

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

March 11, 2020

Dear Representative Gallegos, Representative Grijalva, Representative Haaland, Representative Garcia, and other members of the Subcommittee on the Rights of Indigenous Peoples of the U.S.:

Thank you for these incisive follow-up questions. My responses are set out below after each of your questions.

Questions from Rep. Gallego

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.

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

Response: 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 precedent 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,

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 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.

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 from Rep. Grijalva

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."

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

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

2. Why waive these protective laws in the first place?

Response: 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 from Rep. Haaland

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).

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

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.

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

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 longstanding federal obligation.

Questions from Rep. Garcia

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

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.

Thank you again for the opportunity to testify and to answer these important questions.

Respectfully,

A handwritten signature in dark ink, appearing to read "Sarah Krakoff". The signature is fluid and cursive, with the first name "Sarah" written in a larger, more prominent script than the last name "Krakoff".

Sarah Krakoff
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