail to produce the efficiencies it seeks. The Association calls upon CEQ to withdraw these proposed regulations and enter into required consultations with Tribal Nations.

The proposed rule changes were developed without Tribal consultation. CEQ's Instead, CEQ simply issued a letter on January 13, 2020 to Tribal leaders inviting them to participate in the two public meetings. Federal law, including Executive Order 13175, requires agencies to engage in government-to-government consultation with Tribes when considering regulatory changes that would affect Tribal Nations. Given the magnitude of the proposed changes, and the importance of NEPA in protecting Tribal cultural resources, this rulemaking clearly requires formal tribal consultation.

For this reason, the Association requests that the agency cease its rulemaking process and undertake appropriate Tribal consultations on the proposed changes to the NEPA regulations immediately. Tribal consultations should occur in various regions throughout Indian Country, such that Tribal concerns are broadly reflected in this rulemaking process. These consultations must occur prior to any proposed rulemaking.

There is one benefit in the proposed rules, which is that Tribes are specifically invited to comment when the effects are off-reservation (as opposed to only when there are on-reservation effects). 40 C.F.R. § 1503.1(a)(2)(ii), § 1506.6(b)(3)(ii). However, there are many downfalls of the proposed rules, including limiting NEPA review, eliminating the review of indirect and cumulative effects, and creating barriers to judicial review. Further, these regulations were proposed with very limited and fast-tracked Tribal consultation, even though the proposed rule states that this is not a regulatory policy with Tribal implications.

Nevertheless, it is the Association's opinion that the overall effort to revise the NEPA review process as proposed is badly flawed and does not protect Tribal interests or the interests of health, safety and welfare of all peoples for the additional following reasons:

1. Disregarding Environmental Justice

NEPA reviews are one of the primary ways the Federal Government considers the frequently disproportionate impacts that large-scale, highly disruptive projects and facilities have on people of color, Indigenous peoples, and poor and immigrant populations. Central to consideration of disproportionate burdens is the consideration of cumulative impacts, which result from past, present, and reasonably foreseeable future actions in a project area. **The current proposal explicitly eliminates the requirement to consider cumulative impacts, § 1506.7.** Further, the CEQ's Environmental Justice Guidance under NEPA, which outlines environmental justice principles and considerations in the NEPA process, would be rescinded.

§ 1508.1(g) would redefine "effect" to mean impacts of an action that are "reasonably foreseeable" and that "may include" impacts that occur later or farther from (in distance) the area of proposed effect. This would also gut the existing law and regulation's coverage of indirect and cumulative effects of projects, especially in regard to historic properties where context, setting, and viewscapes are important considerations. In another example, CEQ wants to link "reasonableness" of a program alternative to include consideration of "technical feasibility," "consistency," "practicality," and "affordability." Under these terms, it would be easy for both agencies and proponents to arbitrarily limit NEPA reviews and the identification of potential alternatives. The most troubling aspect of these changes is that agencies and project proponents would be able to make these determinations without an opportunity for public comment.

2. Giving the Fox the Keys to the Henhouse

Companies would be allowed to write their own environmental reviews, and federal contractors would no longer need to disclose conflicts of interests or financial stakes in the projects they are reviewing. § 1506.5(c). This would remove the government-to-government requirement between Tribes and federal agencies, relegating that important mandate and fiduciary responsibility to a non-governmental contractor in violation of federal laws.

In addition, the reason NEPA has long required agencies to maintain responsibility of reviews is because they are charged with making decisions in the public interest. Industry makes decisions based on profit and would have no incentive to consider any alternatives to a proposal, or to take a hard look at its environmental consequences. This would relegate NEPA to a bias one-sided report—giving the proponent all power at the expense of our Tribal Nations' and the public's health, safety and welfare.

3. Loopholes to Avoid Environmental Review and Public Input

The proposed rules provide several avenues for agencies to avoid NEPA review. Agencies could attempt to avoid NEPA altogether by claiming that they are providing "minimal" funding for or have "minimal" involvement in a private development proposal. §§ 1501.1(a)(1) & 1508.1(q). If that doesn't work, an agency could claim that complying with NEPA would be inconsistent with Congress's intent under another statute, or that an entirely different process designed to satisfy other goals could serve as a substitute for environmental analysis and public review under NEPA. Those decisions could be made on a case-by-case basis (i.e., behind closed doors with the polluter). § 1501.1(a)(4)–(5) & (b).

4. Prioritizing Speed of Approvals Over Review and Tribal Consultation

Where NEPA would apply, agencies would be encouraged to do the bare minimum level of analysis. Environmental Assessments and Environmental Impact Statements would be subject to short and strict timelines, and environmental documents would be limited in page numbers. Detailed environmental impact statements would only be prepared as a last resort, and a proposed action's impacts to irreplaceable archaeological resources, parks, wilderness, endangered species, or other sensitive resources would no longer be a factor in consideration of whether detailed analysis is necessary. §§ 1501.3, 1501.4, 1501.5, 1501.10.

The shortened timeline for environmental review and limited document length could pose substantial barriers to Tribal consultation. Agencies, on fast tracks for approval, can speed through Tribal consultation, exacerbating existing shortcomings with federal agency implementation of Tribal consultation requirements. The strict page limits and timelines may also pose barriers to effective consultation under the National Historic Preservation Act.

5. Pushing Polluter Priorities Over Community Concerns

In the rare instance that a proposal would need to go through full environmental review, it could be prejudiced from the get-go, with the so-called "purpose and need" defined by the private company seeking approval. § 1502.13. If industry designs the purpose and need, it sets the stage for NEPA review on narrow terms: the only alternatives that must be considered would need to fit that purpose and need, and they must be "economically and technologically feasible" for the company. §§ 1502.14, 1508.1(z). In other words, all roads would lead to industry development, and the government could absolutely ignore alternative courses of action proposed by Tribes and members of the public who depend on healthy forests and wildlife habitat, clean air and water, and other resources, for cultural and religious practices, as well as health and safety.

6. Ignoring Severe Environmental and Health Impacts

Indirect effects are completely deleted from the proposed regulations. Analysis of impacts associated with a proposal to mine, drill, or log would be limited to those deemed to have "a reasonably close causal relationship to the proposed action," with no requirement to analyze indirect or cumulative effects that are considered to be "remote in time, geographically remote, or the product of a lengthy causal chain" (i.e., climate change). § 1508.1(g).

7. Institutionalizing Climate Denial into Federal Decision-making

It is long-settled that agencies are required to consider not only the impacts a federal decision may have on the climate crisis, but also the impacts of climate change on federal projects. The primary way federal agencies have considered climate impacts is through analysis of indirect and cumulative impacts, which this proposal explicitly eliminates. § 1506.7. By eliminating indirect and cumulative

impact analyses, this proposal allows the government to approve environmentally destructive projects, such as oil pipelines, with no consideration of their contribution to climate change. It also puts communities at risk by allowing agencies to fund projects that are less resilient to severe drought, stronger hurricanes, and more severe weather.

8. Attempts to Silence the Public and Shut the Courthouse Doors

The government could claim that public comments are not "specific" enough or do not include reference to data sources and scientific methodologies and therefore are deemed "forfeited." §§ 1500.3(b), 1503.3(a), 1503.4. Comments that are not submitted within the agency's strictly imposed time limits would not be considered. §§ 1500.3(b), 1501.10, 1503.3(b), 1503.4. Then, if aggrieved communities or individuals want to challenge an inadequate NEPA analysis in court, they may be precluded from doing so if they did not meet the "exhaustion" requirements and could potentially even be required to provide a bond. § 1500.3(b)–(c). These requirements place undue burdens upon Tribal Nations and others potentially impacted by proposed projects, and can shield agencies from litigation in the event of improper procedure. Once in court, the agency may claim that the court must presume that it followed the law, based on a certification in its record of decision. § 1502.18.

9. Heavily Weighted in Favor of the Developer

CEQ published the proposed regulatory changes on January 10, 2020, in accordance with the directives established under Executive Order 13807 (issued August 15, 2017), which set forth a path for "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." Among the steps already taken under EO 13807 were the creation of a "One Federal Decision" standard on project reviews through a single, unified NEPA document and the formation of an interagency working group to evaluate the environmental review processes to "identify impediments to efficient and effective environmental review and authorizations for infrastructure projects." The proposed regulatory changes before us today constitute the end result of this process, which was tainted from the beginning by the administration's desire to greatly limit both the scope and duration of the review requirements, thus reducing the amount of avoidance, minimization, mitigation, and remediation work needed to ensure sound environmental and cultural resources stewardship. For example, the requirement of an economic analysis [§ 1501.2(b)(2)] to justify NOT carrying out types of NEPA work will likely incentivize the constraining of evaluation and mitigation activities.

10. Create New and Problematic Policies Reducing NEPA Compliance

Under the proposed changes, agencies would be authorized to arbitrarily decide that non-federal actions that meet an undefined "minimal" level of federal involvement would be exempt from NEPA requirements under a new Threshold Applicability Analysis [§ 1501.1]. Agencies would also be allowed to designate some federal projects as "non-major" [§ 1507.3] based on an arbitrary percentage level; there would be a significant expansion in the number of Categorical Exclusions [§ 1506.7]. Further changes such as the replacement of "exorbitant" with "unreasonable" would act to limit the universe of potential alternatives, reduce study or permit areas, and allow federal agencies and permit applicants to ignore resources that most certainly will be adversely affected. The proposed changes will increase ambiguity in the process and reduce its ability to identify environmental and cultural resource baselines, evaluate significance and effects, and work to avoid and minimize adverse effects.

11. Limit Public Involvement

The language contained in § 1500.3(b)(3) would prevent comments NOT submitted during the formal EA and EIS comment periods from being considered later in the process. It is understandable and reasonable for agencies and project proponents to want comments to be submitted in a timely manner to avoid having to go back and rework designs and the review process itself simply to accommodate stakeholders who were late in submitting comments. Nevertheless, one of the fundamental goals of NEPA is to incorporate, to the maximum extent practicable, the viewpoints of the public on development projects that use public funds and/or lands. This is to ensure that the mistakes of pre-NEPA project and facilities construction are not repeated. Further, some flexibility in the ability of interested parties to provide comments is necessary when new issues and information arise over the course of a NEPA process. This is a common occurrence. Language must be added to the proposed rule that would require project managers to take into account—even after the expiration of the formal comment period—new and substantive issues raised by the public.

12. Rejects the Scale and Complexity of Projects

The changes put forward by CEQ make no distinction between minor proposals with no or minimal effects and large projects with major impacts on the landscape. CEQ seeks more clarity and efficiency from the NEPA process, and small-scale actions with minimal environmental risk would clearly benefit from such a framework. Yet the draft changes before us would produce exactly the opposite effect—larger, more complex, and better-funded proposals would be incentivized to reduce their NEPA compliance responsibilities, while small project proponents would be placed under the same regulatory burdens as their bigger colleagues.

13. Cultural Resources Would Suffer Adverse Impacts

It is difficult to underestimate how Tribal cultural heritage would be adversely affected by these proposed changes. While NEPA and the National Historic Preservation Act are distinct laws, with their own implementing regulations, there is a synergy between the two statutes that is both mutually beneficial and reinforcing. The current NEPA regulations integrate NEPA and National Historic Preservation Act (NHPA) compliance and enforcement, ensuring that NEPA documents disclose information about cultural resources and that these resources are considered during a project planning process so that efforts can be made to avoid and minimize impacts to historic properties. NHPA Section 106 activities benefit because NEPA documents reach a broad audience, expanding the audience for disclosing information to the public about the presence of resources and potential impacts. Section 106 reviews, if done early and properly, will inform the development and evaluation of NEPA program alternatives and the creation of strategies to avoid and minimize impacts. The proposed changes, by reducing the amount of NEPA work to be done, would inappropriately reduce the scope of analysis for federal actions and eliminate or reduce requirements for consulting with federally recognized Tribes and coordinating with other stakeholders.

CEQ's proposed changes are contrary to the long-standing practice of ensuring that our Tribal Nations' and generally the Nation's cultural heritage is protected for future generations. Under the CEQ proposal, cultural resources would no longer receive the consideration and protection they do today. **Once cultural resources and historic properties are destroyed or degraded, they are lost forever; they are NOT renewable resources.** If we do less to identify and protect cultural heritage areas, it will inevitably lead to a significant loss of our cultural heritage and environmental integrity.

If you have questions, please do not hesitate to contact me at shannon.aaia@indian-affairs.org or 240-314-7155.

Yakoke,

SHANNON KELLER O'LOUGHLIN, ESQ.,
Executive Director

Mr. GALLEGO. Thank you. The Chair now recognizes Mr. Steve Hodapp, a retired independent contractor and environmental specialist.

STATEMENT OF STEVE HODAPP, RETIRED INDEPENDENT CONTRACTOR AND ENVIRONMENTAL SPECIALIST, LEXINGTON, VIRGINIA

Mr. HODAPP. Good afternoon, Chairman Gallego, Ranking Member Gosar, and other members of the Committee. I appreciate the chance to testify before you this afternoon. For the last 10 years until my retirement in March, I have been working as a contractor, supporting CBP environmental compliance efforts primarily in the state of Arizona. The major point of my testimony today is that, in the execution of its border security mission, CBP fully complies with all the applicable laws as provided in the REAL ID Act and, in fact, often exceeds the legal requirements.

In 2016, the House Natural Resources Committee requested the Interior Department to provide a list of all peer-reviewed studies

which documented impacts on natural resources resulting from border construction. After 6 months, the Interior Department could not produce a single study. It is important to understand that the waiver authorized in the REAL ID Act only applies to barrier construction. It doesn't apply to any other construction activities by Border Patrol, towers or border patrol stations, roads, etc.

It is also important that when the Secretary applies the REAL ID Act, although it would waive these laws in their entirety, CBP, in fact, complies with the substantive portions of these laws. For example, if the National Historic Preservation Act were to be waived, CBP would still conduct a cultural resource survey. CBP would still treat any resources that are discovered in accordance with the procedures that are in place for protecting cultural resources.

CBP has been working cooperatively with the Tohono O'odham Nation for a number of years to develop and implement border security on the Nation's lands. For the last 10 years specifically, we have been working on deployment of a surveillance tower system within the Nation's lands. We have coordinated with the tribal historic preservation officer on all the roads, all the tower sites. And where we found cultural resources, we have gone to alternate tower sites.

We have used ground-penetrating radar to go beyond the visual surveys which are normally the standard protocol for locating cultural resources. I'd like to talk a little bit and turn back the clock a little with regard to Monument Hill. In 2002, tragically, Kris Eggle, park ranger at the Organ Pipe Cactus National Monument, was killed at the border by illegal drug cartels.

Within a few months, the Park Service shut down the entire border and 60 percent of the Park because it was unsafe for visitors. Within a year, the Park Service began an environmental assessment. The Park Service built the first road all along the entire border of the monument and the adjacent fence.

When they did their environmental assessment in 2003, they found no significant cultural resources along this road, including at Monument Hill and Quitobaquito. The Tribe made no comments about the cultural significance of these sites. In 2007, CBP issued an environmental assessment to upgrade the fence at Lukeville. This would widen the footprint from 30 to 60 feet and, in this case, again, CBP issued an environmental assessment. We did cultural resource surveys. Even though this wall section was waived, we found no cultural resources. The Tribe made no comments about the cultural significance of Monument Hill, even though a border wall was constructed on Monument Hill.

And in 2012, again, CBP did an environmental assessment about maintenance of the road on Monument Hill and on the fence on Monument Hill, and again the Tribe made no comment and CBP found no significant risks to cultural resources from that action. So, only now in May 2019, when CBP has again solicited comments from the Tribe and others, has the issue of these sacred sites been raised to CBP, not in any of these previous actions.

With regard to Quitobaquito, again, CBP has worked cooperatively with the Park Service and with the Fish and Wildlife Service to have appropriate stand-off distances for water withdrawal and

protection of that important resource during the border construction activities. Thank you.

[The prepared statement of Mr. Hodapp follows:]

PREPARED STATEMENT OF STEVE HODAPP, ENVIRONMENTAL SPECIALIST/INDEPENDENT CONTRACTOR, RETIRED

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 regarding the environmental consequences of border security construction in Arizona.

My name is Steve Hodapp, for the last 10 years, until my retirement last March, I was working as a Contractor supporting the environmental compliance efforts of the U.S. Customs and Border Protection (CBP), primarily in the state of Arizona. The major point of my testimony is that in the execution of its border security mission, CBP fully complies with all applicable laws as provided in the REAL ID Act, and in fact, often exceeds the legal requirements. Adverse impacts of CBP construction activities have often been grossly mis-characterized. In 2016, the House Natural Resources Committee requested that the Department of the Interior provide a list of peer-reviewed publications which document the impacts of CBP actions on natural resources. The Department of the Interior could not identify a single peer-reviewed study in 6 months' time. In fact, a majority of the citations provided by the Department were not even from peer-reviewed publications. CBP has completed a number of important conservation measures in the state of Arizona in recent years (see attached).

First, it is important to understand that the environmental waiver authorized on a bi-partisan basis by Congress in the REAL ID Act only applies to construction of border barriers, and such roads as are required for border barrier construction. All other CBP construction activities: for roads, towers, bridges, operations, border patrol stations, lighting, etc. must be completed in full compliance with all applicable environmental laws. Congress only provided the statutory waiver to a small subset of border security construction activities. In fact, effective border security requires a combination of deterrence factors, including: a barrier, technology to determine when the barrier has been breached, enforcement personnel, adequate access for enforcement personnel to reach the border and prompt adjudication procedures. If Congress desires to enhance border security further, then these same statutory authorities should be applied to other border construction activities.

Second, while the REAL ID Act authorizes a complete waiver of environmental or other statutes, as determined in the sole discretion of the Secretary of the Department of Homeland Security, in practice, CBP complies with the substantive provisions of the various environmental laws. For example, CBP still undertakes cultural resource surveys in areas where there will be ground disturbance. And, if cultural resources are discovered during the surveys, those resources are treated in accord with accepted practice. In other words, any significant cultural resources identified will either be collected for future study and placed with an appropriate entity for curation, or if collection is impracticable, the resources will be documented in place in accord with accepted practice.

While CBP does not formally consult with the State Historic Preservation Officer (or in this case the Tribal Historic Preservation Officer) if the National Historic Preservation Act is waived, CBP still solicits their input; as well as input from the public, and other interested parties regarding border barrier projects. Any input received is carefully reviewed by CBP and used to ensure that potential impacts on natural and cultural resources are minimized to the extent possible. On May 6, 2019, CBP broadly issued a letter seeking comments on the proposed bollard wall in Pima and Cochise Counties. The letter detailed how to provide comments which were accepted from interested parties on this project until July 5, 2019 (see CBP National Environmental Policy Act webpage).

CBP is concerned about potential impacts of its activities on cultural resources of concern to the Tohono O'odham Nation, and has taken, and continues to take all possible steps to minimize the impact of its activities on tribal cultural resources consistent with its border security responsibilities. In fact, according to the Tribal Historic Preservation Officer, CBP has conducted more extensive archeological surveys on the Tohono O'odham Nation lands than anyone else (including the Tribe).

CBP and the Tohono O'odham Nation have been working cooperatively on border security for many years. For the last 10 years, CBP and the Tribe have been working on the deployment of a surveillance tower system across the Nation's lands. Several years ago, CBP's contractor was in the field conducting test borings to

evaluate the engineering feasibility of certain tower sites. During this activity, the contractor inadvertently knocked over two saguaro cacti, a species which is considered sacred to the Tribe. CBP took immediate action to shut down the contract and to provide remedial training to the contractor, and enhance the monitoring protocol to ensure future incidents were avoided. CBP erected and stabilized the cacti which were damaged, and provided additional saguaro cacti at a 2:1 replacement ratio. This mitigation approach was agreed to by the Tribe.

CBP fully coordinated the environmental assessment for this tower project with the Tribe, and all tower sites and roads to be upgraded were approved by the Tribal Historic Preservation Officer, Peter Steere. CBP even went beyond the traditional visual archeological surveys and performed ground penetrating radar surveys of sites where visual surveys were inconclusive, including an additional site as requested by the Tribal Historic Preservation Officer.

Despite the completion of surveys before the final site selection decision was made, additional cultural resources were discovered when construction crews went to the field last fall. CBP and the Tribal Historic Preservation Officer agreed on techniques to protect cultural resources within the road prism, and CBP changed one of its tower sites to a location where cultural resources were not present.

In addition to this survey for the tower project, CBP has completed surveys of approximately 220 miles of roads on the Tohono O'odham lands which are needed for border patrol purposes. The purpose of these surveys was to enable CBP to conduct future maintenance of these roads, which would benefit both tribal access and border security. During these surveys, several dozen cultural resource sites, a number of which are significant sites, were located. Although these surveys were completed nearly 6 years ago in 2014, these sites remain unprotected today and are being impacted by ongoing road traffic.

With specific regard to the cultural significance of Monument Hill, I point out the following:

1. In 2003, the National Park Service issued an environmental assessment for construction of a border barrier and adjacent 30-foot-wide road along 35 miles of monument boundary, including Monument Hill. The National Park Service completed an archeological survey of the project site and determined no significant cultural resources would be impacted. The Tohono O'odham Tribe provided no comments on the environmental assessment regarding potential impacts from either road construction or border barrier construction on either Monument Hill or Quitobaquito Springs.
2. In 2007, CBP issued an environmental assessment for 5.2 miles of mesh pedestrian fence centered on Lukeville, and located about 3 feet north of the National Park Service-constructed vehicle fence (within the Roosevelt Reservation). This project included 0.65 miles of primary pedestrian fence on Monument Hill. CBP conducted an archeological survey of the project site and the environmental assessment found no potential impacts on cultural resources. The Tribe made no comment about cultural significance of Monument Hill.
3. In 2009, CBP issued an environmental assessment for construction of 10 surveillance and communication towers within and adjacent to the Monument, including one tower within 2 miles of Monument Hill. The Tribe made no comment on this environmental assessment regarding the cultural significance of Monument Hill.
4. In 2012, CBP issued an environmental assessment addressing maintenance and repair of all existing CBP tactical infrastructure (roads, fences, bridges, lighting, vegetation control, drainage structures, surveillance towers, etc.) in Arizona. The proposed action included maintenance of the border fence constructed by the National Park Service and the adjacent road on Monument Hill. The Tribe provided no comment on this environmental assessment regarding the cultural significance of Monument Hill.

Only the Tohono O'odham Nation can provide an explanation regarding why there has been no comment on the cultural significance of Monument Hill prior to the most recent solicitation for comment in May 2019. It is likely that construction of a border barrier will have some impact on the culturally significant Monument Hill and that no mitigation is likely to achieve both complete protection of this site and border security objectives. Procedures adopted by CBP to mitigate impacts on cultural resources as described above will reduce the overall impact of this project on this significant site.

The Quitobaquito Spring which exists in the monument today is a cattle pond constructed by a rancher in the 1860s. The precise configuration of the spring prior to

the 1860s is unknown. According to the U.S. Geological Survey (Hydrogeology of the Quitobaquito Springs and La Abra Plain area, Organ Pipe Cactus National Monument, Arizona, and Sonora, Mexico Water-Resources Investigations Report 95–4295), the source for this spring is the highly fractured rock northeast of the springs (within the monument). These USGS studies suggest that any pumping south of the re-charge area have not been demonstrated to have an impact on the spring.

Since Quitobaquito Springs is one of few natural water sources in the monument vicinity, it has long been an important source of water. Quitobaquito Springs also provides habitat for two listed species, the Quitobaquito pupfish and the Sonoita mud turtle. Although this spring is only about a quarter mile north of the US/MX border which is traveled by CBP agents during patrol there is no evidence that either of these species have been impacted by CBP activity. Pursuant to a 2009 biological opinion (AESO 22410–2009–F–0368), CBP does not patrol within a 40-acre buffer area around this spring. For these reasons, no biological impacts to Quitobaquito Springs are anticipated from this project. Any isolated cultural resources near Quitobaquito Springs will be addressed in a similar manner to any isolated resources located on Monument Hill.

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ATTACHMENT

SIGNIFICANT CONSERVATION ACTIONS UNDERTAKEN BY CBP IN ARIZONA SINCE 2010

*CBP has conducted the most extensive archeological surveys of the Tohono O'odham Nation lands ever undertaken. This includes surveys along more than 250 miles of roads and more than a dozen tower sites. The information collected in these surveys has been used by CBP to reduce or eliminate potential impacts of tactical infrastructure on cultural resources. For example, CBP recently abandoned a preferred tower site due to the presence of significant cultural resources at that site.

During these cultural resource surveys, CBP discovered several dozen historic and pre-historic archeological sites along, and within, the road corridors. A number of the sites were determined to be culturally significant. Since the discovery of these sites in 2014, the Tribe has taken no action to conserve these sites, and the sites continue to degrade due to ongoing vehicular traffic.

*CBP provided $2.9M to the National Park Service to restore Sonoran Desert habitat impacted by past illegal vehicle border crossings.

*CBP has provided more than $2M for jaguar conservation. This funding has been used for surveying and monitoring jaguars as well as a broad public education campaign.

*CBP has provided $2.8M for Sonoran pronghorn conservation and recovery. These funds have been used to establish a captive breeding population, establish a second pronghorn population on Kofa National Wildlife Refuge, inventory and monitoring of pronghorn, studies of potential impacts of human activities on the species and other high priority conservation actions. CBP funding has been a key factor in the ongoing recovery of this species.

*CBP has provided $1.3M for conservation and recovery of lesser long nosed bat. Funding provided by CBP has been instrumental in the discovery of additional lesser long nosed bat colonies which has supported efforts by USFWS to de-list this species.

*CBP provided funding to install a well to secure the habitat for the endangered San Bernardino spring snail.

*CBP provided funding to establish new wetlands at San Bernardino National Wildlife Refuge.

*CBP provided more than $500K to secure the habitat of listed fish at San Bernardino National Wildlife Refuge. Actions implemented with these funds include: construction of a fish barrier to prevent upstream migration of exotic species and erosion control measures along Black Draw and Hay Hollow to reduce sedimentation impacts on listed fish in ephemeral streams.

*Due to the CBP border security efforts in the vicinity of Organ Pipe Cactus National Monument, the National Park Service was able to open 70 percent of the monument which had been closed to public use for more than 11 years (2003 to 2014).

QUESTIONS SUBMITTED FOR THE RECORD TO MR. STEVE HODAPP, RETIRED INDEPENDENT CONTRACTOR & ENVIRONMENTAL SPECIALIST

Questions Submitted by Representative Bishop

Question 1. Lands within the Roosevelt Reservation are not within Organ Pipe Cactus National Monument, is that correct?

Answer. Border barrier construction by the Department of Homeland Security on Federal land in Pima County, Arizona is confined to the Roosevelt Reservation. The Roosevelt Reservation is a 60-foot-wide strip of public land which was set aside in a Presidential Proclamation by Theodore Roosevelt in 1907 for border security purposes. When Organ Pipe Cactus National Monument was established by Presidential Proclamation in 1937, it was established subject to prior public land withdrawals. In fact, the 1937 monument establishment proclamation specifically recognizes the 1907 Roosevelt Reservation withdrawal. Therefore, the Roosevelt Reservation is entirely outside the boundary of Organ Pipe Cactus National Monument, and construction of the border barrier within the Roosevelt Reservation will have no direct effect on the monument.

Question 2. Your testimony suggests that impacts from CBP projects have been exaggerated or mischaracterized. Can you provide any example of this?

Answer. The media and Federal agencies have continually mischaracterized and exaggerated the actual impacts of CBP projects and activities. Examples of these mischaracterizations include:

(a) U.S. Fish and Wildlife Service determined that construction of fixed towers under the Tucson West and Ajo 1 tower projects would result in take of 4.8 lesser long-nosed bats per tower per year due to bats colliding with fixed towers (see Biological Opinions 22410–2008–F–0373 dated Sept 4, 2008 and 22410–F–2009–0089–R2 dated December 10, 2009 respectively). U.S. Customs and Border Patrol was therefore required to monitor this take for a period of 5 years. Over the next 5 years, CBP spent more than $600,000 on contractors searching for bat carcasses at these towers. No bat carcasses were ever located. The impact predicted by the U.S. Fish and Wildlife Service was based on studies of bat mortality at a wind farm located in West Virginia. Further, the U.S. Fish and Wildlife Service never determined that any cell phone tower, radio tower, TV tower, electrical tower, and other fixed tower constructed within the range of the lesser long-nosed bat in southern Arizona would result in take of the species.

(b) U.S. Fish and Wildlife Service determined that CBP maintenance of 100 miles of existing, unpaved roads on Federal lands would result in incidental take of Sonoran pronghorn due to collisions with maintenance vehicles and harassment (see Biological Opinion 02EAAZ00–2012–F–0170 dated November 6, 2012). There are approximately 1,300 miles of existing, unpaved roads within the range of the pronghorn. These roads have been maintained and/or repaired by National Park Service, U.S. Fish and Wildlife Service, Department of Defense and Bureau of Land Management since 1968 when the pronghorn was listed. In no consultation with any of these other agencies has U.S. Fish and Wildlife Service ever determined that road maintenance or repair would result in incidental take of pronghorn. In fact, there has never been a collision with a Sonoran pronghorn reported in Arizona on an unpaved road.

(c) In a letter dated December 17, 2009 from the AZ Fish and Wildlife Service Field Supervisor to the Tucson Sector Chief Patrol Agent, U.S. Fish and Wildlife Service requested CBP immediately initiate Section 7 consultation regarding road dragging of the Geronimo Trail "in order to prevent the significant, and perhaps irreversible, environmental damage we believe is imminent." The imminent damage cited by U.S. Fish and Wildlife Service was sedimentation of listed fish habitat within Black Draw which U.S. Fish and Wildlife Service determined was occurring from ongoing dragging of Geronimo Trail. At the time of this letter, U.S. Fish and Wildlife Service had no data to support these dire predictions and relied on studies of non-relevant species in unrelated ecosystems. Despite this lack of data, U.S. Fish and Wildlife Service advocated for changes to CBP patrol activities. The University of Arizona later completed studies funded by CBP which documented that the source of sediment into the Black Draw was private ranching lands located north of the Geronimo Trail, and that sediment from CBP road dragging resulted in no measurable contribution to sedimentation within the stream.

Question 3. What do you mean when you testify that CBP complies with the "substantive provisions of the environmental laws"?

Answer. In Section 102 of the REAL ID Act, Congress authorized the complete waiver of any law as determined in the sole discretion of the Secretary of the Department of Homeland Security when required to enable border barrier construction on a timely basis. Since the first application of the waiver authority, the Department of Homeland Security has been dedicated to "responsible environmental stewardship" in the construction of border barriers where ever the waiver authority was exercised.

For example, CBP conducts archeological surveys which meet the standards set forth in the National Historic Preservation Act prior to surface disturbance. Similarly, CBP conducts surveys for species listed under the Endangered Species Act. CBP seeks input from regulatory agencies in the development of best management practices. CBP consults with affected Federal land managers and tribal leaders to seek their input on methods to minimize environmental impacts from border barrier construction. CBP completes documentation which quantifies the actual impact of its construction activities and makes that information available to interested parties. These are all examples which illustrate how CBP has complied with the substantive provisions of various environmental laws which have been waived.

Question 4. What is the purpose of the environmental monitors used by CBP?

Answer. The purpose of the environmental monitors is to ensure the best management practices adopted by CBP are fully implemented (see response to question #6). These monitors are responsible to report any violations of best management practices to the government so that real-time corrective action can be taken.

Question 5. What measures are in place to ensure water flow at Quitobaquito Springs are not impacted by this project?

Answer. Quitobaquito Springs has been substantially altered in recent history. Water from the spring is currently contained in an impoundment constructed to serve cattle in the 1800s. Water is delivered to this impoundment from the spring via a concrete-lined channel. The National Park Service has constructed a small (approximately 20-car capacity) parking lot at the impoundment and interpretive trail around it.

U.S. Geological Survey has completed studies in the past which determined that the source of water for the spring is located within the monument north of the current spring outfall. The National Park Service and U.S. Fish and Wildlife requested that no ground water be withdrawn within 5 miles of the spring. CBP has agreed not to withdraw any water within 7 miles of the spring. In addition, the U.S. Geological Survey is performing real-time water flow monitoring of the spring flow when these CBP wells are active. If there is any diminution of flow during construction, then construction can be halted until mitigation measures can be developed.

Question 6. What Best Management Practices are used by CBP to minimize the impacts from border wall construction?

Answer. CBP has completed a number of border barrier projects over the years. During these numerous projects, a standard set of Best Management Practices (BMPs) has been developed. The following list of BMPs were developed for another border barrier project in Arizona. The actual BMPs to be applied for projects adjacent to Organ Pipe Cactus National Monument will reflect a minor modification of these BMPs to reflect local conditions.

General Best Management Practices

The following best management practices (BMPs) should be implemented to avoid or minimize impacts associated with the Project during construction. These represent project objectives for implementation to the extent possible and will be incorporated into construction and monitoring contracts.

1. The perimeter of all areas to be disturbed during construction or maintenance activities in Sections D–5B and D–6 will be clearly demarcated using flagging or temporary construction fence, and no disturbance outside that perimeter will be authorized.

2. CBP will develop (in coordination with U.S. Fish & Wildlife Service [USFWS]) a training plan regarding Trust Resources for construction personnel. At a minimum, the program will include the occurrence of the listed and sensitive species in the area, their general ecology, sensitivity of the species to human activities, protection afforded these species, and project features designed to reduce the impacts to these species and promote continued successful occupation of the project area

environments by the species. Included in this program will be color photos of the listed species, which will be shown to the employees. Following the education program, the photos will be posted in the office of the contractor and resident engineer, where they will remain through the duration of the project. The selected construction contractor will be responsible for ensuring that employees are aware of the listed species.

3. Project Reports. For construction and maintenance projects (e.g., fences, towers, stations, facilities) within 3 months of project completion, a Project Report will be developed that details the BMPs that were implemented, identifies how well the BMPs worked, discusses ways that BMPs could be improved for either protection of species and habitats or implementation efficiency, and reports on any federally listed species observed at or near the project site. If site restoration was included as part of the project, the implementation of that restoration and any follow-up monitoring will be included. Annual reports could be required for some longer-term projects. The project and any annual reports will be made available to the USFWS.

4. Biological Surveys for each Project. CBP will either assume presence of a federally listed species based on suitable habitat or known presence, and implement appropriate measures or will, as part of project design and planning, perform reconnaissance-level preconstruction surveys to validate presence of suitable habitat.

5. Relocation of individuals of federally listed plants found in the project area is generally not a suitable activity. Relocation of aquatic species such as the water umbel and ladies'-tresses is not appropriate. Relocation of small cacti has not been very successful, and is not recommended. A salvage plan will be developed and approved by the government prior to the action. The CBP biological monitor will identify a location for storing any salvaged cactus and/or agaves. For particular actions, the USFWS will advise CBP regarding the relocation of plants.

6. Individual federally listed animals found in the project area will be relocated by a qualified biologist to a nearby safe location in accordance with accepted species-handling protocols to the extent practicable.

7. All construction projects in habitats of federally listed species will have a qualified designated biological monitor on site during the work. The biological monitor will document implementation of construction-related BMPs designed for the project to reduce the potential for adverse effects on the species or their habitats. Weekly reports from the biological monitor should be used for developing the Project Report.

8. Where, based on species location maps or results of surveys, individuals of a federally listed species could be present on or near the project site, a designated biological monitor will be present during construction activities to protect individuals of the species from harm. Duties of the biological monitor will include ensuring that activities stay within designated project areas, evaluating the response of individuals that come near the project site, and implementing the appropriate BMP. The designated biological monitor will notify the construction manager of any activities that might harm or harass an individual of a federally listed species. Upon such notification, the construction manager may temporarily suspend all activities in question and notify the Contracting Officer, the Administrative Contracting Officer, and the Contracting Officer's Representative of the suspense so that the key U.S. Army Corps of Engineers (USACE) personnel can be notified and apprised of the situation and the potential situation can be resolved.

9. Where a construction project could be located within 1 mile of occupied species habitats but the individuals of the species are not likely to move into the project area, a biological monitor is not needed. However, the construction monitor will be aware of the species-specific BMPs and ensure that BMPs designed to minimize habitat impacts are implemented and maintained as planned. This category includes the lesser long nosed bat and all aquatic species.

10. Particular importance is given to proper design and location of roads so that the potential for road bed erosion into federally listed species habitat will be avoided or minimized.

11. Particular importance is given to proper design and location of roads so that the potential for entrapment of surface flows within the roadbed due to grading will be avoided or minimized. Depth of any pits created will be minimized so animals do not become trapped.

12. Particular importance is given to proper design and location of roads so that the widening of existing or created roadbed beyond the design parameters due to improper maintenance and use will be avoided or minimized.

13. Particular importance is given to proper design and location of roads so that excessive use of unimproved roads for construction purposes that results in their deterioration that affects the surrounding federally listed species habitat areas will be minimized. Road construction and use for construction will be monitored and documented in the Project Report.

14. Particular importance is given to proper design and location of roads so that the fewest roads needed for construction will be developed and that these are maintained to proper standards. Roads no longer needed by the government should be closed and restored to natural surface and topography using appropriate techniques. The Global Positioning System (GPS) coordinates of roads that are thus closed should be recorded and integrated into the USBP Geographic Information System (GIS) database. A record of acreage or miles of roads taken out of use, restored, and revegetated will be maintained.

15. The width of all roads that are created or maintained by CBP for construction purposes will be measured and recorded using GPS coordinates and integrated into the USBP GIS database. Maintenance actions should not increase the width of the road bed or the amount of disturbed area beyond the roadbed.

16. Construction equipment will be cleaned using BMPs prior to entering and departing the project corridor to minimize the spread and establishment of non-native invasive plant species.

17. Surface water from untreated sources, including water used for irrigation purposes, will not be used for construction or maintenance projects located within 1 mile of aquatic habitat for federally listed aquatic species. Groundwater or surface water from a treated municipal source will be used when close to such habitats. This is to prevent the transfer of invasive animals or disease pathogens between habitats if water on the construction site was to reach the federally listed species habitats.

18. Materials such as gravel or topsoil will be obtained from existing developed or previously used sources, not from undisturbed areas adjacent to the project area.

19. If new access is needed or existing access requires improvements to be usable for the Project, related road construction and maintenance BMPs will be incorporated into the access design and implementation.

20. When available, areas already disturbed by past activities or those that will be used later in the construction period will be used for staging, parking, and equipment storage, where practicable.

21. Within the designated disturbance area, grading or topsoil removal will be limited to areas where this activity is needed to provide the ground conditions needed for construction or maintenance activities. Minimizing disturbance to soils will enhance the ability to restore the disturbed area after the project is complete.

22. Removal of trees and brush in habitats of federally listed species will be limited to the smallest amount needed to meet the objectives of the project. This type of clearing is likely to be a permanent impact on habitat.

23. Water for construction use will be from wells or irrigation water sources at the discretion of the landowner (depending on water rights). If local ground water pumping creates an adverse effect on aquatic-, marsh-, or riparian-dwelling federally listed species, treated water from outside the immediate area will be utilized.

24. Surface water from aquatic or marsh habitats will not be used for construction purposes if that site supports aquatic federally listed species or if it contains non-native invasive species or disease vectors and there is any opportunity to contaminate a federally listed species habitat through use of the water at the project site.

25. Water tankers that convey untreated surface water will not discard unused water where it has the potential to enter any aquatic or marsh habitat.

26. Water storage on the project area should be in closed on-ground containers located on upland areas, not in washes.

27. Pumps, hoses, tanks, and other water storage devices will be cleaned and disinfected with a 10 percent bleach solution at an appropriate facility before use at another site. If untreated surface water was used (this water is not to enter any surface water area). If a new water source is used that is not from a treated or ground water source, the equipment will require additional cleaning. This is important to kill any residual disease organisms or early life stages of invasive species that could affect local populations of federally listed species.

28. CBP will develop and implement storm water management plans for every project.

29. All construction will follow DHS management directive 5100 for waste management.

30. A CBP-approved spill protection plan will be developed and implemented at construction and maintenance sites to ensure that any toxic substances are properly handled and that escape into the environment is prevented. Agency standard protocols will be used. Drip pans underneath equipment, containment zones used when refueling vehicles or equipment, and other measures are to be included.

31. Non-hazardous waste materials and other discarded materials, such as construction waste, will be contained until removed from the construction site. This will assist in keeping the project area and surroundings free of litter and reduce the amount of disturbed area needed for waste storage.

32. To eliminate attracting predators of protected animals, all food-related trash items such as wrappers, cans, bottles, and food scraps will be disposed of in closed containers and removed daily from the project site.

33. Waste water is water used for project purposes that is contaminated with construction materials, or was used for cleaning equipment and thus carries oils or other toxic materials or other contaminants in accordance with state regulations. Waste water will be stored in closed containers on site until removed for disposal. Concrete wash water will not be dumped on the ground, but is to be collected and moved off-site for disposal. This wash water is toxic to aquatic life.

34. If an individual of a federally listed species is found in the designated project area, work will cease in the area of the species until either a qualified biological monitor can safely remove the individual, or it moves away on its own, to the extent practicable, construction schedule permitting.

35. Construction speed limits will not exceed 35 miles per hour (mph) on major unpaved roads (graded with ditches on both sides) and 25 mph on all other unpaved roads. Night-time travel speeds will not exceed 25 mph, and might be less based on visibility and other safety considerations. Construction at night will be minimized.

36. No pets owned or under the care of the construction contractor or any and all construction workers will be permitted inside the project's construction boundaries, adjacent native habitats, or other associated work areas. This BMP does not apply to any animals under service to the USBP (such as canine and horse patrols).

37. If construction or maintenance activities continue at night, all lights will be shielded to direct light only onto the area required for worker safety and productivity. The minimum wattage needed will be used and the number of lights will be minimized.

38. Light poles and other pole-like structures will be designed to discourage roosting by birds, particularly ravens or raptors that may use the poles for hunting perches.

39. Noise levels for day or night construction and maintenance will be minimized. All generators will be in baffle boxes (a sound-resistant box that is placed over or around a generator), have an attached muffler, or use other noise-abatement methods in accordance with industry standards.

40. Transmission of disease vectors and invasive non-native aquatic species can occur if vehicles cross infected or infested streams or other waters and water or mud remains on the vehicle. If these vehicles subsequently cross or enter uninfected or non-infested waters, the disease or invasive species could be introduced to the new area. To prevent this, crossing of streams or marsh areas with flowing or standing water will be avoided by construction vehicles and equipment, and, if not avoidable, the construction vehicle/equipment will be sprayed with a 10 percent bleach solution.

41. Materials used for on-site erosion control in uninfested native habitats will be free of non-native plant seeds and other plant parts to limit potential for infestation. Since natural materials cannot be certified as completely weed-free, if such materials are used, there will be follow-up monitoring to document establishment of non-native plants, and appropriate control measures will be implemented for a period of time to be determined in the site restoration plan.

42. Fill material brought in from outside the project area will be identified as to source location and will be weed-free to the extent practicable.

43. For purpose of construction, infrastructure sites will only be accessed using designated roads. Parking will be in designated areas. This will limit the development of multiple trails to such sites and reduce the effects to federally listed habitats in the vicinity.

44. Appropriate techniques to restore the original grade, replace soils, and restore proper drainage will be implemented for areas to be restored (e.g., temporary staging areas).

45. A site restoration plan for federally listed species and habitat will be developed during project planning and provide an achievement goal to be met by the restoration activity. If seeding with native plants is identified as appropriate, seeding will take place at the proper season and with seeds from nearby stocks, to the extent practicable. It is understood that some sites cannot be restored, and the project planning documents should acknowledge this.

46. During follow-up monitoring and during maintenance activities, invasive plants that appear on the site will be removed. Mechanical removal will be done in ways that eliminate the entire plant and remove all plant parts to a disposal area. All chemical applications on refuges must be used in coordination with the Integrated Pest Management Coordinator to ensure accurate reporting. Herbicides can be used according to label directions. The monitoring period will be defined in the site restoration plan. Training to identify non-native invasives will be provided for CBP contractor personnel, as necessary.

47. Maintenance activities in cactus and agave habitat will not increase the existing disturbed areas. Use of existing roads and trails will be maximized in areas of suitable habitat for cactus and agaves. Protection of the cactus will be stressed in environmental education for contractors involved in construction or maintenance of facilities.

48. To prevent entrapment of wildlife species during emplacement of vertical posts/bollards, all vertical fence posts/bollards that are hollow (i.e., those that will be filled with a reinforcing material such as concrete), will be covered so as to prevent wildlife from entrapment. Covers will be deployed from the time the posts or hollow bollards are erected to the time they are filled with reinforcing material.

49. To prevent entrapment of wildlife species during the construction of the project, all excavated, steep-walled holes or trenches will either be covered at the close of each working day by plywood or provided with one or more escape ramps constructed of earth fill or wooden planks. The ramps will be located at no greater than 1,000-foot intervals and will be sloped less than 45 degrees. Each morning before the start of construction and before such holes or trenches are filled, they will be thoroughly inspected for trapped animals. Any animals so discovered will be allowed to escape voluntarily (by escape ramps or temporary structures), without harassment, before construction activities resume, or removed from the trench or hole by the biological monitor and allowed to escape unimpeded.

BMPs for Temporary Impacts

1. Site restoration of temporarily disturbed areas such as staging areas and construction access routes will be monitored as appropriate.

2. During follow-up monitoring of any restoration areas, invasive plants that appear on the site will be removed. Mechanical removal will be done in ways that eliminate the entire plant and remove all plant parts to a disposal area. All chemical applications on refuges must be used in coordination with the NPS Integrated Pest Management Coordinator to ensure accurate reporting. Herbicides can be used according to label directions. The monitoring period will be defined in the site restoration plan. Training to identify non-native invasive plants will be

Species-Specific BMPs

(Note the species-specific BMPs will be uniquely developed for each species potentially found in the vicinity of the project. In this case, the BMPs for Lesser long-nosed bat a formerly listed species in the project area are representative of the BMPs which would be developed for species in the project area).

Lesser Long-Nosed Bat

1. When planning activities, avoid, to the extent practicable, areas containing columnar cacti (e.g., saguaro and organ pipe) or agaves that provide the forage base for the bat.

2. Maintenance activities for facilities can occur at any time; however, for major work on roads or fences where significant amounts of equipment will be required, the October to April period is the preferred period for such activities.

3. If construction or maintenance activities continue at night, all lights will be shielded to direct light only onto the work site and the area necessary to ensure the safety of the workers.

Question 7. Can you provide any additional details about the cultural resources identified in the 2019 survey by the National Park Service? Has there been previous border security work completed in proximity to or on Monument Hill in which you have been involved?

Answer. The 2019 National Park Service archeological survey was conducted along approximately 11 miles of border near Quitobaquito Springs. The National Park Service has not reported any recent archeological surveys on Monument Hill. Details from the 2019 National Park Service survey have been redacted and are not available to the public.

In 2003, the National Park Service issued an environmental assessment for construction of a border barrier and adjacent 30-foot-wide road along 35 miles of monument boundary, including Monument Hill and Quitobaquito Springs. The National Park Service completed an archeological survey of the project site and determined no significant cultural resources would be impacted. The Tohono O'odham Tribe provided no comments on the environmental assessment regarding potential impacts from either road construction or border barrier construction on either Monument Hill or Quitobaquito Springs.

In 2007, CBP issued an environmental assessment for 5.2 miles of mesh pedestrian fence centered on Lukeville, and located about 3 feet north of the National Park Service-constructed vehicle fence (within the Roosevelt Reservation). This project included 0.65 miles of primary pedestrian fence on Monument Hill. The disturbance corridor for this project was expanded from the 30-foot-wide corridor under the 2003 National Park Service environmental assessment to the full 60-foot-wide Roosevelt Reservation. CBP conducted an archeological survey of the project site and the environmental assessment found no potential impacts on cultural resources. The Tribe made no comment about cultural significance of Monument Hill after this environmental assessment was publicly released.

In 2009, CBP issued an environmental assessment for construction of 10 surveillance and communication towers within and adjacent to the monument, including one tower within 2 miles of Monument Hill. The Tribe made no comment on this environmental assessment regarding the cultural significance of Monument Hill.

In 2012, CBP issued an environmental assessment addressing maintenance and repair of all existing CBP tactical infrastructure (roads, fences, bridges, lighting, vegetation control, drainage structures, surveillance towers, etc.) in Arizona. The proposed action included maintenance of the border fence constructed by the National Park Service, the pedestrian fence on Monument Hill constructed by CBP and the adjacent road on Monument Hill. The Tribe provided no comment on this environmental assessment regarding the cultural significance of Monument Hill.

The current CBP project on Monument Hill is located within the Roosevelt Reservation and includes the areas addressed under the previous environmental assessments referenced above. It is unknown why the Tohono O'odham Tribe never expressed their concern about the sacred nature of Monument Hill or Quitobaquito Springs during any of these previous environmental compliance efforts.

Question 8. Was there a study or survey conducted at that location prior to construction activities occurring? Was the Tribe involved in that process?

Answer. The Roosevelt Reservation in the vicinity of both Quitobaquito Springs and Monument Hill has been surveyed on multiple occasions in the past. See response to Question #7.

Question 9. Is there evidence that the border wall will impact listed species such as the Sonoran pronghorn?

Answer. There are Sonoran pronghorn populations both north and south of the US/MX border. In the last decade, movement of a number of pronghorn from the U.S. population have been monitored by GPS-enabled collars. Data collected from these GPS collars confirms that movement of pronghorn across the currently permeable vehicle barrier along the border is extremely rare. Once the border wall is completed, no further movement of pronghorn across the border will occur. The current recovery plan for the Sonoran pronghorn does not anticipate movement of pronghorn between the United States and Mexico populations. Rather, the recovery plan anticipates recovery will be accomplished entirely within the United States. Therefore, construction of the border wall is not anticipated to impact survival or recovery of the Sonoran pronghorn.

Mr. GALLEGO. Thank you very much. We will start asking questions. I will start by recognizing myself for 5 minutes.

Chairman Norris, can you take what Mr. Hodapp just said, and do you have anything to respond to what he just said, why there was no interest before?

Mr. NORRIS. Thank you, Chairman Gallego, members of the Committee. It is kind of interesting to hear Mr. Hodapp make those comments because the situation is different. We are not talking about blasting. We are not talking about bulldozing. We are not talking about desecration. We are not talking about running through archaeological sites. We are not talking about digging up graves in that situation that he was describing.

Mr. GALLEGO. So, is it safe to say what Mr. Hodapp was describing is not at all the same as what we are describing right now and, therefore, there wasn't probably as much opposition because it wasn't as intrusive and insulting—is that correct?

Mr. NORRIS. Exactly.

Mr. GALLEGO. Thank you. Chairman Norris, let's move on to something else. In a recent meeting, you mentioned to me that immediately following Chairman Grijalva's visit to the border to bring attention to the Tribe's sacred sites, CBP actually skipped several miles of wall construction to begin blasting on Monument Hill. Do you think that this shows that CBP was aware of the harm and controversy blasting Monument Hill would cause and didn't want to wait to hear opposition? What is your interpretation of why they suddenly just jumped a couple miles to Monument Hill?

Mr. NORRIS. Well, I think because exactly that. I think that they knew that the Nation and its people were going to be seriously concerned about blasting, concerned about the desecration, concerned about these things. And I think they knew that, so they decided, well, let's go ahead and move forward and start doing what we need to do because we know the Nation is going to raise issue and opposition to that.

Mr. GALLEGO. Is it also true that CBP has widened roads both on Monument Hill and Quitobaquito Springs without notifying the Tribe at all, or did they notify you in a very short manner?

Mr. NORRIS. Well, with regards to the blasting, I didn't learn about the blasting until the day they started. I received an e-mail from the tribal liaison that said, "We are going to start blasting today." In fact, that was the only notification that I had. One of the things that I raised to that person is, "Why are you giving me notice now when you didn't give me any notice when you decided to bulldoze and grade through the Quitobaquito Springs area?" And I have not received any response to that question.

Mr. GALLEGO. Ms. Krakoff—did I say that correctly?

Ms. KRAKOFF. It is Krakoff. Thanks for asking.

Mr. GALLEGO. Thank you. Ms. Krakoff, hearing what Chairman Norris just described as the consultation that was given to him, what would you describe that as if you were—in your terms as a lawyer? What would you describe what was just discussed by Chairman Norris?

Ms. KRAKOFF. Inadequate, perfunctory, and I wish I could say that it was atypical, but often Federal requests for tribal consultation are just trying to check the box that they did something.

Mr. GALLEGO. Excellent. The Department of the Interior's testimony today argues that the construction of a border wall will actually improve protection of sacred sites. Given the Tribe's extensive experience working on border security—this is to you, Chairman Norris—and the destruction that has already occurred, do you think this is a valid argument?

Mr. NORRIS. Chairman, would you repeat the question, please?

Mr. GALLEGO. Sure, Chairman. Part of the argument that we are going to hear today from both the Administration and probably some of our fellow Members of Congress is that the construction of the border wall will actually help protect sacred sites. Given what you know, and given the history of the Tohono O'odham Nation protecting the border, do you agree with their argument—this is why they should be able to blast through these monuments?

Mr. NORRIS. Well, I find it very hard to believe that the effort will help protect sacred sites when, in fact, to the contrary, that has not been what was going on now. There have been desecrations. There has been blasting. There have been artifacts. There have been remains that have been ruined and forever lost. So, I have a tendency to disagree that this is going to protect those because blasting them is not protection.

Mr. GALLEGO. Thank you.

Ms. O'Loughlin, in both our remarks, Chairman Norris and I reference Arlington National Cemetery as a burial ground with national historic and cultural as well as personal significance. Your testimony points out the double standard that exists for protection of tribal sacred burial grounds versus other cemeteries, war memorials, and churches. Can you expand on this?

Ms. O'LOUGHLIN. Well, this is the result of historic Federal policy and law that was meant to separate us from our sacred places, that was meant to take away our religion so that we would assimilate and more land would be opened up for colonization and for the growth of the new Nation. And U.S. law has never really correctly repaired this issue.

Today, we have corrective measures like NAGPRA, National Historic Preservation Act, some Executive Orders and other Acts that help bring tribes to the table before these decisions are made. But, often, that is not the case, and that is not what we have been finding during this Administration.

Mr. GALLEGO. Thank you. I yield the remaining time to Ranking Member Gosar. Yield—that is true. I yield to Representative Gosar.

Dr. GOSAR. Thank you, Mr. Chairman. Now that we have heard the testimony and moved to the question part of this hearing, it is a good time for me to ask my colleagues. Do you actually care about the environment, or is it just another political prop? I know the answer. When convenient, it is a wonderful political prop. As we saw, if you look at the—do we have that up here? Yes. As we saw at this Committee 3 weeks ago with the Democrat effort to ban mining in Minnesota, you love to protect the environment here but don't hesitate to sacrifice the environment of the Congo and the lives of Congolese children at the altar of your protectionism.

This hearing today is another reckless example. Uncontrolled illegal immigration is an overwhelmingly destructive activity. You can see by what we are actually showing pictures of that were just

taken. It is an activity that has deeply scarred the border regions from the San Diego Wildlife Refuge and Organ Pipe National Monument to the Rio Grande and Big Bend National Park.

Drug running, human trafficking, trash, feces, water pollution, damaged springs and seeps, foot and illegal vehicle transit, all of the destruction as a result of illegal trafficking has left deep scars and environmental destruction across the landscape. If the Federal Government were required to consider the environmental impacts of this open borders policy under the NEPA, the preferred alternative, there would certainly be a border wall. There is no question that the deep impact on natural resources, waters, and species by this traffic throughout the landscape has a real impact. However, in pursuit of a political open-borders agenda, you are happy to ignore and minimize the environmental impact. You are also willing to not only minimize but degrade the human impact of the lack of border control. The Tucson sector of the border continues to have some of the highest rates of death among border crossers, accounting for 20 percent of all border deaths in 2018.

But it isn't just deaths of random border crossers that you ignore with an open-borders agenda. It is our hard-working personnel as well. When you arrive at Organ Pipe Cactus Monument, as stated earlier, you are greeted by the Kris Eggle Visitor Center. Kristopher William Eggle was a law enforcement park ranger with the National Park Service. Growing up, he was an Eagle Scout, National Honor Society Student, the valedictorian of his class, and was elected president of his class at the Federal Law Enforcement Training Center.

Kris Eggle devoted his life to protecting our country and our public lands. Kris Eggle was shot and killed in the line of duty at Organ Pipe Cactus National Monument on August 9, 2002, while pursuing members of a drug cartel who fled into the United States after committing a string of murders in Mexico. He was just 28 years old. He died because we didn't have control of our borders, and we have failed to protect our people, which brings us to this reckless political hearing.

I get it. You don't want the wall. You don't want to work with the Trump administration in building the wall. In fact, you offer no alternatives in securing that border. Despite your inaction, the wall is being built. President Trump is doing what he promised to do and no one should be shocked about that outcome.

Now the questions. Ms. Krakoff, I am wondering, do you think illegal border crossers bathing, drinking, and defecating in Quitobaquito Springs and other seeps and springs will have an environmental impact on the resources and species at these critically important desert habitats? Yes or no.

Ms. KRAKOFF. I think we would be able to assess the harms of——

Dr. GOSAR. Yes or no.

Ms. KRAKOFF [continuing]. The wall construction versus the harms——

Dr. GOSAR. It is my time. It is my time.

Ms. KRAKOFF [continuing]. Of the border crossing.

Dr. GOSAR. Let me—it is my time.

Ms. KRAKOFF. If we actually did the environmental analysis——

Dr. GOSAR. It is my time.

Ms. KRAKOFF [continuing]. That NEPA requires——

Dr. GOSAR. It is my time. Do you believe in climate change?

Ms. KRAKOFF. Yes.

Dr. GOSAR. Does man have an impact on it?

Ms. KRAKOFF. Absolutely.

Dr. GOSAR. So, I take it that you are yes on this one, then. Do you think illegal border crossers hiding in the adobes at Blankenship Ranch House or Gachado Line Camp, both registered historic places, are causing environmental damage to these historic protected places, and is the arson of the Bonita Campline shack, which was a protected structure burned down by illegal crossers, of a concern to you? Yes or no?

Ms. KRAKOFF. I don't know—you are assuming the facts ahead of time. If all that were occurring, sure. That would be of concern to me.

Dr. GOSAR. This is what has actually happened. So, you should be concerned about that if what I heard from your testimony—now, do you think that the unauthorized vehicle routes and illegal off-road vehicle travel are impacting the border environment, including species, habitat, culture and archaeological sites because CBP says that this sort of UVR activity is questionable? I mean, you see it up here. That is endangering the wildlife. Is it not?

Ms. KRAKOFF. Many things endanger the wildlife, and so does the construction of the border wall.

Dr. GOSAR. And illegal crossers don't take that into consideration? They were fully apprised of the ESA—Endangered Species Act—right? I think you brought that up.

Ms. KRAKOFF. Yes, well——

Dr. GOSAR. So, they are fully aware that they are harming species, right?

Ms. KRAKOFF. I don't believe they are complying with the ESA. I don't believe there have been the kinds of consultations—in fact, I know there have not—that would be required under the ESA because the Secretary of Homeland Security has waived application of the——

Dr. GOSAR. Well, once again, I wasn't bringing that up.

Ms. KRAKOFF [continuing]. Endangered Species Act.

Dr. GOSAR. What I was talking about is illegal crossings. I think the facts speak for themselves.

Mr. GALLEGO. Thank you, Representative Gosar.

We now recognize Representative Deb Haaland.

Ms. HAALAND. Thank you, Chairman. Thank you.

First, I just need to say this. Mr. Hodapp, you sat here and misrepresented your alleged consultation with the Tohono O'odham Tribe, and I take issue with that. And I just needed to bring that up so it is on the record.

I want to also make sure that every single one of my colleagues in this hearing room understands that this hearing is about sacred sites of the Tohono O'odham Tribe and that is all. That is what we are here to discuss, and that is what we are here to defend.

So, my first question—actually, I have a statement first. Thank you, Chairman, for having this hearing. As one of the first Native women in Congress, I find it my duty to speak up for Indian

Country and the Administration's lack of respect for the Federal trust responsibility we have to Native nations. During the recent NCAI session, this was exemplified when the Interior failed to answer basic questions from tribal leaders and is further illustrated with the construction at the border wall. When tribes do not have a seat at the table, Indigenous history is lost.

In this case, the Tohono O'odham Nation has lost pieces of its ancestors to bulldozers and explosions. This bears repeating. The President threatens to destroy Iran's cultural sites and, yes, that would be a tremendous loss to our world. It is considered an international war crime when he states this. But how is what is happening here on the Tohono O'odham Nation any different?

This is also not the first time this Administration has moved forward to destroy Indigenous sacred sites with no tribal consultation. They recently opened up Bears Ears and Grand Staircase-Escalante, ancestral homelands of the Pueblo people, for drilling instead of protecting these Indigenous sacred sites. This irreparably ruins over 1,000 years of Indigenous culture and ceremonial sites. It is a complete failure of the Federal Government's trust responsibility and lack of respect for Native people in this country.

And in spite of how the Administration finagles their way to get this done, they stand by the fact that they are saying this is legal. It is wrong. It is sacrilegious. And it is not who we are as Americans. As far as I am concerned, they can go around and do everything legally. It is immoral. It is immoral, and I am still trying to figure out how the President sleeps at night.

Chairman Norris, your testimony discusses two cultural sites that have been damaged by the border wall construction, Quitobaquito Springs and Monument Hill. But these sites are not on the reservation. Why are these sites important to you and your people if they are not on your reservation?

Mr. NORRIS. Chairman Gallego, members of the Committee, Congresswoman, thank you for that question. Regardless of whether or not these sites are on or off the Tohono O'odham Nation, we are on this reservation not because we wanted to be on this reservation, but our ancestral lands extended well beyond where our current reservation land is today.

So, in that, we have an obligation. We have a responsibility. We have a vested interest in protecting and securing the safety of our ancestors and the remains of our ancestors and protecting these sacred sites regardless of whether or not they are on our current reservation land. They are still within the ancestral lands of the O'odham. And that is why it is important to us.

Ms. HAALAND. Thank you. How have tribal citizens responded to the news of DHS bulldozing and blasting the Nation's sacred sites in Organ Pipe?

Mr. NORRIS. It is hard. It is hard to see the blasting that you showed on the video today because I know in my heart and what our elders have told us and what we have learned that that area is home to our ancestors. And blasting and doing what we saw today has totally disturbed, totally, forever damaged our people. Thank you.

Ms. HAALAND. I yield, Chairman.

Mr. GALLEGO. Thank you, Representative Haaland. I now recognize Representative García.

Mr. GARCÍA. Thank you, Chairman Gallego and Ranking Member Cook or Gosar. Thank you to the witnesses who are here today. The first question that I want to ask is what kind of consultation has there been with the tribes who have raised objections to the blasting and the clearing away of the land to build the wall. And I would like to direct that to Mr. Hodapp.

Mr. HODAPP. I am not directly involved as a CBP employee, as I retired last March. But what I can tell you in general is that CBP issued a letter in May 2019 soliciting input broadly from all interested parties, including the Tribe. That door for input was open for 3 months, and CBP is considering that input as they implement and construct the barrier in that area.

Mr. GARCÍA. Do you consider that to be a formal engagement with the tribes or casual conversations?

Mr. HODAPP. In my personal opinion, it is not formal consultation as provided for under the statutes, but you have to remember that the Administration has waived these statutes. So, there is discussion, but it is not under the formal procedures.

Mr. GARCÍA. So, you could pretty much do whatever you want because of the waiver? Is that what you are saying?

Mr. HODAPP. I mean, the Congress has authorized the waiver to apply to any law that the Secretary believes is required in order to permit expeditious fence construction.

Mr. GARCÍA. So, you could do whatever you want, basically?

Mr. HODAPP. That is the authorization that Congress has provided.

Mr. GARCÍA. Thank you. Chairman Norris, what would you respond to the same question about what is referred to as this consultation with the tribes that allegedly took place?

Mr. NORRIS. Thank you, Mr. Chairman, Members of Congress. Thank you, Congressman, for that question. That is not consultation. That is not government-to-government consultation. A telephone call letting us know what is going on or even a meeting that is called between the parties is not consultation. It is not leader-to-leader. It is not with the people that have the authority to make the decisions that are going to impact us or may impact them.

So, these meetings that are being referred to, in our opinion, have never been consultation. We have never been consulted on a government-to-government level on this issue by anyone, the Bureau of Indian Affairs, the Department of the Interior, anybody. You may get some folks that are coming here to testify and say that we do consultation. We have done many consultations over the course of time. I don't doubt that. But ask the question to them. How many of these consultations were done pursuant to this particular wall construction activity and the desecration that has been going on? And I guess they are going to tell you none of them.

Mr. GARCÍA. Thank you very much. Mr. Chairman, I yield back. I have some questions for the following panel as well. Thank you.

Mr. GALLEGO. Thank you, Representative García. We will move to Representative Soto. As other Members of the Minority come in, we will also be recognizing them. Thank you.

Mr. SOTO. Thank you, Mr. Chairman. And Chairman Norris, thank you for being here today. I could not imagine how painful this all is for you and the Tohono O'odham Tribe. I know that we will have major debates over border walls in Washington and through the courts. But I think the key here today is that these things can be still built respectfully and going through the process and making sure we are not destroying people's heritage in the process. And I think that is what this is really about today. It is doing it in a respectful way as these debates go on.

Chairman Norris, you had outlined a variety of Border Patrol initiatives that the Tohono O'odham Nation has jumpstarted over the past few decades. Often, these initiatives require coordination with ICE special agents, Border Patrol operatives, and the FBI. Can you elaborate on the working relationship that the Nation has maintained with these non-tribal entities?

Mr. NORRIS. Thank you for that question, Congressman. I sit here and I share with you that the Tohono O'odham Nation's leadership—I have 2 of our 22 Legislative Council members with me today—has a long history of working with the Border Patrol. Even at the opposition of our own people, our leadership has worked with the Border Patrol.

The Tohono O'odham Nation understands and realizes the need to protect the United States of America. We will do what is necessary and short of building a wall, we will do what we can to ensure the security of the United States of America. We understand that, and we will continue that relationship.

Many times, decisions that are made in Washington, DC can have a negative effect on the relationship that we spent many years building with the local folks back at home. We have a long history, but we have done that in good conscience. We have done that giving all consideration to what the impacts are going to be, not only to the United States of America but also to the Tohono O'odham Nation itself. So, we will continue to work on the relationship. We will continue to do what is necessary short of building a wall. We will never agree to a wall that is being built. We will never agree to what is being built now and this desecration of our sacred sites.

We have developed the relationship that we will continue, but it makes it difficult when decisions that are made in Washington, DC are negatively impacting that relationship that we spent a long time to build with the local folks——

Mr. SOTO. Thank you, Mr. Chairman. I am also concerned about the precedent set right now, the dangerous precedent that could be set for other tribal sites throughout the Nation. You reference in your testimony Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act and the waiver authority granted to DHS within it. Are there other sacred sites or cultural resources of significance to the Nation that are likely to be negatively impacted by the ongoing and planned border wall construction?

Mr. NORRIS. In addition to Monument Hill, in addition to Quitobaquito, further west of there is another area in the Cabeza Prieta National Monument, an area commonly referred to as Las Playas. Right in that area has been identified a ceremonial ground that, in my estimation, is about a football field in length and about

half a football field in width. We have history. We have our elders. We have archaeologists that have identified that area as ceremonial grounds to the Hia-C'ed O'odham people, our lineage with the Hia-C'ed O'odham.

And even just a little bit further down, another 4 or 5 miles from there, there is a definite burial ground, burial site, within the current road of the proposed border wall. That is a significant burial ground. There is no way around that. In November, we had proposed a letter to the Department of Homeland Security some alternatives in addressing the sacred sites, some alternatives they may want to consider in working with us to try to eliminate the desecration that is going to go on if they continue to bulldoze. I got a response from that letter. They basically ignored the recommendations that we were making as alternatives.

Mr. SOTO. Thanks. And my time has expired.

Mr. GALLEGO. Thank you, Representative Soto. We now recognize Chairman Grijalva.

Mr. GRIJALVA. Chairman, let me reaffirm what our colleague, Ms. Haaland, said. The necessary debate about the border wall and my opposition to it on many levels is a debate that we have been having and we will continue to have, and I think that is important. But what we are talking about here today is a very significant point, and she mentioned this, about sacred sites. It is about trust responsibility. And it is about abuse of power.

And I think that we have to keep that in focus, that the Nation has, through its own pocketbooks of its people, provided paramedic support for migrants that are out in the desert, has provided additional law enforcement and response, and watched their roads being destroyed because of the use by Border Patrol, and from their own revenues, they have sustained that.

So, to even imply that this is something other than, I think is a huge mistake. Chairman Norris, one of the issues that you brought up and I thought was important is to talk a little bit about how you see the relationship in terms of how the resources that DHS has employed to assess the cultural significance. One of the things that these waivers do and the REAL ID does is that it is not just a question of expediting. You just overlook things and with legal protection.

So, the cultural significance of the sites that we are talking about plus others that have been identified in the past, in your opinion, has DHS adequately surveyed Organ Pipe Monument for tribal impacts? Have the surveys been completed that reflect input from the Nation and the National Park Service survey that identified a number of important archaeological and cultural sites in the Tucson project area? Was that study reflected, that you know of, in anything that DHS has done?

Mr. NORRIS. Thank you, Congressman, for that question. Let me just talk about the National Park Service's own archaeological study of 11 miles of the border in the Organ Pipe. In that study, it found that it is probable that significant presently unrecorded surface level and buried archaeological deposits, mainly the sacred site and cultural patrimony about which the Nation is worried, persist across where the wall is being built. That was the statement out of that study.

In addition, the Park concluded that we must assume that all such unrecorded deposits will be destroyed over the course of the ensuing border wall construction. So, simply to say that somebody such as Mr. Hodapp or anyone else at his level came out and did surveys and looked at this area is not an in-depth archaeological survey of that particular area.

Mr. GRIJALVA. OK. Thank you. Any time the questions are raised about the wall and in this particular issue here that I think is very much different, the response is always, "Well, you are for open borders. You are for murderers, thieves, drug runners, people smugglers. You are condoning the death of a ranger because you have questions about the wall." None of that is true. None of that is true, and I think that, if I may, Mr. Chairman, that this discussion has to focus on the jurisdiction this Committee has in terms of Indian Country and the protection of those laws that were put in place to try to reaffirm an identity that there had been attempts to wipe out.

And I think this is an important issue. It is a precedent. And the fact that there is no consultation, the fact that the trust responsibility is being violated and the fundamental question of sovereignty is being violated as well, I think, requires this Committee to explore whatever possibilities are available to us.

It is OK for this Administration to try to undo NEPA. It is OK for this Administration to try to undo ESA. It is OK for a major funder of this President's campaigns and inauguration to get the contract to build a fence in Organ Pipe. That is somehow permissible and it is not OK. I think there are things that we need to look into in this Committee, and I appreciate this hearing, Mr. Chairman, and I yield back.

Mr. GALLEGO. Thank you, Mr. Chairman. I want to thank the first panel for answering our questions. The members of the Committee may have some additional questions for the witnesses, and we will ask you to respond to those in writing. I now invite Panel 2 to take their places at the witness table.

As with the previous panel, oral statements are limited to 5 minutes, but your entire statement will be part of the hearing record. When you began, the lights on the witness table will turn green. After 4 minutes, the yellow light will come on. Your time will have expired when the red light comes on. I will ask you to please wrap up your statement. I will also allow the entire panel to testify before we question the witnesses.

Now I would like to introduce our distinguished witnesses at this point. Our first witness is Dr. Anna Maria Ortiz, the Director of Natural Resources and Environment at the U.S. Government Accountability Office. Dr. Ortiz.

STATEMENT OF ANNA MARIA ORTIZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC

Dr. ORTIZ. Good morning, or good afternoon. Thank you, Chair Gallego, Ranking Member Gosar, Chair Grijalva, and members of the Subcommittee. Thank you for having me here today. During the expansion of the United States, the Federal Government forcibly removed countless Native Americans from their original

homelands. Other tribes ceded lands and resources to the Federal Government in treaties and agreements.

Recognizing that Indian tribes' interests and historic sites and natural resources did not end with their relocation, the United States later enacted several laws designed to protect Indian cultural and natural resources, a goal consistent with the Federal trust responsibility. Tribal consultation requirements are an important element of these laws. When triggered, tribal consultation provisions require agencies to consult with tribes on activities and infrastructure projects that risk affecting current or ancestral lands and resources.

Tribal consultation is a critical mechanism for demonstrating the United States' commitment to tribal sovereignty and its respect for the government-to-government relationship with tribes. More than 60 percent of the comments GAO reviewed from 100 tribes highlighted potential impediments to Federal tribal consultation. When tribes get notification too late in a project, important decisions may already have been made. When agencies fail to adequately weigh tribal input, they can imperil cultural resources that might have been preserved with a modest adjustment.

One tribe told us that an agency's failure to consult when approving county road work resulted in desecration of a burial mound, scattering their ancestors' remains and exposing them to the elements. Poorly executed tribal consultation limits tribal governments' opportunities for input, sows mistrust and can expose agencies to legal challenges later on.

Thankfully, several agencies have taken steps to improve the likelihood of successful tribal consultation. For example, HUD and two other agencies have developed systems to help identify tribes that should be consulted on projects because they have current or ancestral interests in an area or resource. EPA's policy requiring formal written communication from a senior agency official to an affected tribe following a consultation has facilitated positive outcomes despite sometimes challenging circumstances. One tribe told us that they considered its consultation with the EPA a success even when the tribe disagreed with the agency's final decision because the letter helped it to understand the rationale behind the decision. This example underscores a critical takeaway from GAO's research that effective tribal consultation does not always mean that everyone agrees on the outcome. It does mean that agencies do their best to obtain tribal input in a timely fashion, weigh that input appropriately, and respect the government-to-government relationship with tribes, or, in the words of one tribe we spoke with, "striving for the intent of consultation requirements rather than going through the motions of compliance."

GAO has made recommendations to 17 agencies on how to improve their approaches to tribal consultation. These improvements will help ensure that the Federal Government respects tribal sovereignty and works in partnership with tribal governments to minimize adverse consequences of infrastructure projects on current and former tribal lands and resources. That tribes no longer maintain sole claim to specific religious or historic sites or that government infrastructure requires construction at a specific location does

not render these tribal lands, artifacts, and sites any less sacred. This concludes my oral statement. I welcome your questions.

[The prepared statement of Dr. Ortiz follows:]

PREPARED STATEMENT OF ANNA MARIA ORTIZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

NATIVE AMERICAN ISSUES

EXAMPLES OF CERTAIN FEDERAL REQUIREMENTS THAT APPLY TO CULTURAL RESOURCES AND FACTORS THAT IMPACT TRIBAL CONSULTATION

Why GAO Did This Study

Federal agencies are required in certain circumstances to consult with tribes on infrastructure projects and other activities—such as permitting natural gas pipelines—that may affect tribal natural and cultural resources. According to the National Congress of American Indians, Federal consultation with tribes can help to minimize potential negative impacts of Federal activities on tribes' culturalresources.

The Secretary of Homeland Security has waived Federal cultural resource laws that generally require Federal agencies to consult with federally recognized tribes to ensure expeditious construction of barriers along the southern U.S. border.

This testimony discusses examples of (1) federal laws and regulations that apply to Native American cultural resources and (2) factors that impact the effectiveness of federal agencies' tribal consultation efforts. It is based on reports GAO issued from July 2018 through November 2019 related to Federal laws that apply to Native American cultural resources, tribal consultation for infrastructure projects, and border security. It also includes additional information about the consultation requirements in these cultural resource laws and regulations.

What GAO Recommends

GAO recommended in March 2019 that 17 Federal agencies take steps to improve their tribal consultationpractices. The agencies generally agreed and one agency has implemented the recommendation.

What GAO Found

Examples of Federal laws and regulations that apply to Native American cultural resources include:

- **The Native American Graves Protection and Repatriation Act (NAGPRA).** In August 2018, GAO reported that NAGPRA prohibits the intentional removal from, or excavation of, Native American cultural items from Federal or tribal lands unless a permit has been issued and other requirements are met. NAGPRA and its implementing regulations contain provisions to address both the intentional excavation and removal of Native American cultural items as well as their inadvertent discovery on Federal and tribal lands.
- **Section 106 of the National Historic Preservation Act (NHPA).** In March 2019, GAO reported that section 106 of the NHPA and its implementing regulations require Federal agencies to consult with Indian tribes when agency "undertakings" may affect historic properties—including those to which tribes attach religious or cultural significance—prior to the approval of the expenditure of Federal funds or issuance of any licenses.

In March 2019, GAO reported that tribes and selected Federal agencies identified a number of factors that impact the effectiveness of consultation on infrastructure projects, based on GAO's review of the comments on consultation submitted by 100 tribes to Federal agencies in 2016 and GAO's interviews with officials from 57 tribes and 21 Federal agencies. Examples of these factors include:

- **Agency consideration of tribal input**. Sixty-two percent of the 100 tribes that provided comments to Federal agencies in 2016 identified concerns that agencies often do not adequately consider the tribal input they collect during consultation when making decisions about proposed infrastructure projects.
- **Maintaining tribal contact information**. Officials from 67 percent of the 21 Federal agencies in GAO's review cited difficulties obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities.

GAO also found that the 21 agencies in GAO's review had taken some steps to facilitate tribal consultation. For example:

- Eighteen agencies had developed systems to help notify tribes of consultation opportunities, including contact information for tribal leaders or other tribal officials.
- Five agencies' tribal consultation policies specify that agencies are to communicate with tribes on how tribal input was considered.

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Chairman Gallego, Ranking Member Cook, and Members of the Subcommittee:

Thank you for the opportunity to discuss examples from our prior work regarding Federal laws and regulations that apply to Native American cultural resources and factors that impact the effectiveness of Federal agencies' tribal consultation efforts for infrastructure projects. Federal cultural resource laws include the Native American Graves Protection and Repatriation Act (NAGPRA), the Archeological Resources Protection Act of 1979 (ARPA), and section 106 of the National Historic Preservation Act (NHPA). These acts and their implementing regulations cover different cultural resources, including Native American cultural resources, but all require Federal agencies to consult with federally recognized Indian tribes in certain circumstances. According to the National Congress of American Indians, Federal consultation with tribes can help to minimize potential negative impacts of Federal infrastructure projects on tribes' natural resources and cultural resources, which may include cultural items protected by NAGPRA and archaeological resources subject to ARPA.[1] Federal agencies are to consult with tribes on many infrastructure projects and other Federal activities.[2] For example, infrastructure projects, such as constructing pipelines, may involve various Federal activities that trigger statutory and regulatory tribal consultation requirements.

As Congress found in the Indian Trust Asset Reform Act, "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians."[3] The act also notes that the historic Federal-tribal relations and understandings have benefited the people of the United States for centuries and established "enduring and enforceable [f]ederal obligations to which the national honor has been committed."[4] We have previously reported that agencies can improve the efficiency of Federal programs that serve tribes and can take additional actions to improve tribal consultation for infrastructure projects.[5] Such improvements would be consistent with the expressed view of Congress in the act as to the Federal Government's trust responsibilities and would strengthen the performance and accountability of the Federal Government.

In January 2017, the President issued Executive Order 13767, which directs the Secretary of Homeland Security to immediately plan, design, and construct a wall or other physical barriers along the southwest border.[6] In response, U.S. Customs and Border Protection (CBP) initiated the Border Wall System Program to plan and deploy new barriers and other assets.[7] Section 102 of the Illegal Immigration

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[1] See National Congress of American Indians, *NCAI Comments on Tribal Trust Compliance and Federal Infrastructure Decision-Making* (Nov. 30, 2016). The National Congress of American Indians is a non-profit organization that advocates for tribal governments and communities.

[2] For the purposes of this testimony, we define infrastructure to include any ground-disturbing activities. For example, infrastructure may include surface transportation such as highway or rail infrastructure, energy development such as wind turbine projects, and facilities construction such as visitor centers in national parks.

[3] Pub. L. No. 114–178, § 101(3) (2016) (*codified at* 25 U.S.C. § 5601(3)). See also U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (Washington, DC: December 2018).

[4] Pub. L. No. 114–178, § 101(5) (2016) (*codified at* 25 U.S.C. § 5601(5)).

[5] GAO, *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others*, GAO–17–317 (Washington, DC: Feb. 15, 2017) and *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, GAO–19–22 (Washington, DC: Mar. 20, 2019).

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

[7] Within the Department of Homeland Security, CBP's U.S. Border Patrol is the Federal agency responsible for securing U.S. borders between ports of entry. See 6 U.S.C. § 211(a) (establishing CBP within the department), (c) (enumerating CBP's duties), (e) (establishing and listing duties of U.S. Border Patrol within CBP). Ports of entry are officially designated sea, air,

Reform and Immigrant Responsibility Act of 1996, as amended, authorizes the Secretary of Homeland Security to waive all legal requirements as determined to be necessary, in the Secretary's sole discretion, to ensure expeditious construction of barriers and roads under section 102.[8] The Secretary of Homeland Security has used this statutory authority to waive the three cultural resource laws identified above and their implementing regulations as well as certain other legal requirements. We have previously reported on the progress the Department of Homeland Security has made and challenges it has faced implementing its border security efforts.[9]

My statement today will focus on examples of (1) Federal laws and regulations that apply to Native American cultural resources and (2) factors that impact the effectiveness of Federal agencies' tribal consultation efforts. My statement is based on work we issued from July 2018 through November 2019 related to Federal laws that apply to Native American cultural resources, tribal consultation for infrastructure projects, and border security.[10] It also includes additional information about the consultation requirements in these laws and regulations. To conduct our previously issued work, we reviewed relevant Federal laws, regulations, and policies; reviewed agency documentation; reviewed oral and written comments submitted by tribes to several Federal agencies; and interviewed tribal, Federal, and industry officials. To identify examples of factors that impact the effectiveness of Federal agencies' consultation efforts for this testimony, we considered those factors that more than 60 percent of 100 tribes identified as hindering effective tribal consultation for tribes in our March 2019 report;[11] we also considered those factors that more than 60 percent of 21 Federal agencies identified as concerns in our March 2019 report.[12] More detailed information on our objectives, scope, and methodology for that work can be found in the corresponding issued reports.

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

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or land border facilities that provide for the controlled entry into or departure from the United States.

[8] Pub. L. No. 104–208, div. C, § 102(c), 110 Stat. at 3009–555, as amended by the REAL ID Act of 2005, Pub. L. No. 109–13, div. B, tit. I, § 102, 119 Stat. 231, 306 (2005).

[9] GAO, Border Security: *Assessment of the Department of Homeland Security's Border Security Improvement Plan*, GAO–19–538R (Washington, DC: July 16, 2019); *Southwest Border Security: CBP is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information*, GAO–18–614 (Washington, DC: July 30, 2018); and *Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps*, GAO–17–331 (Washington, DC: Feb. 16, 2017).

[10] GAO, *Tribal Programs: Resource Constraints and Management Weaknesses Can Limit Federal Program Delivery to Tribes*, GAO–20–270T (Washington, DC: Nov. 19, 2019); GAO–19–22; *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions*, GAO–18–537 (Washington, DC: Aug. 6, 2018); and GAO–18–614.

[11] GAO–19–22. We analyzed the transcripts of oral comments as well as written comments that 100 tribes provided to the Departments of the Interior, the Army, and Justice from October through December 2016 during meetings, in letters submitted to the agencies, or both. The agencies collected these comments as part of developing an interagency report on barriers to and improvements needed for consultation on infrastructure projects, released in January 2017.

[12] GAO–19–22. We interviewed officials with 21 Federal agencies, which we selected because they are, in general, members of the Federal Permitting Improvement Steering Council and they consult with tribes on infrastructure projects. The 21 selected agencies are: the Department of Agriculture's Forest Service and Rural Development; Department of Commerce's National Oceanic and Atmospheric Administration; Department of Defense's Army Corps of Engineers; Department of Energy; Environmental Protection Agency; Federal Communications Commission; Federal Energy Regulatory Commission; Department of Homeland Security's Coast Guard and Federal Emergency Management Agency; Department of Housing and Urban Development; Department of the Interior's Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Fish and Wildlife Service, and National Park Service; Nuclear Regulatory Commission; and Department of Transportation's Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, and Federal Transit Administration.

Background

Federal agencies have varying roles in planning, approving, and implementing infrastructure projects, depending on their missions and authorities.[13] Some Federal agencies help fund or construct infrastructure projects, and others grant permits or licenses for activities on private or Federal lands.[14] Agencies that manage Federal lands, such as the Bureau of Land Management, may construct infrastructure on lands they manage and must also approve projects on those lands.

The circumstances under which Federal agencies may need to consult with tribes will vary based on the agencies' responsibilities for infrastructure projects as well as an infrastructure project's potential effects on tribes' land, treaty rights, or other resources or interests.

Federal agencies are generally responsible for identifying relevant tribes that may be affected by proposed projects, notifying the tribes about the opportunity to consult, and then initiating consultation, as needed. One or more tribes located near or far from the proposed project site may have treaty rights within lands ceded in treaties or interests in lands with cultural or religious significance outside of lands ceded in treaties.[15]

Additionally, the Federal Permitting Improvement Steering Council—which was created to make the process for Federal approval for certain (large) infrastructure projects more efficient—has issued two annual reports that identified best practices for, among other things, consulting with tribes.[16] These best practices include: training staff on trust and treaty rights; providing clear information on proposals in a consistent and timely manner; holding consultations on lands convenient to tribes when possible; compensating tribes for consultant-like advice; and working to build strong, ongoing dialogue between tribal authorities and agency decision makers, among others. In 2017, Executive Order 13807 directed agencies to implement the techniques and strategies identified by the steering council as best practices, as appropriate.[17]

For purposes of this testimony, Native American cultural resources means Native American cultural items as defined by NAGPRA,[18] archaeological resources that are remains of past activities by Native Americans,[19] and historic properties to which Indian tribes attach cultural or religious significance.[20]

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[13] Not all infrastructure projects have Federal involvement, and the extent of Federal involvement depends on the nature and type of project, as well as ownership of the land.

[14] For example, the Federal Highway Administration funds highway and bridge projects, and the Federal Emergency Management Agency helps fund recovery projects for infrastructure damaged by disasters.

[15] Treaties between the U.S. government and Indian tribes are the supreme law of the land. Treaties often described the boundaries of the tribe's land ceded to the Federal Government and the boundaries of the lands reserved for habitation by the tribe. Treaties also often discussed the tribe's rights reserved by the treaty, such as the right to hunt, fish, and gather on specified lands they ceded to the Federal Government. As a result of these treaties and other Federal actions, many tribes have ancestral lands they ceded to the Federal Government distant from where they are located today. These ancestral lands may include sites that have religious and cultural significance for the tribe.

[16] Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects* (Washington, DC: Jan. 18, 2017); and *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (Washington, DC: December 2017). In our March 2019 report, we identified the members of the steering council as: the Advisory Council on Historic Preservation, Council on Environmental Quality, Department of Agriculture, Department of the Army, Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, General Services Administration, Nuclear Regulatory Commission, and Office of Management and Budget.

[17] Exec. Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, § 4(b)(iii), 82 Fed. Reg. 40463, 40465 (Aug. 24, 2017).

[18] NAGPRA defines Native American cultural items to mean human remains, funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001(3).

[19] Archaeological resources as defined by ARPA and its implementing regulations are any material remains of past human life or activities which are at least 100 years old and capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation. 16 U.S.C. § 470bb(1); 43 C.F.R. § 7.3(a).

[20] Historic properties are prehistoric or historic districts, sites, buildings, structures, or objects included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. 36 C.F.R. § 800.16(l)(1).

Examples of Federal Laws and Regulations That Apply to Native American Cultural Resources

ARPA and NAGPRA

ARPA, NAGPRA, and section 106 of the NHPA are examples of Federal laws that apply to Native American cultural resources. These laws and their implementing regulations contain many different provisions applicable to Native American cultural resources, including requirements for Federal agencies to consult with Indian tribes in certain circumstances.

ARPA and NAGPRA, among other things, prohibit trafficking of certain archaeological resources and Native American cultural items, respectively. In August 2018, we reported on Federal laws that address the export, theft, and trafficking of Native American cultural items and any challenges in proving violations of these laws.[21] That report included a discussion of ARPA and NAGPRA.

In addition, we reported in August 2018 that ARPA and NAGPRA contain provisions prohibiting the removal of archaeological resources and Native American cultural items from certain lands unless certain conditions are met, including consultation with Indian tribes.[22] Specifically, ARPA prohibits, among other things, the excavation or removal of archaeological resources from public[23] or Indian[24] lands without a permit from the Federal agency with management authority over the land.[25] If the Federal agency determines that issuance of such a permit may result in harm to, or destruction of, any religious or cultural site, the agency must notify any Indian tribe which may consider the site as having religious or cultural importance and meet, upon request, with tribal officials to discuss their interests.[26]

NAGPRA prohibits the intentional removal from, or excavation of, Native American cultural items from Federal[27] or tribal[28] lands unless an ARPA permit has been issued and other requirements are met. Specifically, regulations implementing NAGPRA require Federal agency officials to take reasonable steps to determine whether a planned activity on Federal lands may result in the excavation of human remains or other cultural items. Officials are also required to consult with certain tribes, including any tribe on whose aboriginal lands the planned activity will occur, about the planned activity. After consultation, the Federal agency official must complete and follow a written plan of action that includes, among other things, the planned treatment, care, and disposition of human remains and other cultural items recovered.[29]

NAGPRA and its implementing regulations also include provisions regarding inadvertent discovery of Native American cultural items on Federal and tribal lands. Specifically, the person making the discovery must notify the responsible Federal agency or tribal official, stop any activity occurring in the area of the discovery, and make a reasonable effort to protect the human remains or other cultural item discovered. The NAGPRA regulations specify procedures for the agency and tribal

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[21] GAO–18–537.

[22] GAO–18–537.

[23] Public lands are lands owned and administered by the United States as part of the national park system, national wildlife refuge system or national forest system and all other lands the fee title to which is held by the United States except lands on the Outer Continental Shelf and lands under the jurisdiction of the Smithsonian Institution. 16 U.S.C. § 470bb(3).

[24] Indian lands are lands of Indian tribes or Indians, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or Indian. 16 U.S.C. § 470bb(4).

[25] The regulations implementing ARPA specify that the Department of the Interior is the agency with management authority for Indian lands. 43 C.F.R. § 7.3(c)(2). ARPA does not require Indian tribes and their members to have a Federal permit for excavation or removal of any archaeological resource on Indian lands of such tribe unless the tribe does not have a law regulating the excavation or removal of archaeological resources. 16 U.S.C. § 470cc(g)(2).

[26] If the Federal agency determines that a permit must be issued immediately because of an immediate threat of loss or destruction of an archaeological resource, the Federal agency must notify the appropriate tribe. 43 C.F.R. § 7.7(a)(4).

[27] Under NAGPRA, Federal land is any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971. 25 U.S.C. § 3001(5).

[28] Tribal land is all lands within the exterior boundaries of any Indian reservation, all dependent Indian communities, and any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act. 25 U.S.C. § 3001(15).

[29] NAGPRA specifies who has ownership or control of Native American cultural items excavated from Federal or tribal lands after NAGPRA's enactment on November 16, 1990. 25 U.S.C. § 3002(a).

officials to take after receiving a notification and when the activity that resulted in the inadvertent discovery can resume.

Section 106 of the NHPA

In March 2019, we reported that under section 106 of the NHPA and its implementing regulations, Federal agencies are required to consult with Indian tribes when agency "undertakings" may affect historic properties—including those to which tribes attach religious or cultural significance—prior to the approval of the expenditure of Federal funds or issuance of any licenses.[30] The implementing regulations require agencies to consult with Indian tribes for undertakings that occur on or affect historic properties on tribal lands or may affect historic properties to which Indian tribes attach religious or cultural significance, regardless of where the historic properties are located.[31] In addition, these regulations establish the following four-step review process for Federal agencies, with tribal consultation required for each step: (1) initiating the section 106 process, (2) identifying historic properties, (3) assessing adverse effects, and (4) resolving adverse effects.[32]

Examples of Factors Tribes and Selected Agencies Identified That Impact the Effectiveness of Federal Agencies' Consultation Efforts

As we found in March 2019, tribes and selected Federal agencies identified a number of factors that hinder effective consultation on infrastructure projects, based on our review of the comments submitted by 100 tribes to Federal agencies in 2016 on tribal consultation and our interviews with officials from 57 tribes and 21 Federal agencies.[33]

Tribes identified a variety of factors that hinder effective consultation. For the purposes of this testimony, we are highlighting those factors that more than 60 percent of the 100 tribes identified as concerns. For example:

- **Agencies' timing of consultation.** Sixty-seven percent of tribes that provided comments to Federal agencies in 2016 identified concerns with agencies initiating consultation late in project development stages; according to one tribal official we interviewed, late initiation of consultation limits opportunities for tribes to identify tribal resources near proposed project sites and influence project design.
- **Agency consideration of tribal input.** Agencies often do not adequately consider the tribal input they collect during tribal consultation when making decisions about proposed infrastructure projects, according to 62 percent of tribes that provided comments to Federal agencies in 2016. Tribes' comments included perceptions that agencies consult to "check a box" for procedural requirements rather than to inform agency decisions.
- **Agency respect for tribal sovereignty or the government-to-government relationship.** Other concerns were related to agencies' level of respect for (1) tribal sovereignty or (2) the government-to-government relationship between the United States and federally recognized tribes, according to 73 percent of tribes that provided comments to Federal agencies in 2016. Comments included concerns that some agency practices are inconsistent with this relationship. For example, tribes cited agencies limiting consultation to tribal participation in general public meetings and sending staff without decision-making authority to represent the U.S. government in consultation meetings.

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[30] An undertaking is a project, activity, or program that is funded in whole or in part by a Federal agency and under the agency's direct or indirect jurisdiction, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval.

[31] Regulations implementing section 106 of the NHPA define consultation as the "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement."

[32] For more information, see Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Washington, DC: December 2012).

[33] See GAO–19–22 for additional information.

- **Agency accountability.** Sixty-one percent of tribes that provided comments to Federal agencies in 2016 raised concerns related to the extent of agencies' accountability for tribal consultation, stating that some agencies or officials are not held accountable for consulting ineffectively or for not consulting with relevant tribes. For example, comments included concerns that tribes may not have appeal options short of litigation when they believe that Federal officials did not adhere to consultation requirements.

In addition, officials from 21 Federal agencies included in our March 2019 report identified factors that they had experienced that limit effective consultation for infrastructure projects.[34] For the purposes of this testimony, we are highlighting those factors that more than 60 percent of the 21 agencies identified as concerns. For example:

- **Maintaining tribal contact information.** Officials from 14 of 21 agencies (67 percent) cited difficulties obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities. For example, ongoing changes or turnover in tribal leadership make it difficult to maintain updated tribal information, according to some agency officials we interviewed.
- **Agency resources to support consultation.** Officials from 13 of 21 agencies (62 percent) cited constraints on agency staff, financial resources, or both to support consultation. Officials from these agencies said that they have limited funding to support consultation activities, such as funding for their staff to travel to in-person consultation meetings for infrastructure projects.
- **Agency workload.** Officials from 13 of 21 agencies (62 percent) identified a demanding workload for consultation as a constraint, because of large numbers of tribes involved in consultation for a single project, high volumes of consultations, or lengthy consultations, among other reasons. Officials from some of these agencies said that it may be difficult to stay on project schedules when there are multiple tribes to consult with or multiple agencies involved.

In March 2019, we also found that the 21 agencies in our review had taken some steps to facilitate tribal consultation, but the extent to which these steps had been taken varied by agency.[35] For example:

- **Developing information systems to help contact affected tribes.** Eighteen agencies developed systems to help notify tribes of consultation opportunities, which generally include contact information for tribal leaders or other tribal officials. Three of these agencies also included information on tribes' geographic areas of interest. For example, the Department of Housing and Urban Development developed a system that aims to identify over 500 tribes' geographic areas of interest and includes their contact information. The Federal Permitting Improvement Steering Council identified developing a central Federal database for tribal points of contact as a best practice.[36] We recommended that the council should develop a plan to implement such a database and consider how it will involve tribes to help maintain the information, among other actions.

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[34] The 21 agencies include 3 independent regulatory agencies, 3 departments, and 15 component agencies that are offices or bureaus within other departments. We selected these agencies because they or their departments (1) are, in general, members of the Federal Permitting Improvement Steering Council and (2) consult with tribes on infrastructure projects. See GAO–19–22 for more information.

[35] GAO–19–22.

[36] See Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (Washington, DC: December 2017).

- **Developing policies to communicate how they considered tribal input.** Five agencies' tribal consultation policies specify that agencies are to communicate with tribes on how tribal input was considered. For example, the Environmental Protection Agency's policy directs the most senior agency official involved in a consultation to send a formal, written communication to the tribe to explain how the agency considered tribal input in its final decision.[37] However, 16 agencies did not call for such communications in their policies. We recommended that these agencies update their tribal consultation policies to better communicate how tribal input was considered in agency decision making.[38]
- **Addressing capacity gaps through training.** Most of the 21 selected Federal agencies have taken steps to facilitate tribal consultation for infrastructure projects by providing a range of training opportunities for staff involved in tribal consultation to help build agency officials' knowledge of tribal consultation topics. For example, the U.S. Army Corps of Engineers coordinates an immersive, 4-day training, hosted by a tribe on the tribe's land or reservation for agency staff and other participating agency officials, which focuses on cultural competency important for tribal consultation.
- **Utilizing various approaches to address resource constraints.** Some of the selected Federal agencies used various approaches to help address resource constraints agencies and tribes may face when consulting on infrastructure projects, according to agency officials. For example, the Bureau of Land Management's policies state that the agency may use its appropriated funds and designated accounts to reimburse tribal members' travel expenses to attend meetings in connection with some consultations.[39] The Nuclear Regulatory Commission collects fees from project applicants to cover agency costs related to consultation.[40]

In conclusion, effective consultation is a key tenet of the government-to-government relationship the United States has with Indian tribes, which is based on tribal sovereignty. Failure to consult, or to consult effectively, sows mistrust; risks exposing the United States to costly litigation; and may result in irrevocable damage to Native American cultural resources. In our March 2019 report, we made recommendations to 17 agencies to take steps to improve their tribal consultation practices, which agencies generally agreed with and in one case, have implemented.[41] However, sustained congressional attention to these issues and the relevant factors impacting the effectiveness of agencies' consultation efforts may help to minimize the negative impacts on tribes' cultural resources, when relevant Federal laws and regulations apply.

Chairman Gallego, Ranking Member Cook, and members of the Subcommittee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

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[37] Representatives from one tribal organization we interviewed said that in one example, the agency had approved a permit for an injection well that the tribes had opposed during consultation, but agency officials explained their rationale for the decision to the affected tribes. As a result, tribal officials considered the consultation a success, even though they disagreed with the final decision.

[38] GAO–19–22. The 16 agencies generally agreed with this recommendation and one agency—the Federal Emergency Management Agency—has implemented it.

[39] Bureau of Land Management, *Bureau of Land Management Manual 1780 Tribal Relations*, (Washington, DC: Dec. 15, 2016) and *BLM Handbook 1780–1: Improving and Sustaining Bureau of Land Management—Tribal Relations* (Washington, DC: Dec. 15, 2016).

[40] The Nuclear Regulatory Commission is required by statute to charge fees to anyone who receives a service or thing of value from the commission to cover the commission's costs in providing that service or thing. In addition, the commission is required to recover approximately 90 percent of its annual budget authority through fees on licensees and certificate holders. 42 U.S.C. § 2214.

[41] In March 2019, we made one matter for congressional consideration and 22 specific recommendations to 17 of 21 agencies and a Federal steering committee for permitting decisions on actions they can take to improve tribal consultation. The 17 agencies to which we made recommendations generally agreed with them, and one agency, the Federal Emergency Management Agency, has implemented our recommendation. GAO–19–22.

QUESTIONS SUBMITTED FOR THE RECORD TO DR. ANNA MARIA ORTIZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Questions Submitted by Representative Soto

Question 1. What are the impacts of not properly involving all necessary stakeholders when making infrastructure project decisions?

Answer. GAO's prior work has identified several impacts from not including all the necessary stakeholders in infrastructure project decisions. Specifically, it:

- **Increases the likelihood of irrevocable harm to tribal resources.** Not involving tribal stakeholders may increase the likelihood of irrevocable harm to irreplaceable tribal cultural resources impacted by the project, according to work performed for our March 2019 report on tribal consultation.[1] For example, one tribe told us that Fish and Wildlife Service (FWS) officials did not consult the tribe when approving county roadwork within a National Wildlife refuge. A burial mound was unearthed and desecrated during construction, but FWS would not allow tribal members to access ancestors' remains for a month because of a criminal investigation—leaving them exposed to damage from the elements. Another tribe told us that a Department of Energy (DOE) laboratory did not consult the tribe for a tree-thinning project near important archaeological sites on the tribe's ancestral lands. DOE signed an agreement with the state to study the sites and mitigate impacts, but they did not include the tribe. Ultimately, the project partially destroyed five of the archaeological sites.
- **Undermines the unique trust relationship between Federal agencies and tribes**. Effective consultation is a key tenet of the government-to-government relationships the United States has with tribes, based on tribal sovereignty. Failure to consult, or to consult effectively, sows mistrust in the United States government's relationships that Congress recently affirmed have benefited the country for centuries. For example, 73 percent of tribes that provided comments to Federal agencies in 2016 on consultation efforts identified concerns about agencies' level of respect for (1) tribal sovereignty or (2) the government-to-government relationship between the United States and federally recognized tribes.[2]
- **Can result in project delays or cancellation due to public opposition and litigation**. Public opposition and litigation due to insufficient stakeholder involvement in decision making can lengthen project time frames and even lead to the cancellation of a project, according to our June 2012 report on state and Federal practices for highway projects.[3] For example, we reported that a lawsuit against the Federal Highway Administration (FHWA) and the U.S. Forest Service regarding their compliance with Federal laws for a highway project in Alaska delayed the project for at least 5 years. We also reported that the Elizabeth Brady Road project in Orange County, North Carolina, was canceled by FHWA due to public and local government opposition to the project.[4]

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[1] GAO, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, GAO–19–22 (Washington, DC: Mar. 20, 2019).

[2] GAO, *Native American Issues: Examples of Certain Federal Requirements That Apply to Cultural Resources and Factors that Impact Tribal Consultation*, GAO–20–466T (Washington, DC: Feb. 26, 2020).

[3] GAO, *Highway Projects: Some Federal and State Practices to Expedite Completion Show Promise*, GAO–12–593 (Washington, DC: June 6, 2012).

[4] In April 2014, we reported that although the number of National Environmental Policy Act lawsuits is relatively low, one lawsuit can affect numerous Federal decisions or actions in several states, having a far-reaching impact. See GAO, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, GAO–14–369 and GAO–14–370 (Washington, DC: April 15, 2014).

Conversely, we and others have highlighted the benefits of involving all necessary stakeholders in infrastructure project decisions—whether it is required by law or not.[5] This includes tribal consultation when tribes' natural or cultural resources may be negatively impacted. Effective stakeholder involvement can help minimize damage to important tribal resources, limit infrastructure project delays, reduce the risk of litigation, and demonstrate agency respect for tribal sovereignty.

Mr. GALLEGO. Thank you.

Now I welcome Mr. Cameron for his testimony.

STATEMENT OF SCOTT CAMERON, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR POLICY, MANAGEMENT, AND BUDGET, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. CAMERON. Chairman Gallego, Chairman Grijalva, Ranking Member Gosar and members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the Administration's coordination and construction of barriers to address security and the humanitarian crisis at our Nation's southern border.

My name is Scott Cameron. I am the Principal Deputy Assistant Secretary for Policy, Management, and Budget at the Department of the Interior. The southern border is a major entry point for criminals, gang members, and illicit narcotics. Along this border, cultural resources, wilderness areas, wildlife refuges, plants and animals are adversely impacted by land degradation and destruction from unauthorized vehicles, trash, fires, contaminated water, and other activities related to unlawful border activity.

The Department manages lands that cover 40 percent of the southern border. The impacts of illegal activity along the border are evident on all of these lands. At Organ Pipe National Monument, for example, in the last 3 years alone, National Park Service rangers have arrested 71 people, apprehended more than 1,200 illegal aliens, and intercepted 7,500 pounds of marijuana. People die trying to cross the border illegally here.

Since 2010, the remains have been found of almost 200 individuals suspected to have died attempting to cross the border illegally. Unfortunately, as it was mentioned earlier, at least one American, a National Park Service Ranger, Kris Eggle, has been murdered by criminals crossing the border. Without an effective barrier, there will be more deaths and more movement of drugs that ruin lives at a distance.

Through implementation of President Trump's directives, the Department has made it a priority to work closely with the Department of Homeland Security, U.S. Customs and Border Protection, and the Department of Defense, among other agencies, to protect the wildlife, natural, and cultural resources that occur on Federal lands along the border. Our work with these agencies enhances the safety of those that live, work, and recreate in the region.

At Organ Pipe, CBP has worked collaboratively with over 100 local stakeholders, including Federal, state, and local government agencies and, of course, tribes. The National Park Service worked

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[5] For example, see GAO–19–22 and Federal Permitting Improvement Steering Council, *Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects for Fiscal Year 2018* (Washington, DC: December 2017).

collaboratively with CBP during preconstruction planning processes to identify known archaeological sites and has worked to protect them. NPS has also recommended, and CBP has agreed, to having an archaeological monitor on site during construction activities with the authority, incidentally, to stop work as necessary to minimize loss of or damage to archaeological sites. As an example of this collaboration, NPS, in coordination with CBP, identified Quitobaquito Springs as a significant resource area.

In order to protect the hydrology, wildlife, and cultural resources of this area, NPS established an agreement with the U.S. Geological Survey to provide real-time monitoring for Quitobaquito, notably, taking into consideration the concerns expressed by the tribes who requested a 5-mile buffer for any wells from Quitobaquito.

CBP and the Army Corps of Engineers, therefore, placed the closest wells for this project 8 miles east and 7 miles west, with the latter being a pre-existing refurbished well to ensure protection of the water resources at Quitobaquito. In early October, NPS archaeologists discovered several bone fragments during an archaeological survey close to Quitobaquito Springs near the southwestern corner of the monument, but north of the Roosevelt Reservation Area, so outside of the project area.

An osteologist viewed the fragments and determined one was human but many were not. Discussions with the Tohono O'odham Nation were initiated on October 24, 2019, regarding this discovery. In November, NPS crews identified three additional bone fragments during a data recovery project that consisted of the surface collection of artifacts, the same area, this time, within the Roosevelt Reservation and within the project area.

An osteologist determined that these bone fragments consisted of animal remains and a rock. But during a subsequent site visit to the same area, two additional remains were found also within the reservation area. These remains could not be identified by the field archaeologist, but both were later confirmed as human.

Along the southern border, the Department will continue to support interdepartmental partnerships. We will also continue our engagement with affected tribes. We are trying to work closely with the tribes. And when we find any artifacts or any human remains, we engage in a process to return those to the tribe. Thank you, Mr. Chairman, for letting me run over, and I apologize for that.

[The prepared statement of Mr. Cameron follows:]

PREPARED STATEMENT OF SCOTT J. CAMERON, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR POLICY, MANAGEMENT AND BUDGET, 1U.S. DEPARTMENT OF THE INTERIOR

Chairman Gallego, Ranking Member Cook, and members of the Subcommittee, thank you for inviting me to appear before you today to discuss the Administration's coordination in construction of barriers to address security and the humanitarian crisis at our Nation's southern border. My name is Scott J. Cameron and I am the Principal Deputy Assistant Secretary for Policy, Management and Budget at the Department of the Interior (Department).

INTRODUCTION

The current situation at the southern border presents a security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang

members, and illicit narcotics. Along this border, cultural resources, wilderness areas, wildlife refuges, plants and animals are adversely impacted by land degradation and destruction from trails, trash, fires and other activities related to unlawful border crossings.

The Department manages lands that cover 40 percent of the southern border, including national parks, wildlife refuges, historic sites, public lands, and wilderness areas along with infrastructure including water delivery structures. The impacts of this crisis are evident on all of these lands. At Organ Pipe Cactus National Monument, for example, in the last 3 years alone, National Park Service (NPS) rangers have arrested 71 people, apprehended 1,231 illegal aliens, and intercepted 7,563 pounds of marijuana. This with an average of only 10 full-time rangers. Since 2010, NPS staff have recovered the remains of 184 individuals.

The problem of large-scale unlawful migration through the southern border is long-standing and has worsened in certain respects in recent years. The impacts of this crisis are vast and must be aggressively addressed with extraordinary measures.

Under President Trump's leadership, the Federal Government is not only tackling the national security and humanitarian crisis, but also addressing the environmental crisis impacting the character of the lands and resources under the Federal Government's care. Construction of border barriers will reduce or eliminate impacts from illegal entry and will help us maintain the character of these lands and resources under the Department's management that may otherwise be lost.

INTERAGENCY COOPERATION

Secretary Bernhardt has ensured that the Department supports stronger interagency and inter-departmental relationships to address risk management efforts along the southern border. Through implementation of President Trump's directives, the Department has made it a priority to work closely with the Department of Homeland Security (DHS), the U.S. Customs and Border Protection (CBP) and the Department of Defense, among other agencies, to protect the wildlife, natural, and cultural resources that occur on Federal lands along the border. Our work with these agencies provides the necessary tools to enhance the safety of those that live, work and recreate in this region. Through this collaboration, the Department maximizes safety and stewardship, benefiting all Americans in response to this crisis.

At the Department, interdisciplinary experts coordinate with DHS, CBP, and Army Corps of Engineers to fully engage in the planning, construction and maintenance phases for barrier and infrastructure projects. For these projects, the Department also coordinates interagency and interdisciplinary review and consensus-based adjustments among Bureau of Land Management, Bureau of Reclamation, the U.S. Fish and Wildlife Service (FWS), the NPS, the Bureau of Indian Affairs, Tribes, and the U.S. International Boundary and Water Commission as appropriate. Coordination efforts often include site visits and strategic planning meetings to better clarify agency priorities, address complex natural resource issues and efficiently resolve challenges as they arise to the best of our abilities. On a regular basis, challenges are addressed at the local level. This includes recognizing and protecting cultural resources, protecting water sources, maintaining wildlife corridors and wilderness areas, and relocating sensitive plants that may be affected by construction activities. Last year, the Department worked with DHS and CBP to support barrier construction along 305 miles of the southern border adjacent to 244 miles of public lands.

TRIBAL CONSULTATION

In addition to the Department's responsibilities for ensuring coordination and resource conservation, the Department conducts tribal consultation for actions initiated by the Department's bureaus and offices that have tribal implications.

In accordance with law and policy, all Federal agencies have accountable consultation policies. The Department's Tribal Consultation Policy is in the Departmental Manual (DM) at 512 DM 4, *Policy on Consultation with Indian Tribes*, and 512 DM 5, *Procedures for Consultation with Indian Tribes*. The DM provides that the Department will consult with Tribes whenever its "plans or actions have tribal implications."

The Department remains committed to meaningfully consulting with Tribes on a government-to-government basis with regard to each plan and action the Department takes that has Tribal implications. Since the beginning of the Trump administration in January 2017, the Department has hosted almost 90 formal consultation sessions on 17 topics. In the spirit of ongoing dialogue, the Department has also held over 30 informal listening sessions with Tribes for their input on actions taken by the Department.

DHS BORDER WALL CONSTRUCTION AT ORGAN PIPE CACTUS NATIONAL MONUMENT

At Organ Pipe Cactus National Monument, CBP has worked collaboratively with local stakeholders in the construction of the Pima and Cochise Counties Border Infrastructure Project through the Monument. Stakeholders include over 100 entities, including Federal, state and local government agencies and tribes, among others.

NPS worked collaboratively with CBP on siting and wall alignments to identify known archeological sites, ethnographic resources, and areas with a high potential for intact cultural resources. NPS also recommended using an archaeological monitor during construction activities to minimize loss of or damage to archaeological sites.

The NPS also worked with CBP to identify sensitive plant species within the construction zone to salvage plants, when practicable. FWS similarly worked with CBP to discuss ways to avoid impacts to federally listed species' habitat, migration movements, and ability to travel and breed between Mexico and the United States (such as the endangered jaguar).

As an example of this collaboration, NPS, in coordination with CBP, identified Quitobaquito Springs as a significant resource area. In order to protect the hydrology, wildlife, and cultural resources of this area, NPS established an agreement with the United States Geological Survey to provide real-time monitoring and alarm for the Quitobaquito spring hydrological system. This allows the NPS to work directly with DHS, CBP and the Army Corps of Engineers to address any reduction in water output. Notably, taking into consideration the concerns expressed by the Tribes, who requested a 5-mile buffer from Quitobaquito Springs, CBP and the Army Corps of Engineers placed the closest wells used for this project 8 miles east and 7 miles west (with the latter being a pre-existing, refurbished well) of the Springs, to ensure protection of this resource.

ACTION TAKEN BY THE DEPARTMENT OF THE INTERIOR

In the process of working with CBP on completing the border infrastructure process, the Department has honored its responsibility to consult with affected tribes on Departmental actions, although certain laws related to cultural resources have been waived for the purposes of this project. When the NPS discovered several bone fragments during archaeological surveys close to Quitobaquito Springs, the NPS voluntarily engaged in processes drawn from NAGPRA to mitigate or avoid potential impacts from the project.

In mid-September, NPS archaeologists discovered several bone fragments during an archaeological survey close to Quitobaquito Springs near the southwestern corner of the monument just north of the Roosevelt Reservation and outside of the project area. An osteologist reviewed the fragments on October 4, and determined one was human. Consultation with the Tohono O'odham Nation was initiated on October 24, 2019, regarding this discovery.

In late November, NPS archaeological crews identified three additional bone fragments during a data recovery project that consisted of the surface collection of artifacts near the same area, this time within the Roosevelt Reservation and within the project area. Based on the archaeologist's assessment, two of the fragments were more consistent with animal remains, while the third showed qualities of being human. NPS informed the tribe that they will treat all three remains as if they are human remains.

The NPS is currently working to repatriate the bone fragments to the Tohono O'odham Nation following the process of the NAGPRA.

NPS and CBP met with the Tribe on December 11, 2019 at the Organ Pipe Cactus National Monument. And most recently, on January 16, 2020, Departmental employees including cultural staff of the Fish and Wildlife Service, the Cabeza Prieta National Wildlife Refuge Manager, the Superintendent of the Organ Pipe Cactus National Monument, Chief Ranger, and Chief of Natural and Cultural Resources met with the Tohono O'odham Nation Chairman and other representatives, along with Congressman Raúl Grijalva. This meeting of Departmental employees with the Tribe resulted in a tour of the border area, and allowed the Tribe to inform FWS and NPS employees about concerns regarding CBP actions to secure the border.

CONCLUSION

Along the southern border, the Department will continue to support interdepartmental partnerships. These efforts provide for effective collaboration and establish an avenue for the Department's land management interests to be considered in ongoing organizational border security efforts with DHS and the Army Corps of Engineers.

Chairman Gallego, Ranking Member Cook, and members of the Subcommittee, thank you for the opportunity to testify. I am glad to answer any questions you may have.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. SCOTT CAMERON, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR POLICY, MANAGEMENT, AND BUDGET, U.S. DEPARTMENT OF THE INTERIOR

Mr. Cameron did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Grijalva

Question 1. In your testimony, you mention that the Department of the Interior (DOI) has strong interagency and inter-department relationships. For this situation, an inter-agency relationship would include working with the Department of Homeland Security (DHS).

1a. Please provide the dates, and related documents, which demonstrate that Secretary Bernhardt has met with the Acting Secretary of Homeland Security, Chad Wolf, regarding the construction of the border wall.

Question 2. During my tour of the border, the Tohono O'odham Nation's archeologist attempted to interact with the contractor that DHS had hired as its arborist. The tribal archeologist tried to ask the arborist about DHS' criteria for the removal of saguaro cacti, as the Nation has found DHS' internal policies for the removal and replanting of saguaro cacti to be very inconsistent in the past.

2a. Rather than providing an answer, the DHS arborist said that he could not talk to the Nation because he was under an order to not speak with tribal officials or representatives. Are you aware of this "gag order" that prevents DHS contractors from speaking to tribal representatives?

2b. What is DOI's internal policy regarding the agency's interactions with tribal officials and representatives?

2c. How, if at all, does DOI provide input in DHS' internal policies about agency interactions with tribal officials and tribal representatives?

Questions Submitted by Representative Gallego

Question 1. In December 2019, U.S. Customs and Border Protection and the National Park Service conducted a meeting with the Tohono O'odham Nation to discuss construction activities on the sites of Monument Hill and Quitobaquito Springs.

1a. Please provide a record of communications and meetings between U.S. Customs and Border Protection; and the National Park Service (NPS) with the Tohono O'odham Nation regarding the border wall's construction activities within Organ Pipe National Monument, including the activities on Monument Hill and Quitobaquito Springs.

Questions Submitted by Representative Haaland

Question 1. You mention in your testimony that the Department will strive to "provide effective collaboration and establish an avenue for the Department's land management interests to be considered in ongoing border security efforts with DHS and the Army Corps of Engineers."

1a. By land management interests, do you mean national monuments and Federal lands held in trust for tribal nations?

1b. What are the legal implications of waiving pertinent Federal laws to build on tribal trust land? In what ways would these implications affect Indian Country in the future?

Mr. GALLEGO. Thank you to our witnesses for your testimony. We will now be moving on to the questions portion of it, and I will recognize myself for the first 5 minutes.

Mr. Cameron, the Department of the Interior, along with other Federal agencies, is charged with upholding our trust responsibility to Native American tribes. Mr. Cameron, what does that responsibility entail?

Mr. CAMERON. There are a number of statutes, Mr. Chairman, as I know you are very much aware, that relate to the relationship between the tribes and the Federal Government. It fundamentally involves, I think, a communication, conversation, the Federal Government trying to understand what the concerns are of the tribes and the Federal Government figuring out, in light of that information, what is an appropriate course of action.

Mr. GALLEGO. Mr. Cameron, to be more specific, is it the position of the Department of the Interior that protecting tribal sacred sites and cultural and historical artifacts is part of that responsibility, both on tribal and non-tribal land?

Mr. CAMERON. Yes, sir. As a general principal, I think that is true. I think it is less clear in terms of off tribal lands than it may be in terms of on Federal lands or certainly on an Indian reservation. But as a general principle, I think the Federal Government is responsible for working with the tribes to be concerned about their cultural heritage and helping them conserve that.

Mr. GALLEGO. OK. In light of the evidence you have heard today, evidence showing the destruction of multiple sites, including burial sites that are sacred to Native people, how is it possible for you to argue that this activity is not a violation of that trust responsibility, then?

Mr. CAMERON. Mr. Chairman, I am not familiar with all activity going on across the entire border. I am aware of the fact that the Congress provided authority to the Federal Government.

Mr. GALLEGO. Just specific to what you heard today and from the testimony of other witnesses is what I am referring to, not the grander border area.

Mr. CAMERON. Yes, sir. The way I would respond to that is that the National Park Service and, indeed, all of our bureaus, when in the conduct of any of our activities, we discover cultural resources or human remains, most certainly, we go through a process with the tribes to try to repatriate, if you will, those resources if they are interested in doing that.

Mr. GALLEGO. Moving on, then, on the first panel, Chairman Norris discussed the fact that CBP expedited its construction on several sacred sites, including Monument Hill, after Chairman Grijalva visited and pointed out these places.

Given your department's close working relationship with CBP, can you provide a concrete explanation to why the timeline and construction on these sites was moved up? Can you confirm the Department intended to pre-empt any opposition to the destruction of these places?

Mr. CAMERON. Mr. Chairman, I am unaware of what particular stretches of ground DHS was planning construction on. What I can tell you is none of the human remains that have been found were found from Monument Hill if that is at all helpful.

Mr. GALLEGO. When was the last time you had consultation with DHS regarding this construction?

Mr. CAMERON. The Department has conversations almost on a daily basis with DHS in terms of our activities along the entire southern border.

Mr. GALLEGO. And what was the last time there was coordinated meetings with the Tohono O'odham Nation or other tribes regarding the sacred sites?

Mr. CAMERON. Let's see. According to my records, most of the activity, certainly the most recent one that I am aware of was in December 2019 when CBP, the Park Service, conducted a meeting with the members of Tohono O'odham to discuss construction activities at Monument Hill and Quitobaquito. That is the last one I am aware of. There may have been ones subsequent, Mr. Chairman.

Mr. GALLEGO. So, when Chairman Norris received, I think it is an e-mail or text that they are about to start blasting, when would that occur?

Mr. CAMERON. I don't know, sir.

Mr. GALLEGO. Were you made aware prior to Chairman Norris getting that notification that they are about to start blasting?

Mr. CAMERON. I certainly was not. There is a possibility other folks at the Department may have been but I was not, no.

Mr. GALLEGO. You can see how that isn't, according to what I believe the Tohono O'odham Nation sees and I think what many of us see, that that does not show a certain level of respect or tribal consultation or coordination when one of our trusted leaders and community leaders and tribal leaders is getting an e-mail about blasting to start.

Last, I would like to make sure that we get a record of all the communications and meetings between CBP and Department of the Interior regarding the project and I yield back my time.

Dr. GOSAR. Mr. Cameron, in your testimony, you state, and I quote, "cultural resources, wilderness areas, wildlife refuges, plant, and animals are adversely impacted by land degradation and destruction from trails, trash, fires and other activities related to the unlawful border crossings." Did you make that statement?

Mr. CAMERON. Yes, sir, I certainly did.

Dr. GOSAR. Now, you add in, "Construction of border barriers will reduce or eliminate impacts from illegal entry and will help maintain the character of these lands and resources." Do you have things that back that up? I mean, do we see where a current fence is? We see a better area of vegetation?

Mr. CAMERON. Well, sir, I think it is very clear that if you don't have illegal vehicles driving willy nilly over an area, you are less likely to have destruction of archaeological resources, you are less likely to be running over endangered desert tortoises, you are less likely to be inflicting all sorts of damage on the land and the resources associated with it. And by creating a wall, if you are limiting the traffic, then those resources are easier to restore and less likely to be damaged, not to mention the fact that you won't have people trying to cross that area and end up dying as has happened.

Dr. GOSAR. In implementing this mandate, you outline legal requirements placed on the agencies that, despite the waiver

authority being in place, must be carried out. You cover an extensive list of resource protection actions and stakeholder consultations performed by the Federal Government. Specific to border infrastructure in Organ Pipe Cactus National Monument, you cite consultation with over 100 entities, including Federal, state and local government agencies and tribes, among others.

You stated these actions and requirements have resulted in siting and wall alignments to identifying known archaeological sites, ethnographic resources and areas with a high potential for intact cultural resources, identifying sensitive plant species and avoiding impacts to federally listed species habitat, real-time monitoring and alarm for Quitobaquito Springs hydrology system to ensure the protection of the resource. Mr. Cameron, my question to you, does the government of Mexico offer monitors to ensure the drug cartels or unlawful immigrants avoid these archaeological sites?

Mr. CAMERON. Sir, to the best of my knowledge, they do not.

Dr. GOSAR. As a followup, to your knowledge, do the drug cartels or unlawful migrants offer mitigation strategies to reduce their impacts on the cultural sites and environment?

Mr. CAMERON. I think it is fair to say, Mr. Gosar, that the drug cartels and other illegal people doing things on the border are oblivious to or don't care about our Endangered Species Act or NEPA, for that matter.

Dr. GOSAR. Do you know if they consult the tribes or other impacted stakeholders?

Mr. CAMERON. I would be really surprised if they did, Mr. Gosar.

Dr. GOSAR. Is there evidence that the border wall will impact listed species such as the Sonoran Pronghorn?

Mr. CAMERON. There is the possibility. What I would also point out is the Department, for a number of years, has undertaken mitigation activities to try to protect fish and wildlife populations in the border area and more generally. And I know there have been some efforts undertaken to help restore populations of Sonoran Pronghorn.

Dr. GOSAR. But in a wide-open aspect of which is frequently frequented by drug smugglers and cartel members, it seems to me like they would be very problematic to those species recoveries.

Mr. CAMERON. In fact, Mr. Gosar, if I were a drug smuggler with a gun and I was hungry, I would be tempted to shoot a desert pronghorn and have it for dinner.

Dr. GOSAR. Kind of what I was thinking. The border wall that currently exists there, we were just there last week—I mean, there is a barrier, the cross brace that is on the ground like the Normandy cross and stuff. Has that really mitigated and helped the area?

Mr. CAMERON. I don't have specific information on that. I think it is really clear that a low barrier or vehicle barrier is not nearly as effective as the sort of barrier that CBP is installing along the border at this point. Clearly, the existing barriers have not stopped illegal movement of people. They have not stopped drug trafficking.

Dr. GOSAR. I agree. But they stopped a lot of traffic. We have heard over a thousand different violations with vehicles who were actually stopped by putting the Normandy barrier but——

Mr. CAMERON. Yes, sir. I think that is successful. They have also seen, as you have illustrated with some of the photographs we have shown earlier, there are abandoned vehicles perhaps just south of those barriers that are causing issues.

Mr. GALLEGO. Thank you, Ranking Member. I now recognize Representative Haaland.

Ms. HAALAND. Thank you, Chairman. My first question will go to Dr. Ortiz. Those of us in Indian Country know that when Federal agencies fail or refuse to engage in tribal consultation on a project, mistrust can result. My first question is how do you see the relationship with the Interior and Tribal Nations developing under the current Administration after everything that has happened. And is the current situation at the border reversible?

Dr. ORTIZ. GAO has not done work specifically looking at that relationship. We do know that on occasions, like we have seen over the past couple of months, when consultations or other requirements are waived, it further exacerbates mistrust that may have already existed, and it really risks irreparable harm to sites.

Sometimes these sacred sites and cultural resources could have been preserved with very modest adjustments. And GAO's research suggests that even outside the realm of formal consultation, developing a good ongoing relationship with tribal and local stakeholders will help you figure out ways to construct infrastructure with the minimal potential harm.

Ms. HAALAND. I understand. And when all of this occurs, what does the GAO recommend the Federal Government do to regain tribal trust?

Dr. ORTIZ. GAO recommends improvements to tribal consultation practices, specifically such as we have recommended to 15 agencies that they should tell tribes how their input was weighed. We are also recommending improvements to the Federal Permitting Improvement Steering Counsel in terms of centralizing information so that tribes can be consulted in a more timely fashion and that there is better coverage to recognize which tribes are concerned with the geographic area even if they don't live there.

Ms. HAALAND. Right, that is better than a text a few hours before the incident happens, I guess. Thank you, Dr. Ortiz.

Mr. Cameron, with respect to your testimony regarding—and my colleague, Mr. Gosar, brought this up—the cultural resources, plants, animals, being adversely impacted from the various negative impacts, including trash and people driving through there, can trash be cleaned up?

Mr. CAMERON. Sorry.

Ms. HAALAND. I mean, it is a yes or no. Can trash be cleaned up?

Mr. CAMERON. Yes.

Ms. HAALAND. OK, good. But a sacred site that has been blasted, it can never be made whole again. I want you to understand that. And you know why? Because ancestors put those things in the ground with care and love and tradition and prayers. Those can never be regained again. And I want you to understand that you can't equate sacred sites and burial grounds with trash. You can't equate that with people walking through the desert or leaving their abandoned trucks there. That pales in comparison to what these ancestors of these people have done. They put those things there

for a purpose, because they knew that, in the future, we would rely on that knowledge and knowing that those ancestors are there.

I don't expect you to understand that, but I am trying to impart a little information on you so that you understand how they feel about this and why they cry when they see that place being blasted apart. You can't equate that with trash and with, oh, somebody—they burned up this tree or they—the damage that this Administration is doing to this area is irreparable. It is irreparable, and you didn't even ask. Nobody asked permission of these people to do any of that.

It is shameful and it is immoral. Like I said during the last panel, this—we are having this hearing because we care deeply about what is happening with this land. But it is all over. It is happening all over the country with this Administration. And that is why I will say again I don't know how any of you sleep at night. Chairman, I yield.

Mr. GALLEGO. Thank you, Representative Haaland. I now recognize Representative García.

Mr. GARCÍA. Thank you, Mr. Chairman, and to the two members of the panel. Before I make my remarks, I just have to preface this by saying that, for all of the talk of protecting religious freedom, I can't believe what the Administration and its representatives here are telling us and the exchange that is taking place and how sacrilegious it really is.

Since taking office, Donald Trump has relentlessly tried to fund construction of an ineffective wall at the cost of taxpayers, the environment, and Indigenous peoples, as we see today, all while helping his friends make profits at the expense of our communities, such as in waiving the procurement process. It is beyond egregious and repugnant to think that this Administration, one that pushes for religious freedoms, is also violating the sanctity of the ancestral lands of Indigenous people in our country.

The Administration continues to bypass environmental regulations and other laws in its efforts to construct a border wall. But it will not go unchecked, not while Democrats control the House. Dr. Ortiz, in what ways is it within the purview of the Federal Government to actively engage in tribal consultation, and why is that consultation important?

Dr. ORTIZ. Tribal consultation is a critical way in which we demonstrate the Federal respect for tribal sovereignty and the government-to-government relationship we have with tribes. When we act to protect archaeological, historical, cultural, natural resources that are of importance to Native Americans, we are acting consistent with the Federal trust responsibility.

Mr. GARCÍA. Can you elaborate on the current barriers that hinder effective consultation with the tribes?

Dr. ORTIZ. There are several current barriers. And among those that came out most frequently in GAO's review were those dealing with the timeliness of notification and the adequacy of notification, whether or not a tribe that had ancestral or treaty rights in an area was actually notified. We have also noted there have been problems with whether or not agencies genuinely weigh tribal input. I think, as one Representative said earlier today, going through the motion of compliance rather than actually weighing

input and acting with the respect that a government-to-government relationship merits.

Mr. GARCÍA. Thank you. Mr. Cameron, do you feel that your agency has done an adequate job in consulting with the tribes?

Mr. CAMERON. Yes. Congressman, as a general principle, I know Assistant Secretary Sweeney has been involved in numerous tribal consultations around the country. In the particular instance we are talking about today, the Congress passed a statute that provides for an expedited process for construction of a border wall. And the Administration has chosen to exercise the authority that the Congress gave.

Mr. GARCÍA. Is the consultation adequate?

Mr. CAMERON. Adequacy——

Mr. GARCÍA. Your opinion.

Mr. CAMERON. Adequacy, I think, is probably in the eye of the beholder, Congressman. What I can tell you——

Mr. GARCÍA. OK. Thank you. In your testimony, you note that the agency has conducted 90 formal consultation sessions on 17 topics and 30 informal listening sessions with tribes. What is the difference between a formal consultation and an informal listening session?

Mr. CAMERON. I am afraid I am out of my legal depth to give you a precise answer. I am happy to do that for the record.

Mr. GARCÍA. OK. Do you consider e-mails a form of consultation?

Mr. CAMERON. I consider e-mails a form of communication.

Mr. GARCÍA. Are they consultation?

Mr. CAMERON. All I can tell you is that the Department and CBP have taken steps to communicate regularly with the affected tribes, in terms of activity on the border, and we have made a good-faith effort to understand the tribes' concerns and to try to address them.

Mr. GARCÍA. Regardless of what you say, this Administration is bulldozing through and desecrating sacred sites with little to no consultation with the tribes. Thank you, Mr. Chairman. I yield back.

Mr. GALLEGO. Thank you. I now recognize Chairman Grijalva.

Mr. GRIJALVA. Mr. Cameron, when Interior effectively lost control of the public lands back in 2005 with the REAL ID Act and we ceded that responsibility to Homeland Security, much of the decision making that occurs around issues such as sacred sites, consultation, has been ceded to another agency. And you mentioned in your testimony how strong interagency cooperation and meetings occur.

Let me ask you about one topic, if there was any discussion. The decision and the change, the administrative change to expedite and waive the procurement process so that the wall could be built more rapidly and the firms that came on, did Interior have any role in assessing whether they understood what a relationship with a tribal nation might be, that they understood what a sacred site might be, a burial site, a ceremonial site? Did you have any input into assessing that construction company's ability to work in the Southwest, to work adjacent to Indian land, and to be able to do that and still be respectful of the historic, cultural, and human issues that are involved with that? Did you have any input in that?

Mr. CAMERON. Mr. Chairman, what I can tell you is that Interior and CBP talked on a regular basis. There were archaeological surveys that the Park Service did.

Mr. GRIJALVA. I am talking about the firms that got hired.

Mr. CAMERON. I am not aware of specific details in terms of briefings with the individual contractors. But I would be happy to try to find that information for the record, Mr. Chairman, if you would like.

Mr. GRIJALVA. Yes, I think that would be important, or we can request it ourselves. But the other issue, Mr. Cameron, that I think is important, and it goes to the issue of consultation which separates what we are talking about here from the other issues that are going on relative to the wall. That trust responsibility is embedded in the work of Congress and in the Constitution. And, as such, I think it has pre-eminence in many of the discussions that we are having.

And something as important, as enshrined as trust responsibility and nation-to-nation consultation gets routinely waived, ignored. Don't you think that creates a fundamental problem? You keep saying we have the right based on 2005 that we can waive whatever we want. Fine. But in terms of the Interior and its role and its jurisdiction and its relationship with Indian Country, don't you think you can't be that cavalier about that situation?

Mr. CAMERON. Mr. Chairman, I would suggest that Interior is not being cavalier at all. Interior is having conversations all the time with the Tohono O'odham Tribe and, not to mention, other tribes in the Southwest. We take our trust responsibility very seriously, which, at its core, is an open communication between the Federal Government and the tribes in trying to understand each other's mutual concerns and interests. I think, as you have observed, Mr. Chairman, it is rather an unusual statutory situation along the border with the Roosevelt Reservation. And the Congress has given the executive branch unusual authorities. And the Administration has determined that it is in the best interest of the national security——

Mr. GRIJALVA. The last Congress gave them unusual authority. This Congress hasn't given them unusual authority. That is why you had to go to the Defense Department to get money to build a wall because this Congress didn't do it.

But anyway, my other point is, Dr. Ortiz, different agencies and when you talk to tribal leaders, some agencies find the requirement of consultation burdensome. Tribes respond that it is subjective, that some do it well, like you gave examples. Is there a place for some level of uniformity and a legal mandate on how consultations should be done across the Federal Government, agency-to-agency, so that we don't have different boxes that are being checked off, that there is a criteria on how you interact and how you deal with tribes? Did you think there is a need for that that Congress should explore?

Dr. ORTIZ. GAO hasn't directly evaluated the need for that. We have looked specifically at different policies. Where we do see some agency policies really shine in terms of what they demand for those consultations in terms of what they expect agencies to do and in

terms of the manner in which they treat the input and expertise of tribes.

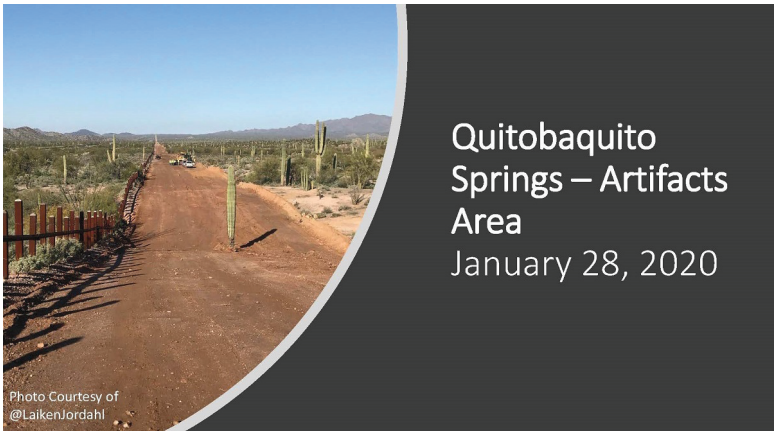
Mr. GRIJALVA. Thank you. I yield back. Thank you for your indulgence, Mr. Chairman.

Mr. GALLEGO. Thank you. I would like to thank our witnesses for their insightful testimony and the Members for their questions. As I stated before, the members of this Committee may have some additional questions for the witnesses, and we will ask you to respond to these in writing. Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following the hearing, and the hearing record will be held open for 10 business days for these responses. If there is no further business, without objection, the Committee stands adjourned.

[Whereupon, at 4:48 p.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

POWERPOINT PRESENTATION FOR THE OPENING STATEMENT OF THE HON. RAÚL M. GRIJALVA, CHAIR, COMMITTEE ON NATURAL RESOURCES


Quitobaquito Springs – Artifacts Area
January 28, 2020
Photo Courtesy of @LaikenJordahl

Quitobaquito Springs

Water Pumping
• Customs and Border Protection (CBP) has reportedly been pumping groundwater along Arizona's southern border to mix with concrete for the planned construction.
• The Tohono O'odham Nation has requested DHS to stop pumping the local groundwater for concrete mixing.
• As of today, water is still pumped to mix the concrete.

Construction Marker
Used to indicate how far the construction road will go into the desert.

Las Playas – Intaglio Site
Ceremonial Site
as big as a football field

Las Playas - Hohokum Traditional Burial Site

Bulldozing Saguaro Cacti and other desert plants
• No DHS Monitor
• No DHS Arborist
• No relocation and replanting
• No tribal consultation

T.O. Border Trip
Chairman Grijalva Briefing Notes and Locations

Monument Hill

Archeologists, Tribal elders were interviewed and identified this hill as sacred to the O'odham. This hill is mentioned in Father Kino's letters and there was no Sonoita. During Apache raids, if a body was found their body would be placed on this hill. Meaning there are bodies of other tribes among this Hill with bone fragments. DHS mentioned that they would back off on developing the Hill but the work is still being done (as you can see the road is widened in the photos/video) even after the tribe mentioned this area in a letter. Edward Abbey mentioned Monument Hill and its significance to the tribe in his archeology papers published in 1960s.

Quitobaquito Springs

There is a Hia-ced O'odham (Sand People) village next to the Spring that was mentioned in 1693–1695 by Father Kino. There is another mention of this area in 1908 that also recorded the village north of the Springs. In 1937, the Park Service purchased the land from the families in this area and that was the last time people habited the area. There is a Hia-ced O'odham cemetery ½ mile north of the Springs.

Ground water pumping

Since the border wall construction includes ground water extraction, there is a white water monitoring tank that has been temporarily placed in the Springs for the benefit of the tribe and the park. The Border Patrol is digging water wells for the construction of the wall. The tribe is concerned about how the digging of the wells will affect the water tables of the sacred Springs. Archeologist noted that in the late 19th century a diversion of water into this area for fields. The tribe asked for a buffer area to allow for the animals to come back and forth through the area since the Springs is also considered a watering hole for some animals in the area.

Wildlife Impacts

Quitobaquito pupfish is an endangered species in this spring. The Sonora Mud Turtle is a candidate for the endangered species list and is only found in this spring. Other animals in this area include the Sonora Prong Horn and little animals—there are 150 species recorded drinking out of this Spring. The roadrunner will not be able to go through the fence. There will be an impact for wildlife—the fence construction includes lights for night construction crews, and this is a concern for migrating birds. The nearest water wells are being pumped 7–8 miles away. The impacts of the water pumping and wildlife may not be seen for several years.

Also, north of the Springs there is a graveyard the Tribe uses as a site for reburials. The spring head is also a sacred site for the O'odham. White clay is gathered from this area for ceremonies.

Artifacts Area—Between the Springs and the current border fencing there is an area where artifacts have been found. This area will be in the proposed construction

roadway. The proposed roadway may come up to 60 ft from the current border fencing.

Artifacts, seashells, and human bone fragments have been found in an area near Quitobaquito Springs for the Hia-ced O'odham (Sand People). Bones, artifacts, pottery and shells are found throughout the area leading to the Springs on both the U.S. and Mexico side of the border.

There is an archeologist that DHS has contracted to be the monitor for the entire construction of the border wall, and he drives back and forth along the road. This is not the most efficient way to monitor the desecration of artifacts. At one point during our trip we saw him driving, the tribe's archeologist stopped him and asked about the new roadways constructed and the plants that were thrown on the side of the roads. He noted that they have hired another archeologist to monitor, but he was not allowed to talk to anyone.

Saguaro Impact

To prepare for the construction trucks, cranes and materials that will need to be transported the current roadway next to the border will be widened up to 60 ft. This means that plants within that area will be bulldozed or replanted. Cacti with stakes mean they have been transplanted away from the current construction area. From what archeologist know there are over 800 saguaros that have been transplanted. The DHS Contractor for the construction—Northland Research only listens to its own arborist and dose not coordinate with Parks or tribal archeologists. Photos and video indicate that folks on the ground were surprised to see the progress on the roadway there were areas of the roadway that were not bulldozed just a month ago that were flattened.

Construction Roadways

The Nation was told that the roads next to the current fencing and border structures would be widened for the border wall construction trucks and crew to put the wall up. The new road would be within 60 feet of the current border structures. There are markers along the current roadway that show where the proposed roadway will be. Most of the plants in the area are supposed to be marked with a stake for re-planting or receive a red spray paint dot that indicates the plant is not replantable and is tossed aside.

DHS has its own arborist that monitors the construction. The Arborist does not notify the NPS Archeologist of the plants that are in the way of the roadway construction.

Las Playas—Intaglio Site

Some rock piles date back over 2,000 years maybe even longer. Other rock piles are more recent and are at least 100 years old. Ceremonial dances were performed in this area which is as big as a football field. This site was known to exist for at least 10,000 years. Tribal elders have noted that this is an area used for ceremonies, and dances. The Hia-ced O'odham have a village across the border not too far from this location. DHS has not responded as to where the site of the proposed roadway would be—given is proximity to the border and the current roadway. The area where the rocks are placed falls within the 60 ft.

Las Playas—Burial Site

This was a burial site for the Hohokam around the 1700–1800s in this area there are artifacts that go back 10,000 years. The older sites are showing a continuity of the people living in this area, this is consistent with the oral traditions. This area was part of a walking area for people and is in the pathway that would lead to water. Across the border from this site, is another Hohokam village. This burial site may have been used by the people of that village. Bone fragments and shells were also found in this area. This burial site is next to the current Normandy style barriers that exist for the border. Current roadways go around the burial site, but a widening of that may disturb the burial site.

PHOTO SUBMISSIONS TAKEN FROM CHAIRMAN GRIJALVA'S BORDER WALL TOUR ON JANUARY 20, 2020

Border Barrier Fence

Border Barrier, Normandy Style

Hohokam Burial Site—Bone Fragments

Hohokam Burial Site

Las Playas Intaglio Site—Bone Fragments

Las Playas Intaglio Site

Quitobaquito Springs—Chair Grijalva and Chairman Norris Walking

Quitobaquito Springs—Endangered Pupfish

Chairman Grijalva at Organ Pipe Cactus National Monument

Construction Effects on Saguaro Cacti

Border Wall Construction, Crane

July 5, 2019

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Re: Coalition Comments on Proposed Border Walls in Arizona's Pima and Cochise Counties

Dear Mr. Enriquez,

These comments on the proposed construction of 63 miles of border walls and the installation of lighting and technology in the United States Border Patrol (USBP) Tucson sector are submitted on behalf of the undersigned conservation, human rights, public interest, and faith-based organizations.

We must note immediately that this comment process is deeply flawed and seemingly meaningless, as Customs and Border Protection (CBP) has already awarded a $646,000,000 construction contract for this project just days after sending the public a request for comment.[1] This clearly illustrates that CBP has no intentions of modifying or changing the proposed course of action based on input received. CBP's attempt to exempt itself from 41 environmental, public health and cultural resource protection laws[2] further demonstrates the agency's complete disregard for engaging with stakeholders and addressing concerns of communities that will be harmed by the project. Unless CBP immediately halts construction and rescinds the waiver of these laws, it appears there will be no analysis of the clear harm the project would inflict on communities, clean air, clean water, endangered species,

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[1] Department of Defense. 2019. Contracts for May 15, 2019. https://dod.defense.gov/News/Contracts/Contract-View/Article/1848882/.

[2] 84 CFR 21798. May 15, 2019. Pages 21798–21800 https://www.federalregister.gov/documents/2019/05/15/2019-10079/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility#print.

cultural resources, and indigenous culture and heritage along the Arizona-Mexico Border.

While CBP has failed to provide adequate information for the public to comment on this project, it is clear from the vague information in the comment solicitation notice that the construction of 63 miles of border walls in the locations proposed would cause severe and irreversible damage to the environment and harm the culture, commerce, and quality of life for communities and residents located near the project areas. Similar border barrier projects have damaged and destroyed protected landscapes, interfered with binational conservation efforts, obstructed the movement of wildlife, and impacted nearby communities.

Based on the limited information provided by CBP in the May 6 notice, we gather that the area of proposed construction for this project would fundamentally alter or destroy portions of Organ Pipe Cactus National Monument, Cabeza Prieta National Wildlife Refuge, Coronado National Memorial, the San Pedro Riparian National Conservation Area, and the San Bernardino National Wildlife Refuge, among many other areas. The project would also damage or destroy designated critical habitat for dozens of endangered species including the jaguar, Quitobaquito pupfish, San Bernardino spring snail, Huachuca water-umbel, Mexican spotted owl, Yaqui catfish, Yaqui chub, and beautiful shiner. The project would also occur near homes, ranchlands, and recreational areas, and have negative impacts on the health and wellbeing of residents on both sides of the border.

The proposed project and further militarization of the border would also damage commerce, trade, and tourism in the region. CBP's proposal to construct border walls through frequently visited tourist destinations would have significant repercussions on southern Arizona's ecotourism economy and cause economic harm to border communities. CBP must assess potential harms that the proposed project would have on the environment, the economy, endangered species, air quality, water quality, and public health before moving forward.

CBP's notice to comment is replete with vagueness and devoid of site-specific details. The one thing that is clear from the limited information provided is that the scale of the project is massive, spanning the majority of Arizona's southern border. A project of this scale will undoubtedly result in the destruction of federally protected lands, and restrict the movement and migrations of myriad species of wildlife, interfering with their ability to access food, water, mates and habitat. This project clearly warrants an in-depth and transparent review of potential impacts, as would normally be required under the National Environmental Policy Act (NEPA).

Before we discuss the potential harms caused by the proposed project, we must remind CBP that there is no evidence that the construction of additional border barriers would achieve the agency's stated goals to "impede or deny illegal border crossings," as border walls of many designs have proven easily surmountable by people in a number of ways, including with a ladder or a rope.

We request that CBP carefully review and respond to the numerous concerns raised within the following sections of this letter before moving forward with any aspect of border barrier construction.

Inadequate Public Notice and Comment

We strongly object to CBP's insubstantial and discriminatory public comment process for this project. CBP's failure to publish a Spanish language notice to comment is unacceptable and amounts to language-based public input suppression and discrimination. Based on the substantial inadequacies of the public comment process, it is almost certain that key stakeholders have been disregarded and federal requirements for coordination and/or consultation with other federal agencies, such as those required by the Endangered Species Act (ESA), NEPA, and other relevant federal laws, have been ignored.

CBP has held just one public meeting in Ajo, Arizona, with only low-level, non-decision-making CBP staff in attendance. No additional public meetings have been scheduled for communities that will undoubtedly be harmed by the project. This denial of a transparent public process strongly suggests that CBP has no sincere interest in obtaining thoughtful comments and broadly engaging with the diverse constituencies affected by the project. To gather sufficient, meaningful public input, CBP must host public comment forums in English and Spanish in each of the affected areas including Tucson, Sells, Sierra Vista, Patagonia, Douglas, Nogales, and Yuma regarding the construction of border barriers through communities and protected lands.

We note that CBP has already awarded a construction contract for the proposed project, which suggests that no amount of public input, scientific data, or new information provided to agency officials and decision-makers would actually alter the

proposed action or inform the development of alternatives. CBP must cancel or at a minimum put the existing contract on hold until all relevant stakeholders have been consulted, public forums have been held, and public comments and concerns with the project—including the consideration of alternative courses of action—have been analyzed.

We also note that the information provided within CBP's notice to comment is wholly inadequate to solicit meaningful public comment. The map contained in the notice lacks basic landmarks, simple cadastral data, and even a rudimentary map legend and scale. CBP says it intends to install lighting but gives no description whatsoever of the extent its intent, including how the lighting will be powered, how light pollution will be mitigated, and why lighting is even necessary when billions of tax dollars have been spent on surveillance technology that works in the dark. Similarly, CBP has provided no information about the critical issue of water. We have heard through informal sources that CBP plans on drilling wells every five miles along the border for this purpose. Such an action would be devastating to wildlife and border communities.

To meaningfully comment on the impacts of this project, the public must first understand the specifics of the proposal, including a detailed and accurate description of where the proposed walls and associated infrastructure would be placed. It is CBP's responsibility, not the responsibility of the public, to compile and share detailed information on the proposed project *before* requesting the public to comment. CBP must provide detailed maps of the project area and extend the comment period to allow the public to make informed and specific comments *after* reviewing detailed and specific maps showing the extent of CBP's proposal.

NEPA is a clear and well-established method of soliciting public comment, for which there is no substitute. Though CBP has elected to waive NEPA in its entirety, the public interest and the ultimate decision-maker would benefit from complying with NEPA and moving this process forward under NEPA with the completion of an Environmental Impact Statement (EIS). Importantly, a NEPA-compliant EIS would ensure that the process is transparent and publicly accessible by providing notice to comment via Federal Register publication, local newspapers, and other means that are necessary to reach the communities that the proposed action would impact. The NEPA process would also cure the numerous and significant shortfalls in CBP's effort to notify and invite public comment for this project, including the selective distribution of the notice to comment and the dismal lack of detail about the project included therein.

Lastly, a NEPA-compliant EIS would allow CBP to analyze the true purpose and need for the project and consider alternatives to the proposed project, including a "no action alternative" and other alternatives that would be less costly to taxpayers and less harmful to the environment and neighboring communities. CBP has recently stated that the agency would conduct environmental planning and produce Environmental Stewardship Plans (ESPs) for border wall construction projects that would "look exactly like Environmental Assessments (EAs)" and "mirror" the intent of NEPA.[3] We note, however, that ESPs are not and will never be an adequate substitute for the NEPA process. ESPs fail to meet the rigor set forth by NEPA in numerous ways. As stated in the Council on Environmental Quality's regulations implementing the procedural provisions of NEPA, alternatives are "the heart of the environmental impact statement."[4] Whether in the context of an EIS or an EA, NEPA requires agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[5]

Prior ESPs prepared by DHS and CBP do not examine alternatives, and instead have been used to justify decisions already settled on for projects that were undertaken before the drafting or release of an ESP. This is most clearly evidenced by DHS's August 1, 2017 decision to waive 37 environmental, public health, and cultural resource protection laws and break ground on 8 border wall prototypes and 16 miles of "primary" border wall in San Diego before conducting any sort of assessment on the potential harms of project. CBP did not complete an ESP for this project until 10 months after virtually all applicable environmental, public health, and cultural resource protection laws had been waived and construction was nearly complete.

For these reasons, before CBP moves forward with the proposed construction, we request that CBP (1) immediately cancel or place on hold the $646,000,000 construc-

[3] Paul Enriquez, U.S. Customs and Border Protection. 2018. Statement made during webinar on Rio Grande Valley border wall construction. October 30, 2018.

[4] 40 C.F.R. § 1502.14.

[5] 42 U.S.C. § 4332(E).

tion contract with Southwest Valley Constructors; (2) provide additional specific details about the project including accurate, detailed maps as would be required in an EIS to allow for informed public comment; (3) host public forums in English and Spanish in the Tucson, Sells, Sierra Vista, Douglas, Nogales, Patagonia, and Yuma communities; and (4) conduct this project in compliance with all relevant federal laws including, but not limited to, NEPA, ESA, the Clean Water Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Air Act, the Safe Drinking Water Act, the Archaeological and Historic Preservation Act, the Historic Sites, Buildings, and Antiquities Act, the Religious Freedom Restoration Act, the Native American Graves Protection and Repatriation Act, the National Wildlife Refuge System Administration Act, and the Administrative Procedure Act. CBP can start with the publication of a notice to comment on the proposal in the Federal Register that provides a 60-day scoping period after sufficient information has been made available to the public about the proposed actions.

Destruction of Habitat and Impacts to Wildlife

Border barriers—regardless of whether they are composed of mesh, bollards, solid steel, or concrete—are well understood to be ecological stressors that destroy habitat, prevent genetic interchange, and impede wildlife migration.[6] In July 2018, more than 2,500 scientists published a paper detailing the harms that border walls cause to habitat quality, stating: "Physical barriers prevent or discourage animals from accessing food, water, mates, and other critical resources by disrupting annual or seasonal migration and dispersal routes."[7] Existing border walls in Arizona and across the U.S.-Mexico borderlands have caused extensive and well-documented harm to wildlife and natural processes, including the destruction and fragmentation of habitat; interference with the flow of water and the exacerbation of flooding; and disturbances and harm to wildlife during construction.

Existing border security infrastructure, including miles of border barriers built with no environmental review, already poses a significant threat to wildlife and conservation lands in and around the proposed project area in Arizona. CBP's operation of motor vehicles in wilderness, round-the-clock patrols, and helicopter flights are already persistent disturbances to wildlife in many of the project areas. The proposed walls will only exacerbate existing damage and further degrade the unique and irreplaceable habitats in the Arizona borderlands. Any potential harm caused by the proposed project must be considered cumulatively with the existing stressors on species and habitat caused by border militarization and associated infrastructure and operational activities.

CBP's proposed project seeks to replace existing vehicle barriers with border walls in federally protected lands along the Arizona border. We remind CBP that the existing vehicle barriers, typically made of steel ranging from four to six feet in height, were installed as a result of collaboration, compromise, and much deliberation between federal land managers, border security officials, and environmental groups. We note that the National Park Service (NPS) even paid to install vehicle barriers in Organ Pipe Cactus National Monument out of its own budget, indicating the agency's investment in this less damaging alternative to a solid border wall.[8] Since their installation, vehicle barriers have been touted as both effective at stopping smuggling and compatible with the environmental considerations inherent in protected federal lands.

A 2006 article in the Arizona Republic attested to the effective compromise that the newly installed vehicle barriers represented, noting:

> "For now, barriers are the best compromise available for land managers who want to protect their battered parks, Border Patrol agents who want to keep illegal immigrants out and environmentalists who are concerned that solid border walls will destroy protected species and impede animal migration. They are proving effective, too, reducing illegal vehicle traffic by more than 90 percent in some areas . . . Vehicle barriers . . . seem to be

[6] Flesch, A.D., C.W. Epps, J.W. Cain, III, M. Clark, P.R. Krausman, and J.R. Morgart. 2010. Potential effects of the United States-Mexico border fence on wildlife. Conservation Biology, 24, 171–181.

[7] Peters, R., W.J. Ripple, C. Wolf, M. Moskwik, G. Carreón-Arroyo, G. Ceballos, A. Córdova, R. Dirzo, P.R. Ehrlich, A.D. Flesch, R. List, T.E. Lovejoy, R.F. Noss, J. Pacheco, J.K. Sarukhán, M.E. Soulé, E.O. Wilson, J.R.B. Miller. 2018. Nature Divided, Scientists United: US-Mexico Border Wall Threatens Biodiversity and Binational Conservation, *BioScience*.

[8] Congressional Research Service. 2009. Border Security: Barriers along The U.S. International Border. Prepared by Haddal C., Kim Y., and John Garcia, M. March 16, 2009. https://fas.org/sgp/crs/homesec/RL33659.pdf.

an answer to one point on which environmentalists and Border Patrol agree: The success of a border wall on Arizona's public lands is doubtful."[9]

The existing vehicle barriers in Organ Pipe Cactus National Monument and across the U.S.-Mexico border are the result of years of careful deliberation and compromise. CBP's new proposal to replace these effective and environmentally compatible barriers with a solid wall ignores decades of communication between federal land managers, border security officials, environmentalists, and the public. Indeed, CBP's proposal would steamroll all of these important concerns and cause severe damage not just to Arizona's protected natural resources, but to CBP's relationships with key local stakeholders, federal land managers, and the Arizona public at large.

The disturbance of land, potential harms to air and water quality, and interference with natural water drainage and flow also has high potential to harm and alter southern Arizona's unique flora. Ground disturbance resulting from the proposed project also raises concerns about the introduction of nonnative plants and erosion. Without plant cover to slow water flow and stabilize soils, rain would likely cause gullying and loss of topsoil, further degrading ecosystems within and adjacent to the proposed project areas.

Apart from the low-resolution and inadequate maps attached to CBP's notice to comment, no maps have been released that adequately detail the project area or assess the acreage of habitat that would be destroyed as a result of the project. Even based on the limited information CBP has provided, it is clear that the proposed project would harm native species and the natural environment. Despite this, CBP has not indicated that it would mitigate harm to wildlife, including threatened and endangered species, and their habitat. Even if CBP proposes mitigating actions, we are concerned by CBP's poor track record regarding promised mitigation.

For instance, in the Lower Rio Grande Valley National Wildlife Refuge, where CBP erected many miles of border wall and upgraded patrol roads in 2008, CBP prepared an ESP which determined that the most appropriate mitigation for destroyed or fragmented habitat would be the purchase of 4,600 acres of land that could serve as ocelot habitat to be added to the U.S. Fish and Wildlife Service (USFWS) refuge system. To date, CBP has purchased only 1,100 acres of potential ocelot habitat in South Texas. This is less than a quarter of the habitat that CBP committed to purchasing in the 2008 ESP to offset habitat destruction. This demonstrates 1) that CBP does not take mitigation commitments seriously and 2) that mitigation strategies and conservation measures outlined in ESPs are not adhered to by the agency, further demonstrating how ESPs are an inadequate substitute for NEPA. We are concerned that similar pledges of mitigation that might be made in the course of this proposed project may also be left unmet or ignored.

Given the massive scale of the proposed project and the importance, uniqueness, and sensitivity of many of the areas that would be harmed, it is impossible to condense all of our concerns into one short document. We have selected certain key species, areas and issues of concern that are expanded upon below.

Endangered Species:

To our knowledge, CBP has not initiated ESA formal consultation with USFWS to ensure that the proposed activities will not jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of endangered species habitat. There is no indication in the notice to comment or elsewhere that CBP intends to comply with the ESA or is taking into account the impacts of border wall construction on federally listed endangered species. If this project moves forward, failure to comply with the ESA would further endanger the recovery of numerous endangered species including the jaguar, cactus ferruginous pygmy owl, Sonoran pronghorn, Quitobaquito pupfish, San Bernardino spring snail, Yaqui topminnow, Yaqui catfish, beautiful shiner, willow flycatcher, lesser long-nosed bat, and many others.

Despite the extremely vague description of the proposed project in notice to comment, it is clear that the proposed construction would result in the removal and degradation of habitat and could lead to direct wounding, harassment, killing, and/or other forms of "take" of listed species. The proposed construction would inevitably remove vegetation, create disturbances, and potentially restrict species' movement. CBP, like all other federal agencies, must also further the purposes of the ESA by ensuring its activities aid in the conservation and recovery of endangered and

[9] Arizona Republic. 2006. *New Fences Protecting Fragile Areas on Border*. Corinne Purtill. August 26, 2006.

threatened species.[10] We implore CBP to uphold its legal duties under the ESA and request that CBP engage in formal consultation with USFWS immediately.

Night Lighting Harms Wildlife, Wilderness Character, Visitor Experiences:

Many of the areas that would be harmed by the proposed projects are wild, rugged and largely free of development. Remoteness from urban centers, low humidity levels, and a lack of light pollution make places like Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge spectacular destinations for stargazing, largely free of anthropogenic light.

CBP's notice to comment, while devoid of many details, does state that the proposed wall would include the "installation of lighting." This would severely detract from dark night skies and harm wilderness character in Organ Pipe Cactus National Monument, Cabeza Prieta National Wildlife Refuge, and any other areas where it is installed by emitting light pollution and marring the natural night skies with artificial light.

NPS management policies identify preserving dark night skies as an important factor in preserving many park resources and values, including "wildlife, wilderness character, visitor experience, cultural landscapes and historic preservation."[11] A 2017 report compiled by resource managers at Organ Pipe Cactus National Monument noted the impacts of new security lighting installed along the border, stating:

> "Future border security developments also have the potential to significantly impact dark skies. If the existing vehicle barrier is converted into a full-on border wall, permanent security lighting could potentially be installed—a development that would be catastrophic for dark night skies in the region."[12]

Organ Pipe Cactus National Monument is currently in the process of becoming an International Dark Sky Park and has undertaken a multi-year process to retrofit lighting fixtures and conduct renovations that minimize light emissions. This significant financial investment, as well as the monument's future designation as an International Dark Sky Park could be needlessly jeopardized by CBP's proposed project if construction moves forward and lighting is affixed to the border wall.

Light pollution also has numerous and severe impacts to nocturnal and crepuscular wildlife species by disrupting natural rhythms, influencing predator-prey relationships, and hindering navigation.[13] High intensity lighting in many of the proposed project areas would affect birds, bats, and pollinators and disrupt natural movements. CBP's proposed night lighting is also a significant concern for endangered ocelots and jaguars, especially in the project areas that encroach into designated critical habitat for the jaguar and known occupied habitat for ocelot.

A 2004 paper on the effects of artificial night lighting on ocelot populations in Texas' Rio Grande Valley determined "illumination and noise generated from diesel powered portable lights may cause ocelots to seek other travel corridors."[14] The same paper concludes "activity levels either cease entirely as the result of night luminance or shift to covered habitat that provides a shield from the effects of night lighting."[15]

Most border wall construction to date, particularly in remote wilderness areas, has not involved the installation of night lighting. For this project, CBP has demonstrated no clear need for night lighting, especially considering the vast and severe harm such lighting would cause to wildlife, wilderness character, and tourism.

Quitobaquito Springs:

CBP's proposed project would be devastating for Quitobaquito Springs, a rare desert oasis just 150 feet north of the border at Organ Pipe Cactus National Monument. Construction activities like bulldozing, trenching, and clearing of vegetation will have catastrophic consequences for this desert spring and Organ Pipe

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[10] 16 U.S.C. § 1531(c)(1).

[11] National Park Service. 2006. Wilderness Preservation and Management Policies 2006. Department of the Interior. Washington DC.

[12] National Park Service. 2017. Organ Pipe Cactus Wilderness: Wilderness Character Narrative and Baseline Monitoring Assessment, Building Blocks for Wilderness Stewardship. Department of the Interior. March 2017.

[13] National Park Service. 2015. Draft National Park Service Air Quality Analysis Methods. Air Resources Division, September 2015. Department of the Interior. Lakewood, Colorado.

[14] Grigione, M.M. & Mrykalo, R. 2004. Effects of artificial night lighting on endangered ocelots (*Leopardus paradalis*) and nocturnal prey along the United States-Mexico border: A literature review and hypotheses of potential impacts. Urban Ecosystems (2004) 7: 65.

[15] *Ibid.* P. 74.

Cactus National Monument as a whole. Quitobaquito is exceptionally rich in biodiversity, harboring the only population of the Quitobaquito pupfish and the only major population of the Sonoyta mud turtle in the United States. Despite the tiny fraction of area, it encompasses within Organ Pipe Cactus National Monument, it supports 45% of the flora found in the Monument[16] and is home to at least 271 plant species, including locally rare wetland species found nowhere else in the country such as the desert caper.[17]

Quitobaquito Springs is on the National Register of Historic Places and contains human cultural artifacts dating back 15,000 years, making it one of the oldest inhabited places in North America.[18] Quitobaquito is still visited and used by traditionally associated tribes, including for the Tohono O'odham ceremonial salt pilgrimage.[19] Decades of persistent conservation efforts to restore and protect the oasis have allowed the spring to remain a thriving haven for endangered species as well as a global tourist destination and area of continued cultural use and significance. DHS's decision to waive the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the American Indian Religious Freedom Act is deeply troubling. Waiving these critical cultural resource protection laws imperils the incredible archeological record present in this area and constitutes a repugnant insult to indigenous peoples with deep cultural ties to the spring.

Due to the waiver of all of the laws and requirements that would normally apply to rush border wall construction, it appears there will be no meaningful analysis on the impacts of wall construction at Quitobaquito before ground is broken. As a result of this reckless decision, the sensitive species, cultural resources, and even the hydrology of the Quitobaquito could be forever harmed.

If border wall construction moves forward, it seems likely that the project would involve the use of a significant amount of water for concrete mixing. It is imperative that CBP refrain from taking any water from Quitobaquito or from wells connected to the regional aquifer, as any disturbance or extraction could jeopardize spring outflow and imperil the future of the spring. Regional ground water levels have been in consistent decline, exacerbated by climate change, and long-term drought.[20] Any water taken from the aquifer by drilling new wells or reactivating existing wells in the region would increase water drawdown and pose a threat to future outflow of the spring. Because of such regional water scarcity, extraction from the regional aquifer should not be permitted under any circumstances.

Quitobaquito Springs is one of the main visitor attractions at Organ Pipe Cactus National Monument and has seen an increase in public use and visitation in recent years.[21] Quitobaquito is listed as one of the monument's Fundamental Resource Values "essential to achieving the purpose of the park and maintaining its significance."[22] CBP's proposed project would have significant impacts not just on the spring itself, but on the visitor experience traveling to and from this unique destination. The public access road to Quitobaquito parallels the U.S.-Mexico border for more than 10 miles. The vehicle barriers currently present on the border along this road pose a minimal visual obstruction, and are generally hidden by desert vegetation. As a result, the drive to and from Quitobaquito feels remote with few signs of human infrastructure or development. If CBP builds an 18–30-ft wall along the border here, it would be visible for the entirety of this drive and much of the southern reaches of the monument. This would severely detract from visitor experience. Such impacts must be analyzed before the project moves forward.

Destruction to Rare Sky Island Ecosystems:

A significant portion of the proposed border wall construction would occur along the eastern portion of the Arizona-Mexico border in an area known as the Sky Island region. Sky Islands are forested mountains surrounded by desert and grassland habitat. They serve as refuges for many plants and animals, providing cooler temperatures, flowing water and suitable habitat within the Sonoran and Chihuahua deserts. The Sky Island region encompasses approximately 22.7 million

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[16] Felger, R. and B. Broyles. 2007. *Dry Borders*, University of Utah Press (2007), p. 209.

[17] Nabhan, G. 2003. Destruction of an Ancient Indigenous Cultural Landscape: An Epitaph from Organ Pipe Cactus National Monument. *Ecological Restoration 21*(4), 290–295. Retrieved from http://www.jstor.org/stable/43442711.

[18] National Park Service. 2016. Foundation Documents: Organ Pipe Cactus National Monument. Department of the Interior.

[19] *Ibid.* P. 6.

[20] National Park Service. 2017. Organ Pipe Cactus Wilderness: Wilderness Character Narrative and Baseline Monitoring Assessment, Building Blocks for Wilderness Stewardship. Department of the Interior. March 2017.

[21] *Ibid.* P. 19.

[22] *Ibid.* P. 6.

hectares (56.1 million acres) and over 55 individual Sky Island mountains, 23 in the U.S. and 32 in Mexico, that reach up to 3,000 meters (10,000 feet) in elevation and support the most biodiverse oak and pine communities in North America.[23] The Sky Island region is renowned for the highest mammal diversity in the United States,[24] the highest bird diversity in the interior of North America, and the highest diversity of desert fish in the U.S. Southwest. Many of these species are in danger of extinction—for example, of 36 original species of native Arizona fish, one species is extinct and 20 more are threatened or endangered, including species near proposed wall construction like the Quitobaquito pupfish, Yaqui topminnow, Yaqui chub, Yaqui catfish, and beautiful shiner.[25]

Wide-ranging wildlife such as black bear, jaguar, mountain lion, coati, white-tailed and Coues deer, javelina and many other species must be able to move between Sky Islands to reach food, water and mates. The proposed construction would sever the ecologically connected Sky Island region in two making it impossible for wildlife to move between Sky Islands in the U.S. and Mexico. Pathways for wildlife spanning the Arizona-Mexico border are vital to the recovery of jaguar and ocelot in the U.S. and the recovery and persistence of black bear in Sonora. These corridors provide critical connections for wildlife of the Sky Islands to move and respond to climate changes that are making water more scarce and bringing more extreme and prolonged heat waves.

The unique nature of this region is reflected in the extensive network of public land along the border including the Coronado National Forest, the Coronado National Memorial, the San Pedro Riparian National Conservation Area, and the San Bernardino National Wildlife Refuge.

For the past 23 months, from July 2017 to May 2019, Sky Island Alliance has monitored borderlands wildlife movement with 24 remote sensing cameras placed along the Arizona-Mexico border. The following species have been documented moving in borderlands pathways: antelope, jackrabbit, badger, bats, birds, black bear, black hawk, black-tailed jackrabbit, bobcat, cliff chipmunk, coyote, desert cottontail, great blue heron, great horned owl, grey fox, grey hawk, hog-nosed skunk, hooded skunk, javelina, Mexican jay, mountain lion, mule deer, northern flicker, raccoon, raven, reptiles, red-tailed hawk, ring-tailed cat, roadrunner, rock squirrel, striped skunk, turkey, turkey vulture, white-nosed coati, and white-tailed deer.[26] CBP's proposed project would harm each one of these species and many more that have yet to be documented by severing critical movement corridors between sky island mountain ranges in Arizona and Mexico.

San Pedro River, general flooding concerns:

CBP's proposal includes a section of proposed barrier that would wall off the San Pedro River and floodplain. The San Pedro is the last free-flowing, undammed desert river in the southwestern United States. In 1988, Congress created the San Pedro Riparian National Conservation Area (SPRNCA) as the country's first National Conservation Area to protect this special resource. To date it is one of only two Riparian National Conservation Areas in the nation. The San Pedro is one of the most biologically diverse watersheds in the United States,[27] providing habitat for a host of wildlife and millions of songbirds that migrate through the area each year. According to the Bureau of Land Management (BLM), the San Pedro River is "a rare remnant of what was once an extensive network of similar riparian systems throughout the Southwest."[28] With about 90 percent of the Southwest's riparian ecosystems already degraded or destroyed, the San Pedro River is an

[23] McLaughlin, S.P. 2015. An overview of the flora of the Sky Islands, southeastern Arizona: diversity, affinities, and insularity. In: DeBano, L.F.; Ffolliott, P.H.; Ortega-Rubio, A.; Gottfried, G.J.; Hamre, R.H.; and Edminster, C.B.; tech. coords. Biodiversity and management of the madrean archipelago: the sky islands of southwestern United States and northwestern Mexico. 1994 Sept. 19–23; Tucson, AZ. Gen. Tech. Rep. RM-GTR-264. Fort Collins, CO: U.S. Department of Agriculture, Forest Service, Rocky Mountain Forest and Range Experiment Station: 60–70.

[24] Warshall, P. 1995. Southwestern sky island ecosystems[1] . In: LaRoe, E.T.; Farris, G.S.; Puckett, C.E.; Doran, P.D.; Mac, M.J. editors. Our Living Resources: A Report to the Nation on the Distribution, Abundance, and Health of U.S. Plants, Animals, and Ecosystems. Washington, DC: U.S. Department of the Interior, National Biological Service. 318–322. https://pubs.er.usgs.gov/publication/70148108 [Accessed January 30, 2019].

[25] US Fish and Wildlife Service 2019. "San Bernardino National Wildlife Refuge." https://www.fws.gov/refuge/san_bernardino/ [Accessed January 30, 2019].

[26] Bethel, Megan. 2019. Sky Island Alliance's Border Camera Summary. Sky Island Alliance.

[27] Boykin, et. al. 2013. "A national approach for mapping and quantifying habitat-based biodiversity metrics across multiple scales." In *Ecological Indicators*. October, 2013. pp. 139–147.

[28] Bureau of Land Management. 2019. San Pedro Riparian National Conservation Area. Department of the Interior. Accessed June 2019. https://www.blm.gov/visit/san-pedro.

outstanding example of a health riparian community[29] and has been a focus area for conservation and restoration on both sides of the border. CBP's proposed project is a direct threat to the San Pedro River and the SPRNCA.

Once known as Beaver River, the San Pedro today supports but a small population of reintroduced beaver. This population is found in small pockets of habitat on both sides of the international border stretching from the headwaters of the San Pedro in Mexico to the Gila River in the U.S. The beaver were originally reintroduced in the U.S. portion of the Lower San Pedro River and then found their way across the border to Rancho Los Fresnos,[30] where the dams of these once extirpated rodents retain water that soaks into the ground, raising water tables and nurturing trees and smaller plants.[31] The presence of beaver is an example of years of effort on the part of people on both sides of the border working to enhance the ecosystem of the San Pedro River. An impenetrable barrier across this river will divide the beaver population in two and almost certainly lead to the decline of beaver on both sides of the border and prevent any future recolonization from one country to another.

The San Pedro is also a known wildlife corridor. Half of all breeding bird species in North America are known to use the San Pedro River corridor, along with 82 species of mammals and 43 species of reptiles and amphibians.[32] Camera monitoring of this river corridor for 3 years in a single spot just north of the international border has documented 1,165 instances of wildlife traveling this river pathway. This effort has proven the San Pedro's importance for numerous species including badger, bobcat, javelina, mountain lion, mule deer, raccoon, several skunk species, turkey, and white-tailed deer, as they roam in search of food, water, and mates.[33]

We have made numerous requests to obtain more information about the type of structure planned for the San Pedro River section of the proposed project. Despite our repeated requests, CBP has provided no relevant information. While we know very little about the type of barrier proposed for the floodplain, it is all but certain that any structure installed here would pose an obstruction to the movement of wildlife and unavoidably alter or dam the flow of water.

In 2007, DHS proposed a similar project to build a wall across the San Pedro River. Federal land managers objected strenuously to these plans, calling alarm to the environmental damage that would ensue and the public safety risk such a structure would create as a flood danger. In a memo dated October 4, 2007, the BLM evaluated DHS's prior proposal to build a wall across the San Pedro River and floodplain, raising many concerns, including the threat of debris build-up against the barrier and obstruction of streamflow during floods.[34] The BLM noted that DHS entirely failed to consider debris buildup as a factor in their flood modeling—a factor which is almost certain to occur in any flood event. The 2007 memo stated, "Existing structures (remarkably similar to proposed design) have considerable problems with debris build-up."[35]

The fact that DHS failed to consider the basic and predictable factor of debris build-up in flood modeling suggests a level of negligence or ignorance in project planning that could seriously harm wildlife and landowners in the area if the project moves forward. Environmental factors have not changed in the 12 years since this project was originally proposed; all of the concerns raised by the BLM in 2007 remain relevant today and are still entirely unanswered in the project proposal and communications with DHS/CBP staff.

The same 2007 BLM memo also voices concern of how the proposed wall would alter streamflow, natural floods, and wildlife habitat on the San Pedro, stating,

> "The timing and intensity of seasonal flood flows in the San Pedro River are essential for maintaining riparian function as well as recharging the alluvial aquifer. Regardless of the maintenance commitments by Border

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[29] Sprouse, Terry. 2005. Water Issues on the Arizona-Mexico border. Santa Cruz, San Pedro and Colorado Rivers. University of Arizona Press.

[30] Smith, J. 2017. Up Against the Wall. BioGraphic.com. September 6, 2017. https://www.biographic.com/posts/sto/up-against-the-wall [Accessed July 1, 2019].

[31] New Mexico Department of Game and Fish. 2017. Wildlife Notes. http://www.wildlife.state.nm.us/download/education/conservation/wildlife-notes/mammals/Beaver.pdf [Accessed on July 1, 2019].

[32] *Ibid*. P. 16.

[33] Sky Island Alliance 2019. Unpublished research.

[34] Memo: 2007. BLM Hydrologic Issues and Concerns, Project: Dept. of Homeland Security ("DHS") Pedestrian Fence, Location: San Pedro River Basin, BLM.

[35] *Ibid.* P. 2.

> Patrol, the proposed/existing fence could inadvertently act as a flood control structure altering natural flood characteristics."[36]

If DHS proceeds with this border wall proposal and installs a structure in the San Pedro River and floodplain, it seems all but unavoidable that the flow of the river would be altered. Such actions would create a dam-like structure that would dramatically increase the flood risk and degrade the natural riparian function of the San Pedro ecosystem.

A 2012 government-contracted study examined the impacts of a border wall installed across ephemeral washes in Organ Pipe Cactus National Monument and Coronado National Memorial, determining that the barrier there was causing significant and consistent alterations to channel flow and geomorphology and harming native vegetation and wildlife. The report warned:

> "The obstruction of flow and sediment transport may have major consequences for stream morphology including lateral and vertical stream instability, as well as increased risk of over bank flows. Changes in channel function can have direct impacts on riparian vegetation and wildlife communities within the affected area. In addition, changes in channel morphology may increase the risk of fence failure due to erosion or hydraulic forces."[37]

The report also warns of the continued maintenance and restoration burdens the border barrier places upon federal land managers, stating "The fence will continue to disrupt stream function and create the need for long term maintenance of the channels near the fence."[38]

If built across the San Pedro River and floodplain, the new wall would create a debris dam that could result in a structural collapse, as happened in Organ Pipe Cactus National Monument and near Nogales, Arizona. These prior flood events provide a concerning example of what could occur on the San Pedro if the proposed project is allowed to move forward. Prior border wall-caused flood events in Arizona paint a deeply troubling picture of how CBP has neglected to consider obvious public safety and environmental dangers despite explicit and direct warning from federal agencies and the public.

On July 12, 2008, just months after a 5.5-mile stretch of border wall was installed in Organ Pipe Cactus National Monument, the new border barrier caused debris buildup and severe flooding during a summer monsoon. The amount of rainfall during that storm (1–2 inches) was typical of summer storms in southern Arizona,[39] yet this normal storm resulted significant damage to government infrastructure and wildlife habitat due to the newly constructed border wall. This flooding occurred despite the fact that the wall was designed with grates across the wash intended to mitigate flood events. Clearly CBP's flood mitigation attempt failed.

Before CBP installed the barrier at Organ Pipe Cactus National Monument in 2008, NPS managers expressed the following concerns:

- "The fence would impede the conveyance of floodwaters across the international boundary."
- "Debris carried by flash floods would be trapped by the fence, resulting in impeded flow and clean-up issues."
- "Backwater pooling would occur due to impeded flow."
- "Lateral flow due to backwater pooling would cause environmental damage as well as damage to patrol roads."
- "Significant increase in surface water depths (or rise in water elevation) would occur as a result of impeded flow, causing adverse affects on downstream and upstream resources and infrastructure in [the monument] and Mexico."[40]

In response, CBP issued a Finding of No Significant Impact (FONSI) stating that the barrier would "not impede the natural flow of water," and would be "designed

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[36] *Ibid.* P. 1.

[37] Natural Channel Design, Inc. 2012. 2011 Monitoring Report: Channel Morphology Related to the Pedestrian Fence. Organ Pipe Cactus National Monument and Coronado National Memorial. April 2012.

[38] Ibid. P. 57.

[39] National Park Service. 2008. Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona. Department of the Interior. Prepared August 2008. P. 9.

[40] *Ibid*. P. 7.

and constructed to ensure proper conveyance of floodwaters and to eliminate the potential to cause backwater flooding on either side of the U.S.-Mexico border."[41]

CBP's predictions in the 2008 FONSI have turned out to be patently false. In an analysis of the flooding that occurred as a result of the border barrier in Organ Pipe Cactus National Monument, NPS stated:

> "The pedestrian fence impeded the natural flow of water and did not properly convey floodwaters during the July 12 storm. . . Debris blockages formed at the upstream side of the fence, restricting water flow and causing significant water elevation rise. . . The foundation wall of the pedestrian fence stopped subsurface sediment flow, which added to the water elevation rise. Backwater flooding occurred in most washes."[42]

The analysis determined that the barrier CBP installed did not meet the requirements set by the FONSI. As a result, NPS managers concluded that a host of short- and long-term impacts would continue to occur, resulting in damage to wildlife habitat, channel morphology, and NPS infrastructure, including:

- "Accelerated scour below the pedestrian fence will damage the structural integrity of the vehicle barrier."
- "Floodwaters will flow laterally along the pedestrian fence and on the patrol road. These flows will result in erosion and scour above and below the foundation wall of the fence, including areas hundreds of feet outside existing drainage channels. As a consequence, the need for routine maintenance and repairs of the patrol road and vehicle barrier will increase."
- "The patrol road associated with the pedestrian fence will change vegetation in OPCNM by changing rainfall retention or runoff along the northern road edge."
- "Riparian vegetation will change in response to increased sedimentation."
- "Channel morphology and floodplain function will change over time."
- "Channelized waters will begin a gullying process that has the potential to transform land surfaces in the affected watersheds."[43]

All of these concerns are clearly relevant to the proposed project at the San Pedro and in other locations where the barrier would cross streams and washes. None of these concerns have been addressed in CBP's notice to comment or phone/email conversations with CBP staff.

The damage that ensued at Organ Pipe Cactus National Monument is a clear example of what happens when border barriers are constructed across washes without proper planning, outreach and study. We note that the San Pedro River has a consistent history of much larger flood events than have ever occurred at Organ Pipe Cactus National Monument. According to a Federal Emergency Management Agency Flood Insurance Study, the 100-year peak flow of the San Pedro River just north of the border is estimated to be 22,300 cfs.[44] Climate change is increasing both the frequency and intensity of flood events, making the threat of flooding even more severe.

No structure built in the San Pedro Floodplain would be able to withstand a flood event of this magnitude. Such a flood would result in a structural collapse of the barrier, causing a wall of water to flood into the SPRNCA and downstream. This would be devastating for wildlife habitat, local landowners, and State and County infrastructure. In 2014, just north of the border, San Pedro floodwaters washed over Arizona State Route 92, causing road damage and forcing its closure.[45] This occurred just 3 miles downstream of the proposed project area. If future floods are amplified and exacerbated by CBP's proposed project, as data indicate they would be, State Route 92 may be washed out entirely. Building a wall across the San Pedro could result in a life-threatening public safety risk. This warrants careful

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[41] U.S. Border Patrol, Tucson Sector. 2007. Final environmental assessment for the proposed installation of 5.2 miles of primary fence near Lukeville, Arizona. U.S. Border Patrol, Tucson Sector, Tucson, Arizona.

[42] National Park Service. 2008. Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona. Department of the Interior. Prepared August 2008. P. 4.

[43] *Ibid*. P. 16.

[44] Federal Emergency Management Agency Flood Insurance Study. 2016. Cochise County and incorporated areas.

[45] Arizona Department of Emergency and Military Affairs. 2014. High water in San Pedro River closes SR 92 south of Sierra Vista. Accessed June 2019. https://ein.az.gov/emergency-information/emergency-bulletin/high-water-san-pedro-river-closes-sr-92-south-sierra-vista.

study, including third-party flood modeling and a transparent process where local and state agencies and the public can provide meaningful comment. Anything less would result in significant harm to the environment and public safety.

Failure to Respect Tribal Sovereignty, Consult with Tribal Governments

CBP has failed to meaningfully consult with tribal governments in the planning process, despite the clear harms the proposed border wall construction would cause to cultural resources, ancient traditions, tribal sovereignty, and modern indigenous communities. Executive Order 13175 requires federal agencies to consult and collaborate with affected tribes on federal policies and actions that have a substantial direct effect on tribes in a "government-to-government" relationship.[46] In this case, it is clear that CBP has failed to consult with tribal governments, and specifically the Tohono O'odham Nation, as sovereign and coequal entities. This is unacceptable and must be addressed before the project moves forward.

The Tohono O'odham people and their ancestors have inhabited lands from the Gila River area south to the Sea of Cortez for thousands of years. Tribal members have experienced the negative consequences of a border imposed upon them for generations. The Tohono O'odham Legislative Council passed a formal resolution opposing border wall construction on February 8, 2017.[47] The resolution condemned the Trump administration's plans to build a border wall on the grounds that a wall would prevent Tohono O'odham members from making traditional border crossings for ceremonial and religious purposes, prevent wildlife from conducting migrations essential for their survival, and destroy saguaro cactus and other culturally significant plants, among many other reasons.

The Tohono O'odham government has clearly and unambiguously objected to border wall construction, yet CBP has made no apparent effort to work with the tribe to remedy these concerns. Instead, the agency has elected to waive laws like the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the National Historic Preservation Act, and the Archeological Resources Protection Act in order to further strip away any abilities that the Tohono O'odham and other indigenous nations would normally have to protect their cultural resources, traditional heritage, and sovereignty.

Federal agencies, including DHS, have a demonstrably poor track record when it comes to tribal consultation, even under normal circumstances where laws and guidelines are followed. A 2019 Government Accountability Office (GAO) report found that most government agencies, including DHS,

> "do not adequately consider the tribal input they collect during tribal consultation when making decisions about proposed infrastructure projects. These comments included perceptions that agencies consult to 'check a box' for procedural requirements rather than to inform agency decisions."[48]

In this case, DHS has waived each and every law that sets requirements for tribal consultation, indicating that even the consultation requirements found inadequate by the GAO will not be adhered to. DHS's insistence on waiving laws that protect cultural resources and tribal sovereignty suggests that CBP has no interest in meaningful consultation with indigenous nations like the Tohono O'odham, and certainly does not view them as sovereign and coequal governments. This is extremely concerning as most of the land along the U.S.-Mexico border is traditional territory for myriad indigenous tribes, full of rich cultural resources and archeological records as well as modern tribal nations and communities. CBP's ongoing failure to properly consult with indigenous nations and insistence on waiving the laws that protect these communities will result in irreparable damage to cultural and archeological resources along the border and serious harm to the U.S. government's relationships with coequal indigenous nations.

We are specifically concerned about the proposed project's clear potential to impact the Tohono O'odham's access to traditional lands and sacred sites, including tribal members' ability to conduct the ceremonial salt pilgrimage—an ancient ritual

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[46] Executive Order 13175. 2000. Coordination and Consultation with Indian Tribal Governments. November 6, 2000.

[47] Tohono O'odham Legislative Council. 2017. Resolution No. 17–053, Border Security and Immigration Enforcement on the Tohono O'odham Nation. February 8, 2017.

[48] U.S. Government Accountability Office (GAO). 2019. TRIBAL CONSULTATION Additional Federal Actions Needed for Infrastructure Projects. GAO–19–22. March 2019. https://www.gao.gov/assets/700/697694.pdf.

that, according to the O'odham, has occurred since time immemorial.[49] The ceremonial salt pilgrimage passes through Organ Pipe Cactus National Monument and crosses the border near Quitobaquito Spring, where currently only vehicle barriers exist. If the proposed wall is constructed, participants would be forced to scale the wall, or to cross the border through a Port of Entry many miles away. The proposed project would place an extreme and unacceptable burden on ceremony participants and threaten the future of this ceremony that has occurred for millennia.

In 2007, the Tohono O'odham Legislative Council passed a resolution affirming unlimited and unrestricted access to sacred sites in the U.S. and Mexico for traditional purposes like the ceremonial salt pilgrimage.[50] Just weeks ago, in a direct response to CBP's proposed project, the Traditional O'odham Leaders of Sonora passed a resolution opposing border wall construction proposed by CBP on the grounds that it would threaten the future of the ceremonial salt pilgrimage. The resolution states:

> "The ceremonial salt pilgrimage is a central part of the O'odham himdag that has occurred since time immemorial. The salt pilgrimage passes through lands now considered the Organ Pipe Cactus National Monument, the EI Pinacate-Gran Desierto de Altar Biosphere Reserve, and the Alto Golfo del California Biosphere Reserve. . . On May 15th, before consulting with the Tohono O'odham or obtaining approval from tribal leaders, the U.S. Department of Homeland Security issued a $646,000,000 construction contract to build border walls through these areas. . . Building a border wall through Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge would cut across the route of the ceremonial salt pilgrimage and damage Quitobaquito spring, a sacred desert oasis used during the pilgrimage. The plans for a new wall would make it impossible to carry out the salt ceremony and threaten to end this sacred tradition forever."[51]

The NPS has identified the "Continuum of Human History" as one of the five key "Fundamental Resources or Values" of Organ Pipe Cactus National Monument.[52] The salt pilgrimage and continued use of Quitobaquito spring is specifically mentioned in the Monument's foundation document, which states "many of the monument's cultural sites, objects, landscapes, and natural resources remain important touchstones that contribute to group identity and heritage."[53] A 2017 report by the NPS states: "continued use of these lands for spiritual and cultural purposes should be celebrated as an implicit value to wilderness character; facilitating these uses should never be considered a burden."[54] Ancestors of the Tohono O'odham have inhabited these lands and participated in rituals like the ceremonial salt pilgrimage for thousands of years. CBP's proposed project could recklessly put an end to this sacred ritual forever.

Economic Harm to Local Economies

CBP's proposed project would result in irreversible damage to the borderlands environment, public lands, and wildlife enjoyed by millions of visitors every year. The damage inflicted by this project would detract from visitor experiences in a multitude of ways including the visual scar caused by such a massive structure, the noise and pollution produced during construction, the light pollution detracting from dark night skies, and of course the myriad harms caused to wildlife species that so many visitors flock to Arizona's public lands to see. The proposed project would damage or destroy numerous renowned Arizona tourist destinations including two national monuments, two national wildlife refuges, several wilderness areas, and a national conservation area. Many of these areas have received federal protection through Congressional designation specifically because of their spectacular values as natural resources, wildlife habitat, and wild places for public enjoyment.

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[49] Tohono O'odham Legislative Council. 2007. Resolution No. 07–714, Authorizing Delegation to Explore Means of Preserving Salt Pilgrimage Sites. November 9, 2007.

[50] Tohono O'odham Legislative Council. 2007. Resolution No. 07–714, Authorizing Delegation to Explore Means of Preserving Salt Pilgrimage Sites. November 9, 2007.

[51] Traditional O'odham Leaders of Sonora. 2019 Acta/Resolution passed June 16, 2019.

[52] National Park Service. 2016. Foundation Documents: Organ Pipe Cactus National Monument. Department of the Interior.

[53] *Ibid.* P. 6.

[54] National Park Service. 2017. Organ Pipe Cactus Wilderness: Wilderness Character Narrative and Baseline Monitoring Assessment, Building Blocks for Wilderness Stewardship. Department of the Interior. March 2017.

According to the NPS, 260,000 people visited Organ Pipe Cactus National Monument in 2018, contributing $23.4 million dollars to the local economy and supporting 226 jobs.[55] Coronado National Memorial also received significant public visitation with 103,000 visitors contributing $7.7 million and 92 jobs to the economy of the surrounding area.[56] While data were not available for wildlife refuges and wilderness areas that would be harmed by this project, these federally protected public lands also receive significant visitation that bolsters local economies and creates sustainable jobs. Before CBP moves forward with planning or construction, the agency must conduct a full assessment of how the proposed project would harm local economies and eliminate long-term sustainable jobs.

Broad Public Opposition to Border Walls in Arizona and throughout the Borderlands

It is also important to note that the overwhelming majority of borderland residents, the majority of Arizonans, and 60% of the American public oppose the border wall.[57] Opposition to the border wall in border communities is even higher than in the rest of the country, with polls showing that 72% of borderland residents oppose the border wall.[58] In an explicit rejection of CBP's proposed border wall construction, 39 cities, counties, and tribal nations across the borderlands have passed "No Border Wall" resolutions.[59]

Many Arizona communities that would be harmed by the proposed project have already passed resolutions opposing the construction of more border walls including Pima County, the Tohono O'odham Nation, the Tohono O'odham Leaders of Sonora, the Inter Tribal Association of Arizona, the City of Tucson, and the Town of Patagonia. Each one of the 39 resolutions in opposition of the border wall should be considered by CBP as statements of direct opposition to the proposed project and all other border wall construction projects.

CBP often argues that the border wall will benefit border communities the most. If that were true, then it would be expected that border communities and their elected officials would support border wall construction. The broad and vocal opposition from border communities demonstrates a different reality. The unambiguous opposition to the border wall expressed by communities across the borderlands shows that border communities neither want nor need additional miles of border walls. CBP has continually attempted to paint border communities as unsafe places while claiming that the construction of border barriers will reduce crime. We remind CBP that crime rates in border communities are consistently lower than the national average.[60]

The opposition to border wall construction from local elected officials and the public at large reflects just how damaging this project would be to local communities. Every single Congressional Representative in the U.S. House with a district on the border has taken a formal stance against the border wall.[61] This includes Congresspersons Raul Grijalva and Ann Kirkpatrick, who represent the districts where the proposed Arizona projects would take place. A Tucson City Council representative even submitted his own letter of opposition to the project calling alarm to the damage the proposed border walls would cause to southern Arizona's natural resources and ecotourism economy.[62]

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[55] National Park Service. 2019. 2018 National Park Visitor Spending Effects: Economic Contribution to Local Communities, States, and the Nation—Organ Pipe Cactus National Monument. U.S. Department of the Interior. Natural Resource Report NPS/NRSS/EQD/NRR—2019/1922.

[56] National Park Service. 2019. 2018 National Park Visitor Spending Effects: Economic Contribution to Local Communities, States, and the Nation—Coronado National Memorial. U.S. Department of the Interior. Natural Resource Report NPS/NRSS/EQD/NRR—2019/1922.

[57] CBS News. 2018. Americans Continue to Oppose U.S.-Mexico Border Wall: CBS News Poll. March 12, 2018.

[58] Cronkite News. 2016. Border Residents: Don't Build a Wall Between Cities. July 17, 2016.

[59] No Border Wall Coalition. 2018. The Opposition webpage. Accessed January, 2019. https://noborderwalls.org/opposition/.

[60] CATO Institute. 2019. Crime Along the Mexican Border Is Lower Than in the Rest of the Country. January 8, 2019. https://www.cato.org/blog/crime-along-mexican-border-lower-rest-country.

[61] CBS News. 2019. Every congressperson along the southern border opposes border wall funding. Kate Smith. January 8, 2019. https://www.cbsnews.com/news/trumps-border-wall-every-congressperson-along-southern-border-opposes-border-wall-funding-2019-1-8/.

[62] Tucson City Council Ward 3 Representative Paul Durham. May 17, 2019. Letter to U.S. Customs and Border Protection.

The fact that CBP has made no effort to host public forums or conduct meaningful or bilingual public outreach suggests that CBP is making an intentional effort to suppress public input on this project. At a bare minimum, CBP must consult extensively with local communities by preparing a full EIS complete with public meetings and ample opportunities for the public and elected officials to understand the impacts and weigh in on the implications of the project before it moves forward in the planning process.

Unproven Purpose and Need, Inefficacy of Border Barriers

CBP's notice to comment fails to describe a purpose and need for the project and supplies no language as to why such an expensive and destructive project is necessary in the first place. We remind CBP that at this point in time, there is no conclusive data to suggest that border barriers actually reduce levels of undocumented border crossings. In fact, a 2017 GAO report noted that there is currently no way of documenting the role of border barriers in impeding border-crossers. The report recommended that CBP

> "develop metrics to assess the contributions of pedestrian and vehicle fencing to border security along the southwest border and develop guidance for its process for identifying, funding, and deploying [Tactical Infrastructure] TI assets for border security operations."[63]

Until CBP develops these metrics to assess the efficacy of border barriers, it is inappropriate to suggest that the deployment of additional border barriers will have any meaningful impact on border crossings.

Border barriers block most species of animals, impede natural flows of water, and even alter plant dispersal, but there is no evidence they stop people from crossing. A 2014 study of activity around border barriers in natural areas showed that terrestrial mammals were found in higher numbers in locations where no border barriers were present. The authors, however, found no difference in the number of border-crossing humans detected between areas with and without barriers, suggesting that barriers are not effective at deterring migrants, but do affect wildlife populations.[64]

The 2017 GAO report that establishes CBP has not proven border barriers to be an effective means for deterring border crossings also sheds light on CBP's overarching tactics of border barrier construction and border militarization. The report outlines CBP's strategy of border wall construction as a tactic employed not necessarily to stop border crossings, but as an attempt "to divert illicit cross-border activities into more remote or rural environments, where illegal entrants may require hours or days to reach the nearest U.S. community."

This tactic has proven ineffective at deterring border crossings. It has also led to the deaths of thousands of migrants who have been pushed into remote reaches of borderland deserts and perished in the elements while attempting to cross the border. CBP's own statistics show that more than 7,000 people have died crossing the border between 1998 and 2017,[65] though this count only reflects bodies that have been found by Border Patrol and therefore is widely considered to be much lower than the actual number of deaths.[66]

From its conception, the construction of border barriers and militarization of border communities has been a part of a larger strategy to intentionally push border-crossers into remote desert environments where many die due to harsh conditions. This policy has led to a crisis of death and disappearance on our southern border. While it is unlikely that CBP's proposed project will actually deter border crossings, it is conceivable that new miles of border walls and increased border militarization could push migrants into harsher terrain and lead to their deaths.

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[63] U.S. Government Accountability Office. 2017. Southwest Border Security: Additional Action Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps. GAO–17–331.

[64] McCallum J.W., J.M. Rowcliffe, I.C. Cuthill. 2014. Conservation on International Boundaries: The Impact of Security Barriers on Selected Terrestrial Mammals in Four Protected Areas in Arizona, USA. PLoS ONE 9(4): e93679. doi:10.1371/journal.pone.0093679.

[65] U.S. Border Patrol. 2017. Southwest Border Deaths by Fiscal Year. Southwest Border Sectors.

[66] Ortega, Bob. 2018. Border Patrol Failed to Count Hundreds of Migrant Deaths on U.S. Soil. CNN Investigates. Tuesday May 15, 2018. https://www.cnn.com/2018/05/14/us/border-patrol-migrant-death-count-invs/index.html.

Environmental Justice

Environmental justice is defined by the Environmental Protection Agency (EPA) as "The fair treatment and meaningful involvement of all people regardless of race, color, culture, national origin, income, and educational levels with respect to the development, implementation, and enforcement of protective environmental laws, regulations, and policies." Executive Order 12898 directs that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[67]

Significant environmental justice concerns have already arisen in the planning process of the proposed project though CBP's failure to send notices in Spanish in an area where a significant portion of the public are Spanish-speaking. Failure to disseminate Spanish language notices suggests an intentional attempt to exclude and discriminate against the very populations that CBP is obligated to engage. For this and other projects, CBP should strive to actively engage *all* community members, regardless of race, culture, national origin, income and educational levels, and minimize impacts on marginalized populations in accordance with Executive Order 12898.

We ask that the planning process for this project proceed no further until CBP can demonstrate that a meaningful and transparent effort has been made to obtain public comment from a wide range of community members, including minority and low-income populations, the neighboring Tohono O'odham Nation, and any other indigenous nations that have traditional claims within or near the proposed project area. Because vast portions of the project area are within traditional Tohono O'odham lands, CBP must work extensively with Tohono O'odham Nation in a co-equal government-to-government relationship before breaking ground.

CBP's proposed project will likely impact air and water quality of neighboring communities. The proposed project is of significant scale and will involve extensive concrete batching, heavy machinery operation, and severe ground disturbance, all of which would likely emit particulate dust and pollutants into air and water and endanger the health of neighboring communities. These public health hazards would adversely and disproportionately impact human health of minority, low-income, and indigenous populations in violation of Executive Order 12898.

We remind CBP that without the preparation of an EIS under NEPA it is impossible to fully understand and analyze the true public health and environmental justice implications of CBP's proposed project. There is a clear framework for assessing environmental justice impacts within the NEPA process. The completion of a NEPA-compliant EIS for the proposed project would illuminate these concerns, mitigate potential harms, and help inform the best path forward.

DHS's use of the REAL ID Act Section 102 waiver to exempt itself from laws like NEPA, the Clean Water Act, the Clean Air Act, and others has denied residents in border communities the same critical public health and environmental protections that communities everywhere else in the nation receive as a basic right. The very purpose of these laws, and of Executive Order 12898, is to protect communities most at risk and ensure they receive the same protections and rights as all other Americans. Each time DHS chooses to issue a waiver, it is low-income minority populations who suffer the most. As such, the May 15, 2019 waiver of 41 laws for this project is profoundly undemocratic and raises significant environmental justice concerns. In this and other projects, DHS must work to actively engage stakeholders and respect our nation's laws, rather than using expired provisions of the REAL ID Act to deny legal rights to low-income, minority, and indigenous communities.

Conclusion

We urge CBP to carefully review and respond to all concerns raised within this letter and to comply with all applicable federal laws before moving forward with the planning and execution of this project. As discussed above, we are extremely concerned that CBP is not conducting this project in compliance with NEPA or other relevant laws. CBP's vague and inadequate notice to comment, which was sent only to select individuals of the agency's choosing, is no substitute for meaningful public comment and is wholly inadequate to meet public consultation and informed decision-making requirements. Because of this, and the additional reasons detailed

[67] Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. 59 Fed. Reg. 32 (Feb. 16, 1994).

within the contents of this letter, CBP must cease all efforts toward constructing border barriers in Arizona until these numerous and significant issues are resolved.

Sincerely,

American Bird Conservancy
Center for Biological Diversity
Coalicion de Derechos Humanos
Colibri Center for Human Rights
Defenders of Wildlife
Great Old Broads for Wilderness
Green Valley/Sahuarita Samaritans
Northern Jaguar Project
National Parks Conservation Assoc.
National Wildlife Refuge Association
Nuestra Tierra Conservation Project
ProgressNow New Mexico
Rachel's Network
Southern Border Communities Coal.
Sierra Club
Sky Island Lodge
Sky Island Alliance
Southwest Environmental Center
St. Francis in the Foothills
Tucson Audubon Society
Wildlands Network

NATIONAL PARKS CONSERVATION ASSOCIATION

July 3, 2019

U.S. Customs and Border Protection
U.S. Border Patrol Headquarters
1300 Pennsylvania Ave 6.5E Mail Stop 1039
Washington, DC 20229

Public Comment Re: Pima and Cochise Counties Border Infrastructure Projects

Dear Customs and Border Protection:

Since 1919, National Parks Conservation Association (NPCA) has been the leading voice in protecting and enhancing our National Park System. On behalf of our more than 1.3 million members and supporters nationwide, we write to express our concerns with U.S. Customs and Border Protection's (CBP) proposed border barrier project in Pima and Cochise Counties, especially related to Organ Pipe Cactus National Monument and Coronado National Memorial. These national parks are connected to the lands and communities that surround them, and the impacts of border activities must be considered comprehensively.

Throughout the planning of this project, it has been clear that little to no consideration has been given to the government's responsibility to our national parks. Congress created the National Park Service (NPS) in 1916 with a stated purpose "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." [1] CBP's proposal to build an 18-to-30 foot bollard wall through nearly the entire border of Organ Pipe and a portion of Coronado undermines the mission and purpose of the NPS, and does so without providing the Park Service and the public with meaningful opportunities to engage in the planning process.

Irreplaceable Natural and Cultural Resources

Organ Pipe Cactus National Monument

Organ Pipe Cactus National Monument was created in 1937 to protect its namesake plant and a scenic, biologically rich portion of the Sonoran Desert. The park is home to 31 species of cactus, multiple vulnerable endangered species and centuries of human history. But this unique landscape is also unnaturally bisected by border barriers. Vehicular barriers run along Organ Pipe's 30-mile border and five miles of 15-foot pedestrian wall flank the Lukeville Port of Entry.

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[1] 16 U.S.C. § 1.

The construction of a 30-foot wall, along with associated roads, lights and clearing, across the entirety of this park landscape will be devastating to the ecosystem. Dozens of wildlife species would be unable to move freely through the landscape in search of food, water and mates. Among the wildlife that may be affected are bobcats, coyotes, endangered desert tortoises, javelinas and mountain lions. Endangered bats and migrating birds will be disrupted by the clearing around the wall, which will eliminate cover and create a place where predators can easily capture prey. The proposed bright lights, which will likely be on all night, may further disrupt bat migration and confuse other wildlife.

These impacts will be felt across the park ecosystem, however one important location to note specifically is Quitobaquito Springs, a desert oasis near the border that hosts two endangered species, the Quitobaquito pupfish and Sonoyta mud turtle. While it is difficult to determine based on the basic map provided for this comment period, the expanded wall will likely be within a couple hundred feet of this pond, changing flood patterns in the area and damaging water quality. In the desert, water is critical and additional wall would prevent wildlife species from using a water source they have relied on for millennia.

Together with neighboring Cabeza Prieta National Wildlife Refuge, Organ Pipe also provides habitat for the endangered Sonoran pronghorn. Over time, human activity shrunk and disturbed their habitat and then a drought in 2002 brought the population in the U.S. down to around 20 individuals. A captive breeding program by the Fish and Wildlife Service has helped the population successfully rebound but the Sonoran pronghorn remains on the endangered species list.[2] While border activities were not the sole reason for the species decline, increased activities or construction may lead to increased negative impacts on the recovery of the species. And a wall will cut the US population off from their counterparts on the Mexican side of the border.

In addition to the impacts on wildlife and the desert ecosystem, a wall through Organ Pipe will significantly degrade the visitor experience. A drive to Quitobaquito from Lukeville along the road that parallels the monument's southern border is now a pleasant outing through the rich Sonoran vegetation of the desert with occasional interesting sights of human activity in Mexico just across the border and continuous views of the protected desert mountains further south. To be flanked by a continuous 30-foot wall with 60 feet of scraped desert in front of it would be a whole different, and much degraded, experience. Rather than the rich, peaceful traditions embodied in the U.S. Mexico-border region, monument visitors will instead experience the militarization policies the current administration is pushing across the region. From the major campground in Organ Pipe, overnight visitors can see Lukeville and a long stretch of the border. In the future, this view will be obstructed by 30 feet of wall during the day and bright lights in the middle of the desert at night. In 2018, park visitation drove $16.2 million in spending on hotels, food and other amenities.[3] Declines in visitor experience will drive these numbers down and certainly negatively impact the local economy.

Coronado National Memorial

Coronado National Memorial was established to commemorate and interpret an expedition led by Francisco Vazquez de Coronado. The arrival of the expedition—with its contingents of Europeans, Aztecs, Franciscan monks, servants and slaves—forever changed the cultural landscape of northwestern Mexico and the American Southwest.[4] The park preserves a portion of the landscape the expedition is thought to have crossed and works to help visitors understand how that history is still felt today. It is a story that our two countries experienced together, a common ground that the border wall cuts straight through.

In addition to protecting part of our cultural heritage, Coronado provides habitat critical for the endangered jaguar.[5] Sightings of the jaguar in the United States are rare. The bulk of the population is in Mexico and while some individuals have made their way into the U.S. on their own, all of them have been male. Those males will need to return to Mexico to breed until a female establishes herself on the U.S. side of the border. Existing border barriers increase the challenge of transiting between

[2] U.S. Fish and Wildlife Service, "Sonoran pronghorn (Antilocapra americana sonoriensis)." https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=4750.

[3] National Park Service, "Visitor Spending Effects—Economic Contributions of National Park Visitor Spending." https://www.nps.gov/subjects/socialscience/vse.htm.

[4] National Park Service, "Coronado National Memorial." https://www.nps.gov/coro/learn/historyculture/index.htm.

[5] U.S. Fish and Wildlife Service, "Jaguar (Panthera onca)." https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=3944.

the two countries and additional barriers or border activity will only impede the jaguar population's migration back into the U.S.

Located 90 miles from the closest major airport in Tucson, Arizona, Coronado's 103,000 park visitors spent an estimated $6.1 million in the local region in 2018.[6] A trip to this monument usually includes a stop at Montezuma Pass for the amazing views both east and west, views that are already compromised by the permanent Border Patrol activity at the pass and seeing the current barriers along the border. Continued expansion of the wall through the park will not only decrease its environmental and cultural character, it will further degrade these views and undermine the economic power of the park.

Environmental Damage without Proof of Success

The existing pedestrian wall at Organ Pipe was supposedly designed to accommodate a 100-year flood and would not impede the natural flow of water or cause backwater flooding. In July 2008, the wall was put to the test. A summer storm delivered up to two inches of rain to the park in about 1.5 hours. According to the Park Service,[7] this type of storm occurs every three to five years. Washes in the park drained directly into the border barriers. Silt and debris were caught by the wire mesh wall, resulting in high water marks up to seven feet, flooding of local businesses and a disturbed habitat once the floodwaters receded—all impacts the wall was designed to prevent.

NPS has been protecting the landscape at Organ Pipe for over 80 years. They know this place intimately. They are the experts. And yet their expertise had no role in the major construction project along the park's border. If the Park Service had been consulted, CBP would likely have received accurate information about the frequency and magnitude of flooding that can occur in the desert and could have made smarter decisions about wall construction.

Such interagency cooperation did not occur then and is unlikely to occur moving forward due to the waiver authority provided to the Department of Homeland Security (DHS) through the Real ID Act of 2005. This authority has prevented NPS, other federal land managers and the public from participating in decision-making processes for construction along the border. DHS has already chosen to waive 41 laws—including the NPS Organic Act—to expedite the current construction project, ensuring CBP is under no obligation to make decisions that consider the park and the impact on its ecosystem.

While our public lands and local communities are feeling the impacts of wall construction, CBP cannot prove that building a wall is helping the agency achieve their mission. According to a 2017 GAO report, CBP does not have metrics to determine border fencing's impact on diverting illegal entries or apprehension rates over time.[8] A more recent report from DHS states that while the department is working on new estimation strategies to better model the flow of immigrants across the border, those models are a work in progress.[9] More wall in the region will exacerbate the environmental damage—and potentially do nothing to impact migration across the border.

If CBP's aim is to combat drug smuggling into the United States, as is the rationale provided to the Department of Defense to justify the transfer of funds not authorized by Congress, then CBP should look to their fellow federal agencies for direction. According to the U.S. Drug Enforcement Administration, the most common method for transporting illicit drugs into the country is through official ports of entry.[10] CBP's effort would be better spent working with Congress to use our country's limited financial resources to address this root problem.

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[6] National Park Service, "Visitor Spending Effects—Economic Contributions of National Park Visitor Spending." https://www.nps.gov/subjects/socialscience/vse.htm.

[7] National Park Service. *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona.* Ajo, AZ: 2008. https://www.nps.gov/orpi/learn/nature/loader.cfm?csModule=security/getfile&PageID=2147897.

[8] U.S. Government Accountability Office. *SOUTHWEST BORDER SECURITY: Additional Actions Needed to Better Assess Fencing's Contributions to Operations and Provide Guidance for Identifying Capability Gaps.* GAO–17–331. Published: February 2017. https://www.gao.gov/products/GAO-17-331.

[9] Department of Homeland Security. *Efforts by DHS to Estimate Southwest Border Security between Ports of Entry.* Published: September 2017. https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf

[10] U.S. Drug Enforcement Administration. *2018 National Drug Threat Assessment.* Published: October 2018. https://www.dea.gov/documents/2018/10/02/2018-national-drug-threat-assessment-ndta.

Inadequate Public Comment Process

CBP provided a paragraph of information and three basic maps when requesting input on a project that will cause significant and lasting damage to two of our national parks. It is an insult to park visitors and American taxpayers that places that belong to all of us—equally and in perpetuity—can be so willfully disregarded. The "comment period" provided is clearly not intended to have any impact on project decisions, as laws were waived, contracts awarded and construction scheduled to start before the allotted 60-day comment period had passed.

Government construction projects of this scope and scale anywhere else in the country would have been subject to safeguards like the National Environmental Policy Act (NEPA), which would have provided for a public input process and ensured alternatives were at least considered. Instead, the public does know not how tall the wall will be, how wide the road will be, how bright the lights will be or any other detailed information about the Pima and Cochise Counties' project. CBP has made it impossible for the public to provide meaningful, substantive feedback on this project by forcing the public to read between the lines.

Public process and planning transparency would have given the government a chance to consider various alternatives, including the NEPA-required no-build alternative, and provided information about design improvements that would allow the project to be more responsive to on the ground conditions. For instance, perhaps the wall would an effective deterrent but better for wildlife passage if the space between the bollards were just a few inches wider than the current project allows. At special places like Quitobaquito, perhaps it would be possible to maintain operational control without the wall if coordination with Border Patrol surveillance and on-the-ground activities were considered. In addition, where gates will be constructed at washes and left open during times of likely flooding, it might be possible to leave the gates open at various other times as well to allow for wildlife migration. There are likely other improvements to consider, but because NEPA and public engagement were waived, these possibilities will never be considered.

Conclusion

Without question, border security is vital to our country, which is why it's so important we get it right. Our nation must look for solutions that are as unique as our landscapes and communities and ensure the solutions we find don't destroy the national treasures we've committed to protecting.

CBP has provided no justification for why expanding the border wall at Organ Pipe Cactus National Monument, Coronado National Memorial and adjacent landscapes is an effective solution for addressing either migration or drug smuggling. Quite simply, a border wall is not the answer, for our national parks or our border communities.

Thank you for considering our comments.

Sincerely,

CHRISTINA HAZARD,
Associate Director, Wildlife & Natural Resources

Statement for the Record
Congressman Greg Stanton, a Representative from the State of Arizona

Thank you Chairman Gallego and Ranking Member Cook for allowing me to share my thoughts on the egregious behavior taking place on the Tohono O'odham Nation in Arizona.

Congress passed the REAL ID law in 2005, and among its provisions was the ability for the Department of Homeland Security to waive "all legal requirements" when constructing walls and roads along the Southwest border. Under the REAL ID law, Customs and Border Protection is actively destroying parts of the Tohono O'odham Nation for the construction of a 30-foot wall. Earlier this year, CBP used explosives on Monument Hill in Arizona's Organ Pipe Cactus National Monument to begin wall construction. This is a burial site sacred to the Nation that dates back more than 10,000 years. For the Trump administration to treat it with such disregard shows the lengths this Administration is willing to go to fulfill a wasteful campaign promise.

In 1853, the Gadsden Purchase established the current southern border, disregarding that it would split the Tohono O'odham Nation across Arizona and Mexico. The reservation now spans 2.8 million acres with 62 miles along the border.

There are currently 34,000 enrolled members, with more than 2,000 residing in the Sonora, Mexico. Construction of a wall negatively affects the Tohono O'odham people in various ways. A wall would disrupt the natural flow of water from critical sources on the southern side of the border. A wall would be culturally devastating as well. Every year, members make a pilgrimage to Magdalena, Sonora to visit the statute of Saint Francis, the patron saint of animals and the environment. This wall would be so detrimental to the Tohono O'odham's way of life that earlier this month the Nation's Legislative Council issued a resolution in opposition to its construction. Listening to and respecting the concerns of the Tohono O'odham Nation is the right thing to do.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) created the Organ Pipe Cactus Biosphere Reserve in 1976 due to its "unique resources representing a pristine example of an intact Sonoran Desert ecosystem." The UNESCO biosphere program was started "with the intention to test and outline how humans can strike a balance among the apparently conflicting issues of conserving biological diversity, promoting economic and social development, and maintaining associated cultural values." By disrupting the environment to construct a wall, CBP is affecting thousands of wildlife species unique to the Sonoran Desert.

On all accounts, this Administration is failing the UNESCO biosphere program's vision and failing the Tohono O'odham Nation. It is destroying Arizona's biological diversity and erasing the cultural values sacred to the Native Americans who lived on this land first. I am against the construction of a wall on the Tohono O'odham Nation's land and am encouraged to see this Committee holding a hearing on this issue. We must do everything in our power to prevent the destruction of our environment and most importantly, the indigenous lands in the United States.

Statement for the Record

SOUTHERN BORDER COMMUNITIES COALITION

by Vicki B. Gaubeca, Director
and
Jennifer Johnson, Border Policy Advisor

Introduction

Formed in 2011, the Southern Border Communities Coalition (SBCC), a project of Alliance San Diego, brings together networks from San Diego, California, to Brownsville, Texas, to ensure that border enforcement policies and practices are accountable and fair, respect human dignity and human rights, and prevent the loss of life in the region.

As the Administration continues to deploy a record level of enforcement resources to the southern border region, including unaccountable agents, active-duty military troops and National Guard, surveillance and military technologies befitting theaters of war, border communities suffer as these deployments and programs jeopardize their human and civil rights, cause irreparable harm to the surrounding environment and wildlife, and erode quality of life and public safety. This escalated militarization comes with little to no accountability and oversight, which leads to increased abuse and impunity at Customs and Border Protection (CBP), ultimately undermining the safety of border communities and the nation.

The Administration has also developed and implemented increasingly reckless and harmful policies that have intensified the suffering experienced by refugees at our southern border. Asylum seekers are returned to often dangerous and untenable situations in Mexico to await their immigration hearings or are subjected to an intensely rushed process where they are denied meaningful access to protection. Other cruel deterrence practices include blocking entry at southern ports of entry by engaging in "metering" or "wait-listing" for people seeking safety; ripping children away from the arms of parents so parents can be prosecuted; holding refugees in unsanitary, overcrowded holding cages that are more akin to dog kennels; and threatening to deport millions of people without regard to the harm it will cause to families and entire communities.

Of deep concern to border communities is the Administration's persistent and dangerous obsession with building a border wall by any means possible and with complete disregard to the profound and irreparable harms of the border wall on the borderlands, in part demonstrated by the Administration's repeated waiver of bedrock laws established by Congress to protect public health, the environment,

wildlife, cultural/religious landmarks, and the U.S. taxpayer to expedite wall construction.

While the Subcommittee is carrying out this important hearing, the Administration is actively causing devastation to the borderlands and southern border communities—blasting away sacred burial sites, bulldozing precious natural resources, and tearing land away from private landowners and ranchers to build an ineffective and lethal border wall.

SBCC submits this statement to provide the Subcommittee with an analysis that includes the perspectives of borderland residents on how the Administration policies and practices have damaged the quality-of-life and eroded the civil rights of the more than 15 million people who call the southern border region home.

Status of Border Wall Construction, Transfers, Waivers and Costs

According to U.S. Customs and Border Protection (CBP),[1] as of Jan. 24, 2019, there were 655 miles of primary barriers on the Southwest border, which included about 301 miles of pedestrian fencing and about 254 miles of vehicle barriers built before January 2017. About 99 miles of these primary barriers are new barriers built in place of dilapidated ones (i.e., replacement walls) and approximately 1 mile of new border wall built in locations where no barriers previously existed. An additional 10 miles of new "secondary" border wall system have also been built since January 2017, bringing the total to 110 miles.

The 115th and 116th Congress have appropriated a total of nearly $5.1 billion in fiscal years 2017, 2018, 2019 and 2020 to fund the construction of approximately 272 miles of new and replacement barriers along the Southern border. In addition to these funds appropriated by Congress, the Administration has gone to unprecedented lengths to unlawfully raid other agencies to access billions beyond what Congress has appropriated for the construction of more border wall.

In Feb. 2019, following the longest government shutdown in history and Congress's rejection of President Trump's full funding request for more border wall in the Fiscal Year 2019 appropriations bill, the Administration brazenly declared in a press conference a dubious "national emergency" (and has blatantly admitted this as a mechanism to circumvent Congress) to divert $3.6 billion from the Department of Defense's (DoD's) 10 U.S.C. § 2808 Military Construction funds (effectively halting 127 military construction projects)[2] and $2.5 billion from 10 U.S.C. § 284 Counter-Narcotics funding to construct another 304 miles of new or replacement barriers. The Administration also tapped into another $600 million from the U.S. Treasury Forfeiture Fund. Both U.S. congressional chambers have voted and passed resolutions of disapproval against the Administration's declaration of a national emergency, but—to date—have failed to obtain a veto-proof majority.

In mid-January 2020, the Administration indicated its intent to circumvent Congress again and transfer $7.2 billion from DoD funding, including $3.7 billion from military construction and $3.5 billion from counter-narcotics funding, to build more border wall. On Feb. 13, 2020, the Administration notified Congress that it intends to transfer $3.8 billion of DoD funds to erect another 177 miles of border barriers. These funds were originally appropriated by Congress in the Fiscal Year 2020 budget to purchase new military aircraft, vehicles, and weapons.

The Administration has also requested another $2 billion[3,4] to build another 82 miles of border wall in the Fiscal Year 2021 budget.

Influenced by presidential election year politics, the Administration is eager and determined to fulfill an uninformed and costly campaign promise to build a border wall. Of course, we must recall that candidate Trump promised that Mexico would pay for the cost of its construction, not the U.S. taxpayer. Instead, he is devastating the border region by constructing a harmful, vanity wall bankrolled by the American taxpayer and circumventing Congress by seizing funds outside the appropriations process.

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[1] Customs and Border Protection. "CBP/USACE Border Wall Status" (Jan. 24, 2020). Available at: https://cdn.factcheck.org/UploadedFiles/CBP-Border-Wall-Status-Paper_as-of-01242020-FINAL.pdf.

[2] Sisk, Richard. "Pentagon Releases List of Military Construction Projects Paused to Fund Border Wall", Military.com (Sept. 4, 2019) Available at: https://www.military.com/daily-news/2019/09/04/pentagon-releases-list-military-construction-projects-paused-fund-border-wall.html.

[3] Kanno-Youngs, Zolan. "What's in President Trump's Fiscal 2021 Budget? Steep cuts to domestic programs and more resources for the military and policing the border with Mexico." New York Times (Feb. 10, 2020) Available at: https://www.nytimes.com/2020/02/10/business/economy/trump-budget-explained-facts.html.

[4] DHS Fiscal Year 2021 Budget in Brief, Available here: https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_web_version.pdf.

Thus far, the price tag for this Administration's border wall is more than $11 billion—or nearly $20 million a mile—and growing. It is the most expensive wall of its kind anywhere in the world.[5]

Ultimately the costs of building this wall will be exorbitant. In 2018, the Government Accountability Office issued a report[6] that suggested that there is no way to verify wall construction costs because estimates do not not fully account for varied, and sometimes extreme, terrain along the borderlands, and how this could play a role in costs. A minority report[7] by the Senate Committee on Homeland Security and Governmental Affairs suggested the costs of building Trump's border wall could rise up to almost $70 billion, or more than $200 for every man, woman and child living in the United States.

Walls also cost billions of taxpayer dollars to maintain. No physical structure is immune to natural wear and tear caused by exposure to the elements over the years. The same minority report referred to above also estimated that maintenance costs, based on current costs of maintaining the wall, could reach $150 million a year—that's billions of more dollars needed that our children will have to pay for. This figure does not include the costs for repairing walls that have been breached or damaged by other causes.

To facilitate the construction of the wall at the expense of border community members, the environment and wildlife, the Administration continues to interpret the Real ID Act as giving the Department of Homeland Security complete and unhindered discretion in waiving any U.S. laws that might interfere with the construction of border wall. As a result, almost 50 laws that were passed by Congress to protect the public from government overreach and protect our water, air, environment and rights have been waived, including the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, the National Environmental Protection Act, the Endangered Species Act, the Clean Air Act and the Safe Drinking Water Act.

To further speed up the construction of the border wall in Arizona, California, New Mexico and Texas, the Administration recently waived Federal procurement statutes and regulations,[8,9] including requirements for open competition and justifying selections.

Border Wall Harms

The consequences and harms of building border walls have been profound to border communities, the environment and wildlife. Since 1994, when the first wall was built near San Diego under Border Patrol's Operation Gatekeeper, the remains of more than 7,800 migrants have been found in remote areas of the southern border, including on the Tohono O'odham Nation and in rural areas near Falfurrias, Texas. However, not all remains are found, and experts estimate that this number reflects only a third of the estimated migrants who lost their lives attempting to cross the border.

Border walls jeopardize tribal sovereignty. The Tohono O'odham Nation, whose ancestral lands straddle the U.S.-Mexico border, already have a physical barrier with a gate bisecting their nation. Most tribal members oppose replacing this physical structure[10] with a wall, because it would interfere with their ability to cross into Mexico to connect with other tribal members for sacred ceremonies and visits.

As noted by Ned Norris, Jr. , Chairman of the Tohono O'odham Nation, "A wall is extremely expensive for the American taxpayer, is ineffective in remote geo-

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[5] Burnett, John. "$11 Billion And Counting: Trump's Border Wall Would Be The World's Most Costly," NPR (Jan. 19, 2020) Available at: https://www.npr.org/2020/01/19/797319968/-11-billion-and-counting-trumps-border-wall-would-be-the-world-s-most-costly.

[6] GAO. "SOUTHWEST BORDER SECURITY. CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information" July 2018 Highlights of GAO–18–614, a report to congressional requesters. Available at: https://www.gao.gov/assets/700/693488.pdf.

[7] HSGAC Minority Report. "Southern Border Wall: Soaring Cost Estimates and Lack of Planning Raise Fundamental Questions About Administration's Key Domestic Priority." (April 18, 2017). Available at: https://www.hsgac.senate.gov/imo/media/doc/Southern%20Border%20Wall%20-%20HSGAC%20Minority%20Report.pdf.

[8] Spagat, Elliot. "Homeland Security waives contracting laws for border wall," Associated Press (Feb. 18, 2020). Available at: https://apnews.com/1689fa48a2e177d1f397b95ff0cb97db.

[9] Statutes and regulations include: 10 U.S.C. § 2304; 10 U.S.C. § 2304c; 10 U.S.C. § 2306a; 10 U.S.C. § 2305(a)–(c), (e)–(f); Section 813 of Public Law 114–328, as amended by Section 822 of Public Law 115–91; 15 U.S.C. § 657q; 48 C.F.R. § 17.205; 48 C.F.R. § 17.207; 10 U.S.C. § 2305a(b)–(e); 48 C.F.R. § 22.404–5; and 48 C.F.R. § 28.102–1(c).

[10] Nañez, Dianna M. "The Wall: A border tribe, and the wall that will divide it" USA Today. Available at: https://www.usatoday.com/border-wall/story/tohono-oodham-nation-arizona-tribe/582487001/.

graphic 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."[11]

Current and proposed land seizures for border wall construction have deeply harmed property owners on the U.S. side of the border. In Texas, the vast majority of land adjacent to the border is privately owned, so the Administration has resorted to condemnation lawsuits against private landowners in many of the poorest communities in the United States to take land for the border wall by force. Hundreds of private property owners have been forced to give up their homes, businesses, farms and ranches—some of whom have held these lands in their families for generations—through eminent domain seizures.

In some cases, DHS has used 'quick take' condemnations to take possession of private property and start wall construction even before just compensation has been determined and the property owner paid. In case after case, DHS has completely discounted the hardships that the border wall will bring to these landowners, to include (1) the devaluation of contiguous property and land left after the taking, (2) problems accessing land and homes behind a 30-foot wall built on top of a levee, and (3) the effects on livelihood as the result of a wall interfering with farming, ranching, and maintaining renters.

Any kind of physical barrier at the U.S.-Mexico border also interferes with the migration patterns and access to food and water of wildlife—many of which are endangered and protected species, like the Mexican grey wolf, ocelot, bighorn sheep and jaguar. More than 2,500 scientists from 43 countries signed on to a study that illustrates the harm to wildlife[12] and the environment that would be generated by this Administration's border wall. Even birds will be affected, like the cactus ferruginous pygmy owl[13] which cannot fly higher than 4.5 feet and would be unable to clear Trump's proposed 18- to 30-foot wall. Every day now, we witness more miles of border walls built every day, laying waste to our environment and placing our endangered and protected species on a runaway train toward extinction.

Border walls and infrastructure have exacerbated flooding in Arizona and Texas, causing millions of dollars in damage to the environment and local businesses and endangering the lives[14] of border residents and wildlife. In 2008, a year after a National Park Service report warned the DHS that the border wall would cause flooding, two people drowned in Nogales from flooding intensified by the wall along the Arizona/Sonora border.

Conclusion and Recommendations

Not only is the construction of a border wall costly and harmful, it is also not supported by a majority of voters, including communities directly impacted by the wall. A recent survey by the University of California Immigration Policy Center showed almost 60% of registered voters in California, Arizona, New Mexico and Texas oppose *any additional* funding for border wall.

The southern border region—home to about 15 million people—is a place of hope, encounter and opportunity. It is one of the most vibrant and diverse places in the country with deep cross-border ties from San Diego, CA to Brownsville, Texas.

But instead of embracing our dynamic communities, for decades our border policies have cast aside human rights, criminalized migrants and engaged in deadly and unaccountable border enforcement, undermining public safety for all.

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[11] The Tohono O'odham Nation of Arizona Testimony of The Honorable Ned Norris, Jr., to the 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 (Feb. 26, 2020) Available at: https://naturalresources.house.gov/imo/media/doc/SCIP%2002.26%20-%20Chairman%20Norris.pdf.

[12] Javorsky, Nicole. "Scientists Decry the Border Wall's Harm to Wildlife," City Lab (July 24, 2018). Available at: https://www.citylab.com/environment/2018/07/scientists-decry-the-border-walls-harm-to-wildlife/565913/.

[13] Knowles, Cybele. "5 Animals Threatened by the Border Wall," Medium (Feb. 22, 2017). Available at: https://medium.com/center-for-biological-diversity/5-animals-threatened-by-the-border-wall-3160a6bbfd85.

[14] Sadasivam, Naveena. "The US-Mexico border wall's dangerous, costly side-effect: enormous floods," Quartz, (Aug. 17, 2018). Available at: https://qz.com/1353798/the-us-mexico-border-walls-dangerous-costly-side-effect-enormous-floods/.

It's time to rethink how we do border and push for a new vision[15] that introduces a 21st century border governance model that expands public safety to all, creates a welcoming system for newcomers and residents, and protects human rights and life.

We urge this subcommittee to consider introducing a legislative initiative that would:

- Rescind the vast and arbitrary powers seemingly granted to the Department of Homeland Security to waive all legal requirements to construct the border wall and related infrastructure at the southern border.
- Prohibit the Administration's ability to transfer funds or access resources for border wall construction in violation of the appropriations process or congressional intent.
- Halt existing wall construction and terminate contracts funded by illegally transferred and seized funds.
- Hold this Administration accountable for its failure to comply with consultation requirements in border wall construction efforts, including government-to-government consultation with Tribal governments, and strengthen consultation mechanisms.
- Prohibit DHS from taking physical possession of any acquired land unless and until all persons entitled to compensation for such acquisition have been compensated in full, and the court proceedings described in 40 U.S.C. Sec. 3114(a) have concluded and the case terminated.
- Identify and fund programs to address harms and provide reparations for landowners, communities and public and private lands harmed by border wall construction.

U.S. CUSTOMS AND BORDER PROTECTION
TUCSON, ARIZONA

January 10, 2020

Ned Norris, Jr., Chairman
Tohono O'odham Nation
P.O. Box 837
Sells, AZ 85634

Dear Chairman Norris,

Thank you for your letter dated November 13, 2019 following up on our October 25 conference call regarding the border barrier projects in U.S. Border Patrol's (USBP) Tucson Sector. We are aware of your concerns regarding the border barrier construction projects and potential affects to the Tohono Nation's ancestral lands. Dialogue with the Nation is important to us as we execute these critical border security projects. The paragraphs below address the concerns noted in your letter.

IIRIRA Waiver for Tucson Sector Projects

As you know, Congress has provided the Secretary of Homeland Security with numerous authorities necessary to carry out DHS's border security mission. One such authority is section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In section 102(a) of IIRIRA, Congress provided that the Secretary "shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." In section 102(c) of IIRIRA, Congress granted the Secretary the authority to waive all legal requirements that the Secretary determines necessary "to ensure the expeditious construction of barriers and roads" authorized by section 102 of IIRIRA.

Pursuant to those authorities, the Acting Secretary waived various laws for the construction of border barriers in the vicinity of the United States Border in Cochise County and Pima County, Arizona. The waiver was published in the Federal Register on May 15, 2019. See 84 Fed. Reg. 21798.

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[15] Southern Border Communities Coalition. "A New Border Vision" (May 2019) Available at: http://d3n8a8pro7vhmx.cloudfront.net/themes/5c8a803c4764e89849b5753e/attachments/original/1557787799/SBCC-NBV-H.pdf?1557787799.

With respect to the geographic scope of the waiver at issue, it covers certain project areas that are described in the text of the waiver. The waiver states: "the following areas in the vicinity of the United States border located in the State of Arizona within the United States Border Patrol's Tucson Sector, are areas of high illegal entry (the "project areas"):

- Starting approximately one-half (.5) mile west of Border Monument 178 and extending east to Border Monument 162;
- Starting at Border Monument 100 and extending east for approximately one (1) mile;
- Starting at Border Monument 98 and extending east to Border Monument 97; and
- Starting approximately one-half (.5) mile west of Border Monument 83 and extending east to Border Monument 74."

Regarding the activities covered by the waiver, as noted above, in Section 102(c) of IIRIRA Congress authorized the Secretary to use the waiver authority to "ensure the expeditious construction of barriers and roads" authorized by section 102 of IIRIRA. To this end, in the May 15th waiver, the Acting Secretary specifically noted that the waiver would apply to the "construction of physical barriers and roads (including, but not limited to, accessing the project areas, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, supporting elements, drainage, erosion controls, safety features, lighting, cameras, and sensors) in the project areas."

Taken together, this means that the laws set forth in the May 15th waiver are inapplicable to the construction of physical roads and barriers and/or activities that are undertaken in furtherance thereof, within project areas that are described in the waiver (areas in the vicinity of the border within the descriptions noted above).

In light of the above, simply providing a map, as you requested, would not capture the scope or application of the waiver. To be sure, the waiver described the project areas where it is to be applied. However, the waiver does not cover each and every federal action that is undertaken within those project areas. Rather, as explained above, the waiver applies to the construction of barriers and roads and/or activities undertaken in furtherance thereof, within those projects areas. To this end, to aid in your understanding of the waiver and how it is applied, CBP has enclosed a map that shows the planned project corridors and planned access roads for the projects covered by the waiver at issue. Please note that, as with any construction project, it is possible that the project corridors and/or the access roads could change depending on various circumstances.

When planning for projects covered under an environmental waiver, CBP remains committed to responsible environmental and cultural stewardship, as is the case with these border barrier projects. As part of its commitment, CBP conducts biological, cultural, and natural resource surveys of each project area. In addition, CBP coordinates and consults with Federal, State, and local agencies, Native American Tribes, and other interested stakeholders to obtain information about the possible presence of environmental and other sensitive resources that may be present in each project area. Specifically, CBP met with the Nation on May 15 and May 16, 2019 regarding the border barrier projects within the Tucson Sector area of responsibility. CBP develops site-specific construction best management practices to be implemented by the construction contractor and identifies design elements when and where possible that avoid or minimize environmental impacts to the greatest extent possible. Survey data and information received by CBP are used to prepare an Environmental Stewardship Plan (ESP) for each project, which includes an analysis of potential environmental impacts from the implementation of the project. The ESP for the border barrier projects in Tucson Sector will be available at the link below. https://www.cbp.gov/about/environmental-management-sustainability/cbp-environmental-documents. Finally, CBP is continuing to coordinate with the National Park Service (NPS) regarding the areas of concern noted in your letter. In many instances, cultural resource surveys indicated that resources were either outside the project area limits or not eligible for listing. For those resources that are found within the project, area limits CBP, as it has done in the past, will coordinate with federal managers and, wherever possible, take steps to avoid or minimize impacts to historic and cultural resources.

Buffer Zone

CBP considered your request for a buffer zone 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 and

determined that the proposed gaps do not meet USBP's operational requirements to secure these areas of the border. Regarding disturbances related to road widening, CBP completed environmental due diligence despite the waiver of environmental laws and conducted cultural site surveys of the construction area to include the Roosevelt Reservation, access roads, material laydown areas, and vehicle turn arounds prior to ground disturbance activities. CBP identified several previously recorded and new archaeological sites within and adjacent to the Roosevelt Reservation. CBP completed an evaluation of each site's eligibility for listing in the National Register of Historic Places (NRHP). Of the sites identified, CBP determined they could be avoided by construction activities or were not eligible for listing in the NRHP and no further investigative of data recovery actions were necessary. Further, per your request, CBP coordinated with the USACE to deploy additional cultural resource subject matter experts to the project area that will provide additional monitoring. CBP also acknowledges and is considering the Nation's request for CBP to retain the Nation's tribal monitors for border barrier projects. In the interim, the Nation is welcome to coordinate with CBP and USACE to be present during border barrier construction activities.

Groundwater Use

With regard to your request to stop using groundwater, CBP coordinated with the NPS and the U.S. Fish and Wildlife Service (USFWS) to evaluate potential groundwater impacts to the springs at Quitobaquito. Based on this coordination, CBP, NPS, and USFWS agreed that the construction contractor would not use or drill new wells within five miles of either side of Quitobaquito Springs. The NPS is currently monitoring water levels at Quitobaquito to evaluate and identify significant changes in water levels. CBP is coordinating with NPS to continue this monitoring effort upon completion of NPS' initial activities. The construction contractor will continue to use groundwater in other areas of the project. The amount of water required will vary throughout the project and will depend on a number of factors such as final design specifications, dust control requirements, among other considerations. CBP and USACE continue to coordinate with USFWS to evaluate potential impacts to groundwater from the implementation of the project. CBP will monitor groundwater levels in existing wells and ponds and implement additional measures as needed.

Wildlife Crossings

Regarding your request to include large gaps to allow the movement of wildlife across the border, CBP worked with USFWS to identify and develop design elements that support both wildlife migration and border security that include implementing strategically placed passages to allow cross-border migration of small animals. CBP considered the placement of additional gaps for large mammals; however, these openings do not meet the operational requirements of USBP and compromise our efforts to patrol and secure these areas of the border.

Consultation

Moving forward, CBP recognizes the value of frequent communication between the Nation and USBP Tucson Sector leadership to discuss border barrier projects and other border security matters. Regular meetings with communities, districts and Nation leadership regularly inform Tucson Sector on tribal concerns about USBP operations and tactics in the Tucson Sector area of operations. From past meetings, Tucson Sector and the Nation have been able to deploy ten Integrated Fixed Towers along the U.S.-Mexico border, numerous rescue beacons and have started a road repair project on Federal Route 21. These projects were able to be accomplished by working closely together. USBP and CBP also recently conducted a site visit on December 11, 2019 to consult with representatives from the Nation to discuss concerns and potential strategies to address issues regarding border barrier projects. This meeting was specific to Monument Hill and we were able to hear the concerns from the Nation's Tribal Historic Preservation Officer. In addition to local efforts, CBP benefits from periodic meetings between CBP headquarters' leadership and the Nation's Chairman, Vice Chairwoman, members of the Legislative Council, and other tribal representatives. Regrettably, one such meeting was recently canceled at the request of the Nation, but we look forward to scheduling another meeting in the near future. Continuing this dialogue and communication will allow for Tribal voices and concerns to be heard at all levels of USBP and CBP.

CBP hopes to continue the partnership your predecessor, Edward Manuel, established with us by routinely meeting with CBP senior leadership. These government-to-government engagements were an important opportunity to discuss topics of vital mutual interest including USBP operations on the Nation's land, border security, and border infrastructure projects. In an effort to assure continued

and contemporary information, I suggest we establish a reoccurring teleconference to provide regular construction schedule updates and ensure continued dialogue throughout the project.

I want to ensure you that CBP appreciates and values our continued partnership across all levels within the agency. We are committed to continued dialogue to keep you and other representatives from the Nation updated on the Tucson Sector border barrier projects as we continue to consider and address your concerns where and when possible.

Thank you again for your feedback and we look forward to meeting with you soon.

Honor First,

ROY D. VILLAREAL,
Chief Patrol Agent
Tucson Sector Chief

Enclosure [MAP] (see below)

U.S. CUSTOMS AND BORDER PROTECTION

February 24, 2020
Contact: Tucson Sector
Public Affairs Office
(520) 748–3210
TCA-PAO@CBP.DHS.GOV
www.cbp.gov

MEDIA ADVISORY

Monument Hill Controlled Detonation and Briefing

TUCSON, Ariz.—Tucson Sector Border Patrol, in collaboration with the Army Corps of Engineers and contracted border wall personnel (to include subject matter experts) are providing members of select credentialed media an opportunity to view a controlled detonation occurring on Monument Hill during border wall construction.

Credentialed media I.D. will be verified upon entrance to the below location.

This event features a briefing from USACE and USBP personnel. Media will be transported to a viewing area within the construction site, located a safe distance from where the charges are set to detonate. Long focal length lenses are recommended. Subject matter experts will be onsite and available to answer questions and provide interviews upon request.

Dress appropriately and wear closed-toe footwear suitable for a desert environment. Cell phone coverage may be sporadic in this area. Expect the event to finish around 1 p.m.

Date & Time: Wednesday, February 26, 2020, at 10 a.m. ***Sharp***

Location: Army Corps of Engineers Construction Site Headquarters, **Mile post 79 on the east side of State Route 85**

RSVP Required: Please email TCA-PAO@cbp.dhs.gov to R.S.V.P. no later than close of business Tuesday, February 25, 2020.

—CBP—

U.S. Customs and Border Protection is the unified border agency within the Department of Homeland Security charged with management, control and protection of our n ation's borders at and between official ports of entry. CBP's mission includes keeping terrorists and terrorist weapons out of the country while enforcing hundreds of U.S. laws. Follow us on Twitter @CBPArizona.

Border fence construction could destroy archaeological sites, National Park Service finds

The Washington Times

September 17, 2019 by Juliet Eilperin and Nick Miroff

Bulldozers and excavators rushing to install President Trump's border barrier could damage or destroy up to 22 archaeological sites within Arizona's Organ Pipe Cactus National Monument in coming months, according to an internal National Park Service report obtained by The Washington Post.

The administration's plan to convert an existing five-foot-high vehicle barrier into a 30-foot steel edifice could pose irreparable harm to unexcavated remnants of ancient Sonoran Desert peoples. Experts identified these risks as U.S. Customs and Border Protection seeks to fast-track the construction to meet Trump's campaign pledge of completing 500 miles of barrier by next year's election.

Unlike concerns about the barrier project that have come from private landowners, churches, communities and advocacy groups, these new warnings about the potential destruction of historic sites come from within the government itself.

The National Park Service's 123-page report, obtained via the Freedom of Information Act, emerges from a well-respected agency within the Interior Department as the Department of Homeland Security and the White House push ahead with their construction plans. While the government scrambles to analyze vulnerable sites as heavy equipment moves in, the administration also faces external challenges seeking to block the use of eminent domain to seize land, as well as lawsuits asking courts to halt work in and around wildlife refuges and other protected lands.

New construction began last month within the Organ Pipe Cactus National Monument, an internationally recognized biosphere reserve southwest of Phoenix with nearly 330,000 acres of congressionally designated wilderness. The work is part of a 43-mile span of fencing that also traverses the adjacent Cabeza Prieta National Wildlife Refuge.

With the president demanding weekly updates on construction progress and tweeting out drone footage of new fencing through the desert, administration officials have said they are under extraordinary pressure to meet Trump's construction goals.

The Department of Homeland Security has taken advantage of a 2005 law to waive several federal requirements—including the Archaeological Resources Protection Act, the National Historic Preservation Act and the Endangered Species Act—that could have slowed and possibly stopped the barrier's advance in the stretch in Arizona.

Some archaeological features along the border already have suffered damage as Border Patrol agents zoom through in pursuit of migrants and smugglers in all-terrain vehicles, according to federal officials and two experts who have conducted research in the region.

Environmental groups have fought unsuccessfully to halt construction in protected areas, arguing that more-imposing barriers could disrupt wildlife migration and threaten the survival of imperiled species.

But there has been little mention of the potential damage to archaeological sites, where stone tools, ceramic shards and other pre-Columbian artifacts are extremely well-preserved in the arid environment. Desert-dwelling peoples have populated the area for at least 16,000 years, particularly around the oasis of Quitobaquito Springs in the national monument, one of the few places where the Quitobaquito pupfish and the endangered Sonoyta mud turtle still live in the wild.

The oasis was part of a prehistoric trade route, the Old Salt Trail, where northern Mexican commodities including salt, obsidian and seashells were plentiful, according to the Park Service. The traders were followed by Spanish missionaries, Western settlers, and other travelers and nomads who came to drink.

The springs and surrounding desert wetlands are just 200 feet from the border, where crews plan to bring in heavy earth-moving equipment to install the giant steel barriers. Scientists have raised concerns that the springs could dry up if crews pump ground water from the area for the barrier's concrete base.

CBP officials said the agency has looked at "most" of the archaeological sites identified in the Park Service report and found just five that are within the 60-foot-wide strip of federal land on the U.S. side of the border where the government will erect the structure, an area known as the Roosevelt Reservation, which was set aside along the border in California, Arizona and New Mexico. Of those five, officials said, one had a "lithic scatter"—remnants of stone tools and other culturally relevant artifacts.

Construction crews do not yet have a plan to begin work at that location, CBP officials said, noting that the agency has had discussions with the Park Service about collecting and analyzing fragments of historic significance from that site.

"We've been working very closely with the park," said a CBP official, who spoke on the condition of anonymity to discuss the administration's plan for building near archaeological sites along the border.

The officials said they have not delayed or otherwise altered their construction plans to conduct more detailed surveys or excavations in the area.

Officials said crews with earth-moving equipment have started installing barriers in a two-mile section east of the border crossing at Lukeville, Ariz., a particularly busy stretch for illegal crossings.

CBP officials acknowledged that trucks and earth-moving equipment driving through the fragile desert risk harming sites outside the specific construction zones. The officials said they are following Park Service guidance as to where workers can drive.

President Trump has declared an emergency at the border. This photo shows why a wall won't stop asylum seekers from flooding into the United States.

With CBP, the U.S. Army Corps of Engineers and their construction contractors under pressure from the White House, federal land in the West has become the easiest place to quickly add fencing. There are few private landowners in the desert terrain outside Texas, and it is a far easier place to build than along the winding riverbanks of the Rio Grande.

At least a dozen Native American tribes claim connections to the lands within the Organ Pipe Cactus National Monument, especially near Quitobaquito. They include the Tohono O'odham Nation, which used to inhabit a large swath of the Sonoran Desert and whose reservation lies north and east of the park's boundaries. Members of the nation—who have revived the practice of following the Old Salt Trail—have

protested the idea of any new construction in an area once inhabited by their ancestors, the Hohokam, who lived there between 200 and 1,400 A.D.

Tohono O'odham Nation Chairman Ned Norris Jr. said his tribe remains opposed to any new border fence construction.

"We've historically lived in this area from time immemorial," he said. "We feel very strongly that this particular wall will desecrate this area forever. I would compare it to building a wall over your parents' graveyards. It would have the same effect."

Rick Martynec, an archaeologist who is conducting volunteer surveys of sites within the Cabeza Prieta National Wildlife Refuge along with his wife, Sandy, said researchers have not had time to properly evaluate the area now targeted for construction.

"Quitobaquito, as we know it, may be destroyed before anyone has had a chance to evaluate the consequences of the current actions," Martynec said. "What's the rush?"

He noted that relevant sites within the monument "include evidence of hunting, farming and home sites" along with "historic cemeteries." He added that the adjacent wildlife refuge has other archaeological artifacts, including a rare intaglio figure spanning several hundred yards that was probably created for a ritual.

The Martynecs were doing research in the refuge at one point and saw a Border Patrol agent on a four-wheeler motoring up a road on which the agency was not authorized to drive, "right over a huge roasting pit" used by an ancient community, he recalled. They later checked to see if an incident report had been filed—as would be required if the agency was traversing that land—but none had been, Martynec said.

In the Park Service report summarizing the results of a survey of 11.3 miles along the U.S.-Mexico border, the agency's archaeologists note that previous research had "identified and recorded 17 archaeological sites which likely will be wholly or partially destroyed by forthcoming border fence construction." The park experts, who conducted their survey in June, identified five more archaeological sites that also would be imperiled and would deserve to be protected by a National Register of Historic Places designation.

The report notes that staffers were unable to complete a survey of the entire length of the U.S. side of the border that lies within the monument's boundaries. Park Service archaeologists plan to survey another 1.7-mile section of the park's southern border later this month.

Kevin Dahl, Arizona senior program manager for the National Parks Conservation Association, said that under normal circumstances, the agency would take steps to protect archaeological sites under its purview, including a lengthy excavation process if necessary.

CBP has announced plans to complete this section of barriers through the national monument by January. Those plans call for new fencing in five or six "non-contiguous areas," including places within the monument where the archaeological sites are found, agency officials said. The sections of new barrier are not necessarily contiguous because the terrain might be too steep or mountainous to install a single, unbroken span of fencing.

The project within the monument includes a new steel bollard fence running continuously for 9.1 miles, reinforced with an 8- to 10-foot-deep concrete-and-steel foundation.

"Archaeology takes time, and they have a deadline," Dahl said, referring to CBP. "Putting a wall there is insane. This is just one more reason why ramming this wall through, using illegal, unconstitutional money, is damaging to these public resources. We're destroying what the wall is supposed to protect."

National Park Service spokesman Jeremy Barnum said the agency's mission "is to preserve unimpaired the natural and cultural resources and values of the National Park System for the enjoyment, education, and inspiration of this and future generations." But he noted that some of the parks along the U.S.-Mexico border have been subjected to "cross-border illegal activities" and that the agency has coordinated with the Department of Homeland Security to address the issue.

In 2002, a park ranger at Organ Pipe was shot and killed as he pursued members of a drug cartel hit squad who had fled to the United States from Mexico. The Park Service closed more than half the monument to the public the following year but reopened it entirely in September 2014.

"The National Park Service appreciates the role of an integrated border security approach and values the ongoing interagency efforts to address the multidimensional issue," Barnum said.

An archaeologist working for a CBP contractor, Northland Research, is on site every day when crews are working on the barrier fence, according to federal and tribal officials. The firm referred requests for comment to the government agency.

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