



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

**U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON BORDER SECURITY, FACILITATION AND OPERATIONS
HEARING EXAMINING THE EFFECT OF THE BORDER WALL ON PRIVATE AND
TRIBAL LANDOWNERS**

February 27, 2020

INTRODUCTION & HISTORICAL BACKGROUND

Good afternoon, Chairwoman Rice, Ranking Member Higgins and distinguished Members of the Subcommittee. I am Ned Norris, Jr. and I am the Chairman of the Tohono O'odham Nation of Arizona. It is an honor to have the opportunity to testify before you today on behalf of my Nation. I also want to pay our respects to Representative Lesko, in whose district the northernmost portion of our Reservation is located.

For the reasons that will be obvious from my testimony today, the Nation is deeply appreciative of the attention that this Subcommittee, and its parent full Committee, is paying to the serious issues that surround the frighteningly broad authority that the Secretary of Homeland Security has been given to ignore all manner of statutory rights in connection with border wall construction. The waiver authority granted the Secretary in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) allows the Secretary to take liberties with the law in a way more reminiscent of a totalitarian state than a democracy in which all citizens are equally protected by the laws of the land. We support the Committee's efforts, and hope that the full House will take up the noble cause of H.R. 1232, The Rescinding DHS' Waiver Authority for Border Wall Act, and return this authority to Congress, where it belongs.

The Tohono O'odham Nation is 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. Without consideration for our people's sovereign and historical rights, in 1854 the international boundary was drawn through our ancestral territory, separating our people and our lands. As a result, today the main body of our 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. On the other side of the border in Mexico, seventeen O’odham communities with approximately 2,000 members are still located in our historical homelands. O’odham on both sides of the border share the same language, culture, religion and history. Our 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 U.S. 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), 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.



Map of Tohono O’odham Ancestral Territory

THE NATION SUPPORTS AND IS ACTIVELY ENGAGED IN BORDER SECURITY EFFORTS

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

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

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

BORDER “WALL” CONSTRUCTION IN REMOTE AREAS LIKE OURS IS DEEPLY HARMFUL TO THE NATION -- AS WELL AS INEFFECTIVE AND A WASTE OF TAXPAYER DOLLARS

The Nation shares the federal government’s concerns about border security, and we believe that the measures we have taken to assist CBP and conduct our own law enforcement efforts are necessary to protect the Nation specifically and the United States generally. **But we strongly oppose the construction of a border wall on our southern boundary.** Such a wall comes at great cost to the American taxpayer in this era of a skyrocketing federal deficit. It is ineffective in remote geographic areas like ours where it can easily be circumvented by climbing over, tunneling under, or sawing through it. And it is needlessly destructive when there are more efficient ways to

control the border without damaging the religious, cultural and environmental resources on which our members rely and which make our ancestral land sacred to our people.

Damage Already Done by Construction Outside Our Reservation. In several amicus briefs filed in litigation in 2019 challenging construction of the border wall,¹ the Nation detailed the negative impacts it knew would be caused by border wall construction in Tucson Sector Projects 1, 2 and 3 and Yuma Sector 3. Today, some of that construction is fully underway and the anticipated damage is now occurring. 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 of wall construction, connecting with these projects, extending through Cabeza Prieta National Wildlife Refuge and Organ Pipe Cactus National Monument, and ending less than two miles from the western boundary of the Nation's Reservation. Similar construction is ongoing in Tucson Sector Project 3 to the east of the Tribe's reservation, including the San Bernardino National Wildlife Refuge. These projects already have caused significant and irreparable harm to cultural and natural resources of great importance to the Nation.

The federal government itself acknowledged the significance of the Nation's interest in the areas that are being impacted by the ongoing and contemplated construction in the Tucson and Yuma Sector projects. For example, the National Park Service in its General Management Plan for the Organ Pipe Cactus National Monument (a UNESCO biosphere reserve)² acknowledged the importance of Quitobaquito Spring, which is located 200 yards from the border:

There are 11 springs in the monument, eight of which are located at Quitobaquito, by far the largest source of water. The pond and dam at Quitobaquito were constructed in 1860, and the resulting body of water is one of the largest oases in the Sonoran Desert.

The site is also sacred to the O'odham, who have used the water from this spring for all of their residence in the area.

...

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

¹ 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).

² 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 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 a more recent study, the National Park Service identified five new archeological sites (of pre-contact Native American artifacts) and additional archeological resources within a 60-foot wide federal easement that runs along the border in Organ Pipe, noting that many existing archeological sites will be impacted or destroyed by the border wall construction, and that many areas along the Organ Pipe border have not yet been surveyed to identify archeological and culturally sensitive sites.⁵ Indeed, recent construction activities already have resulted in damage to areas of significance to the Nation within Organ Pipe, including the blading of an area near Quitobaquito Springs and blasting in an area called Monument Hill, which we believe has disturbed human remains.⁶

Similar expert reports show archeological sites of significance to the Nation in the immediate vicinity of Tucson Project 3 in the San Bernardino Valley, as well as the Cabeza Prieta National Wildlife Refuge, although these areas are less well surveyed so the extent of cultural and natural resources potentially affected by construction of a border wall is even less well known.⁷ But there is

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

⁶ *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) <https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites/>.

⁷ 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/CPNWSREIS.pdf>; U.S. Fish and Wildlife Service, *Environmental Assessment of the Malpai Borderlands Habitat Conservation Plan* (July 26, 2008) at 17, available at

little question that the ongoing construction of 43 miles of 30-foot high steel bollard wall will have serious negative impacts on trees, cacti, and other plants of documented significance to the Nation, on archeological and burial sites of O’odham ancestors, on wildlife migration, and on access to vitally important sources of water, and that it will cause flooding in those areas where construction occurs.⁸

The Nation Is Deeply Concerned that DHS Will Next Extend Construction Onto The Nation’s Reservation. If the wall is extended onto our Reservation, it will divide our lands and our people, creating a barrier between families and communities who share the same language and culture. It will interfere with our members’ traditional crossings for domestic, religious ceremonial and cultural purposes. A wall will impede the natural flow of water and prevent it from reaching our Reservation, including the man-made watering holes used by our livestock and by wild animals. A wall built across natural washes also will have a damming effect (as it already has done near Lukeville), and exacerbate the flooding that already occurs on our roads and in our communities during monsoon season. Construction of the wall near the outskirts of our reservation already is disturbing and destroying culturally significant sites and cultural resources, tribal archeological resources, and sacred sites and human remains, and already impacting our wildlife, including some endangered species like the jaguar that are sacred to American Indian tribes, preventing them from moving freely within their habitat and interfering with their natural migration patterns. Construction of the wall near our reservation also already is interfering with the flow and use of scarce and vital water resources, including seasonal washes, on which plants, wildlife and livestock depend. The plants are food sources for animals and are used by tribal members for food, medicine and cultural purposes.

THE IIRIRA WAIVER AUTHORITY IS INCONSISTENT WITH AMERICAN VALUES

The Nation is deeply troubled by the federal statute that gives the Department of Homeland Security (DHS) nearly dictatorial power to issue to itself a “waiver” to circumvent any law with which it does not wish to comply. DHS has used this self-waiver authority to avoid more than forty-two laws that otherwise would protect the rights of individuals and local governments, private property rights, water rights, religious practices and culturally sensitive sites, the environment, endangered species, and a host of other rights and resources that Americans -- and the Tohono O’odham Nation -- hold dear.

As you know, the culprit is Section 102(c) of IIRIRA, as modified by the Real ID Act of 2005. IIRIRA authorizes the Secretary of DHS to install additional physical barriers and roads near the border to deter illegal crossings into the United States, but allows the Secretary to do this without taking into consideration whether the measures are cost effective, how well they actually work, or how much damage they may do to the communities and environment impacted by the measures. IIRIRA Section 102(a). Section 102(c) provides:

Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive **all** legal requirements such Secretary, in such

<https://www.fws.gov/southwest/es/arizona/Documents/HCPs/Malpai/MBHCP%20EA%20w%20FONSI.pdf>.

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

Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

8 U.S.C. § 1701 note. The language is so broad that the DHS Secretary has claimed he has the authority to waive *any law* -- including state and other laws -- if he deems it necessary for expeditious construction of border barriers. 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. 19078 (April 8, 2008) (correction). The notice waives the application of 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. Since then, DHS has issued a series of additional waivers to allow construction of the border wall, *see, e.g.*, 84 Fed. Reg. 21798 (May 15, 2019), and just last week issued yet another waiver that allows the Administration to ignore federal procurement and contracting laws (in addition to all environmental laws) where it is currently constructing the border wall in California, Arizona and Texas. *See* 85 Fed. Reg. 9794 (Feb. 20, 2020).

The extraordinary latitude of DHS's authority to waive any and all laws is exacerbated by IIRIRA's severe limitation on citizens' rights to challenge those waivers. Any claim must be filed within 60 days after the date of the action or decision made by the DHS Secretary (see Section 102(c)(B)), an extraordinarily short time period in which to become aware of the waiver, to determine what DHS construction actions are planned under the waiver, and to prepare a claim in connection with the waiver. Further, the *only* cause of action that the statute purports to allow is in federal district court for a claim "alleging a violation of the Constitution," Section 102(c)(A) -- a draconian limitation that prevents Americans from being able to challenge the impact of DHS' actions on their rights under any statutory laws. Further impeding citizens' right to challenge is IIRIRA's requirement that appeals from a decision of a district court may only be had by filing a petition for certiorari with the U.S. Supreme Court -- and as is well known, each year the Supreme Court grants very, very few petitions for certiorari (*e.g.*, only 1.2% of petitions filed in 2017 were granted according to the Harvard Law Review).⁹

As a practical matter, what this means is that a wall may very well be built without any consideration of the laws that protect the interests of American citizens generally, and the Tohono O'odham Nation in particular, in our natural or cultural resources, archeological or sacred sites, economic resources, or the people and communities that live on the border. And while IIRIRA provides that DHS shall consult with Interior, Indian tribes, state and local governments and property owners to minimize impacts on the environment, culture, commerce and quality of life for those living near the border (see Section 102(b)(1)(C)), the federal government appears to believe it need not comply with these directives, and accordingly such consultation either has not occurred or has been inadequate. Nevertheless, DHS's failure to engage in formal consultation with tribes 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.

⁹ <https://harvardlawreview.org/2017/11/supreme-court-2016-term-statistics/>.

More than that, the manner in which IIRIRA is being implemented has stripped our tribal government, other governments and private citizens in border communities of significant federal protections (as well as protections under state and other laws), and has militarized the border near our communities. No other segment of the United States population has been forced to surrender these legal rights and protections or live under these circumstances. The Tohono O’odham Nation strongly urges that it and its fellow border communities should be entitled to the same rights and protections as other United States citizens.

For all these reasons, the Nation opposes the application of Section 102(c) waivers on its lands, and objects to the waiver authority in general as unacceptably broad and draconian.¹⁰ Indian Country stands with us – the National Congress of American Indians has adopted several resolutions that similarly oppose the waiver of federal, state and other laws under Section 102(c) of IIRIRA as “unnecessary, destructive, and in violation of the federal obligation to consult with Indian tribes on a government to government basis and to respect tribal sovereignty and self-determination.” NCAI Resolution ECWS 08-001; REN-08-002; ECWS 17-002; NCAI Resolution ECWS 18-001.

The Nation’s concerns have been heightened as DHS moves forward full steam ahead in constructing a border wall, despite the absence of federal appropriations, circumventing the will of Congress by reprogramming billions of dollars appropriated for the Department of Defense without any evidence that such a wall will improve border security. IIRIRA is effectively facilitating the use of *billions* of taxpayer dollars appropriated for other purposes to be spent on a border wall that has not been adequately studied and that already is having significant, deleterious effects on the Nation’s Reservation and our members, our cultural and natural resources, our archeological and sacred sites, and our economic interests.

Litigation challenging DHS’s waiver authority has to date been unsuccessful.¹¹ Litigation challenging the reprogramming of funds is proceeding, but destruction of sacred sites and important habitat is continuing as that litigation winds its way through the process. For these reasons, we urge Congress to reconsider whether the IIRIRA waiver provision should remain in place, or whether additional safeguards are necessary to protect border tribes like the Nation and other border communities whose rights and interests are being trampled by its application. We reiterate our support for legislation like H.R. 1232, which would retain IIRIRA’s directive to construct border barriers but strike the waiver provision, as one appropriate response to the over breadth of the current waiver provision.

¹⁰ See, e.g., Tohono O’odham Legislative Council Resolution No. 17-053 (Feb. 7, 2017), No. 18-032 (Jan. 2018).

¹¹ See *Center for Biological Diversity, et al. v. McAleenan, et al.*, Nos. 18-cv-0655-KBJ, Dkt. No. 37 (Sep. 4, 2019), 19-cv-2085-KBJ, Dkt. No. 21 (Sep. 13, 2019), *cert. filed sub nom. Center for Biological Diversity et al. v. Wolf*, No. 19-975; *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1103 (S.D. Cal.), *cert. denied sub nom. Animal Legal Def. Fund v. Dep’t of Homeland Sec.*, 139 S. Ct. 594 (2018), *aff’d*, 915 F.3d 1213 (9th Cir. 2019); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 554 U.S. 918 (2008); *Cty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693, at *1 (W.D. Tex. Aug. 29, 2008) (case challenging the 2008 waiver that applies to the Nation’s reservation).

We ask that at a minimum, Congress consider requiring DHS to engage in a more thorough and substantive consultation and review process that is respectful of our government-to-government relationship, which recognizes the Tohono O’odham Nation’s unique history and relationship to these lands, and which requires DHS to consider the information provided by the Nation before making any decision about what type of border security measures are most appropriate for 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”¹² as required by the law and its tribal consultation policy, DHS currently is giving little more than lip service to consultation. In recent communications with the Nation relating to construction in the Nation’s ancestral territory just outside of the Reservation, DHS has made clear that it will not actually consider any alternative type of border security measures or technology other than construction of a border wall, nor will it slow down its efforts to construct the wall to consider whether there are alternatives or mitigation measures.¹³ DHS should be required to consider and study the information provided by the Nation before imposing a “one size fits all” approach that is not cost effective, not substantively effective, and causes real harm to our people.

CONCLUSION

We urge Congress to withdraw or at least better limit DHS’s authority to unilaterally give itself waivers to circumvent every statute on the books. Its current waiver authority is dangerously broad, and has allowed DHS nearly unchallengeable, dictatorial-authority to run roughshod over the rights of the Tohono O’odham Nation and every other border community in the United States. This kind of non-challengeable power is more appropriate to a totalitarian state, and does not belong among the statutes that are supposed to protect our freedoms -- including from an over-reaching, intrusive federal government, making decisions in which we have no say and have no right to challenge.

The Nation is deeply appreciative of the Subcommittee’s interest in our concerns about the IIRIRA waiver, and about the impact its application is having on our ability to protect our religious and cultural heritage, our way of life, and our environment. We welcome a continued dialogue with you on these issues.

¹² Letter from Acting CBP Commissioner Kevin K. McAleenan to Chairman Edward D. Manuel, Tohono O’odham Nation (Aug. 18, 2017) (attached).

¹³ *See, e.g.*, Letter from Chairman Ned Norris, Jr., Tohono O’odham Nation to Roy Villareal, Chief Patrol Agent, U.S. Border Patrol Tucson Sector Chief (Nov. 13, 2019); Letter from Roy Villareal, Chief Patrol Agent, U.S. Border Patrol Tucson Sector Chief to Chairman Ned Norris, Jr., Tohono O’odham Nation (Jan. 10, 2020) (attached).