

**QUESTIONS FOR THE RECORD BY DEMOCRAT MEMBERS AND
RESPONSES FROM TOHONO O'ODHAM NATION**

Questions from Rep. Gallego:

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.

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

Response: 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 4 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.

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

Response: 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.

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?*

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

Response: 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.

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

Response: Based on our longstanding 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).

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.

Response: 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 25th meeting, making requests in writing and requesting formal consultation.
3. November 25, 2019 – Email 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 five 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 – Email 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 email 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, D.C.).

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 from Rep. Grijalva:

1. ***You mention the connections that the Nation continues to have with its ancestral homelands in Mexico, despite the presence of the border.***
 - a. ***Has the border ever prevented tribal members from returning to these homelands or engaging in ceremonies?***

Response: 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.

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?

Response: 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.

Question from Rep. Garcia:

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?

Response: 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 26th, NCAI issued a statement condemning the recent destruction of culturally significant sacred sites in Arizona resulting from border wall construction activities.

Question from Rep. Soto:

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.

a. 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?

Response: 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. NAGPRA 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.

b. 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?

Response: 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 overreach 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.