



**THE TOHONO O'ODHAM NATION'S  
RESPONSES TO QUESTIONS FOR THE RECORD  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS HEARING ON  
"PROTECTING OUR BORDERS; SAVING OUR NATIONAL PARKS"**

November 6, 2023

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- 1. How would the Nation's sacred sites be better protected if the laws waived by the Department of Homeland Security had been in effect? For example, would these sites be better protected if the National Environmental Policy Act and the Native American Graves Protection and Repatriation Act were not waived?**

There are a number of federal laws, including but not limited to the National Environmental Policy Act (NEPA) and the Native American Graves Protection and Repatriation Act (NAGPRA), that protect the environment and cultural and archeological resources and would have better protected the Nation's sacred sites had they not been waived by DHS.

**Archaeological Resources Protection Act**

The Archaeological Resources Protection Act (ARPA) requires federal agencies to obtain a permit from the federal land manager<sup>1</sup> before excavating or removing archaeological resources from public or Indian lands.<sup>2</sup> This required permitting process includes notification to relevant tribes of anticipated harm to religious or cultural sites,<sup>3</sup> and an opportunity for the federal land manager and tribal officials to meet and discuss tribal interests and proposed mitigation measures prior to issuance of the permit.<sup>4</sup>

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<sup>1</sup> For purposes of ARPA, the "federal land manager" is the federal agency with primary management authority over the relevant lands. 16 U.S.C. § 470bb(2).

<sup>2</sup> 16 U.S.C. § 470cc(a).

<sup>3</sup> 16 U.S.C. § 470cc(c).

<sup>4</sup> 43 C.F.R. § 7.7

Had these ARPA protections been in place during construction of the border wall through the Cabeza Prieta National Wildlife Refuge, the Organ Pipe Cactus National Monument, and the San Bernardino National Wildlife Refuge, the widespread desecration of the Nation's religious and cultural sites in these areas could have been avoided. The Nation could have worked collaboratively on a government-to-government basis with the Department of Homeland Security to identify and exclude certain sensitive areas, and to propose additional mitigation measures. However, because ARPA's protections were waived, there were no meaningful procedural checks to protect the Nation's archaeological resources, and sites of great religious and cultural importance were severely and permanently damaged.

### **Native American Graves Protection and Repatriation Act (NAGPRA)**

Together with the ARPA permitting process, the procedural requirements of NAGPRA provide significant safeguards for tribal human remains, funerary objects, sacred objects, and objects of cultural patrimony.<sup>5</sup> Under NAGPRA, federal agencies planning intentional excavations are required to: (1) take reasonable steps to determine whether the planned activity may result in the excavation of human remains or other cultural items; (2) engage in consultation with relevant tribes and Native Hawaiian organizations regarding the planned activity; and (3) complete and follow a written plan detailing the planned treatment, care, and disposition of human remains and other cultural resources in connection with the planned activity.<sup>6</sup>

The waiver of these important procedural safeguards during border wall construction allowed the Department of Homeland Security to blast unfettered through the historic tribal gravesite at Monument Hill with no forethought to tribal impacts, no tribal consultation, and no plan for mitigation of the irreparable damage to tribal human remains and sacred objects.<sup>7</sup> If NAGPRA had been properly applied, the known tribal burials and protected tribal objects at Monument Hill would have been identified and actively protected through consultation and careful planning, rather than senselessly destroyed. NAGPRA would also have protected inadvertently discovered remains and objects by requiring notification, halting of work in the impacted area, and reasonable efforts to safeguard the resources.<sup>8</sup>

### **National Historic Preservation Act**

Certain cultural resources protected by ARPA and NAGPRA are also protected by the National Historic Preservation Act (NHPA), which requires federal agencies to consult with tribes when agency undertakings affect properties of religious or cultural significance.<sup>9</sup> To comply with

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<sup>5</sup> 25 U.S.C. § 3001 et seq.; 43 C.F.R. § 10.1(b)(2).

<sup>6</sup> 43 C.F.R. § 10.3.

<sup>7</sup> 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/>.

<sup>8</sup> 43 C.F.R. § 10.4.

<sup>9</sup> 54 U.S.C. § 300101 et seq.

NHPA, federal agencies must follow a four-step review process prior to expending federal funds or issuing licenses.<sup>10</sup> This review process requires the federal agency—in consultation with the relevant tribes—to evaluate the applicability of section 106 of the Act,<sup>11</sup> identify historic properties, and assess and resolve potential adverse effects.<sup>12</sup>

Given the religious and cultural significance of the sacred sites destroyed during the border wall construction, it is likely that NHPA and the Section 106 review process would have applied to the project if they had not been waived. Accordingly, the Nation and the Department of Homeland Security would likely have engaged in extensive consultation pursuant to Section 106, and entered into a Memorandum of Agreement outlining the measures the Department would take to avoid, minimize, or mitigate the adverse effects of the undertaking. With this Memorandum of Agreement in place, the Nation could have dramatically reduced the harm caused by the project and preserved more of our cultural resources for future generations.

### **Endangered Species Act**

Other laws like the Endangered Species Act obligate federal agencies to, for example, consult and at least consider impacts on specific species and habitat, that may be crucial to the Nation's historic and cultural existence. The waiver of all these laws allowed the Department of Homeland Security to destroy tribal gravesites at Monument Hill and bulldoze in the area near Quitobaquito Springs, another site of cultural and religious significance to the Nation, without any consideration of the impacts to tribal cultural and archeological resources and sacred sites, not to mention the serious impacts to environmental resources, including wildlife and habitat of significance to the Nation.

### **National Environmental Policy Act**

NEPA requires federal agencies to consider the potential environmental impacts and consequences of their proposed actions before they make decisions to undertake those actions.<sup>13</sup> Environmental effects or impacts are broadly defined to include aesthetic, historic, cultural, economic, social and health effects, whether direct, indirect or cumulative (so NEPA sweeps in impacts and consultation under other statutes like NAGPRA, NHPA and the ESA).<sup>14</sup> NEPA and its implementing regulations require that federal agencies, before taking action, consult with other interested agencies and tribal governments, consider the affected environment and environmental consequences, document the analysis of potential impacts in environmental assessments or environmental impact statements, consider reasonable mitigation measures to offset or avoid the

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<sup>10</sup> 36 C.F.R. § 800.

<sup>11</sup> Section 106 requires federal agencies to account for the effects of their undertakings on properties listed or eligible for listing in the National Register of Historic Places and provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings. 54 U.S.C. § 306108.

<sup>12</sup> 36 C.F.R. §§ 800.3-800.6.

<sup>13</sup> 42 U.S.C. § 4332; 40 C.F.R. § 1500.1-3.

<sup>14</sup> 40 C.F.R. 1508.1.

environmental impacts, and make this information available to the public for comment before the implementation of the proposals.<sup>15</sup> Tribes may participate in the NEPA process as cooperating agencies, to ensure that tribal resources are protected.<sup>16</sup> NEPA also requires the Environmental Protection Agency to review and comment on environmental impacts described in NEPA documents and if the analysis is unsatisfactory, refer the matter to the Council on Environmental Quality (CEQ); NEPA also allows federal agencies involved in the NEPA process to refer matters to CEQ where there are disagreements with the lead agency about potential adverse environmental impacts.<sup>17</sup>

NEPA compliance would have required that the Department of Homeland Security consider all potential environmental impacts, comments from the Nation and the public, and mitigation of those impacts, before deciding to construct a border wall. The waiver of those requirements allowed the Department of Homeland Security to take action and recklessly construct that wall with absolutely no consideration of the impacts to the Nation's cultural, archeological, historic, and other resources and sacred sites – and no meaningful consultation with the Nation beforehand.

The Nation underscores that in 2017, the Nation met with senior Department of Homeland Security officials in Washington, D.C. on two separate occasions. In both meetings, the Nation reiterated its opposition to a border wall and requested more information on the Department's plans to formally consult with the Nation on the issue.<sup>18</sup> DHS did not grant the Nation's request for formal consultation, but rather proceeded with construction without it. The unnecessary destruction of culturally sensitive and sacred sites was the result.

## **2. Are there other sacred sites or resources of significance to the Nation that could be negatively impacted by additional border wall construction?**

Aside from the cultural resources previously identified in Tucson Sector Projects 1, 2 and 3 and Yuma Sector 3, the Nation anticipates several additional sites and resources will be identified as future surveys are taken along the Organ Pipe border, and in other parts of our ancestral territory. We also anticipate frequent inadvertent discoveries of tribal human remains and cultural objects throughout the course of the construction project, given the Nation's extensive history in the region. In light of these concerns, it is imperative that NEPA, ARPA, NAGPRA, NHPA, and other applicable laws protecting the Nation's sacred sites and cultural and natural resources be applied strictly to any future border wall construction to prevent further irreparable harm.

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<sup>15</sup> 40 C.F.R. §§ 1500-1507.

<sup>16</sup> 40 C.F.R. § 1501.8, 1508.1(e).

<sup>17</sup> 40 C.F.R. § 1504.2-3.

<sup>18</sup> In these meetings, the Nation provided DHS with a copy of a Resolution enacted by the Tohono O'odham Legislative Council, *Resolution of the Tohono O'odham Legislative Council: Border Security and Immigration Enforcement on the Tohono O'odham Nation*, No. 17-053 (Feb. 7, 2017).