

Testimony of Sarah Krakoff, Moses Lasky Professor, University of Colorado Law School\*

*Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall*, Hearing before the Subcommittee for Indigenous Peoples of the United States, Committee on Natural Resources, Feb. 26, 2020.

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 twenty 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

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

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<sup>1</sup> 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.<sup>2</sup> 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 traditional religions.], including . . . but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial

<sup>1</sup> 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).

<sup>2</sup> For a broad overview of tribal sovereign status and powers, see Cohen’s Handbook of Federal Indian Law, Chs. 3-4 (2012 ed.)

and traditional rights.”<sup>3</sup> 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.”<sup>4</sup>

The National Historic Preservation Act<sup>5</sup> 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<sup>6</sup> 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<sup>7</sup> 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<sup>8</sup> and modify its actions so as to avoid harm to endangered and threatened species under the Endangered Species Act.<sup>9</sup>

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,

<sup>3</sup> 42 U.S.C. § 1996.

<sup>4</sup> Executive Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

<sup>5</sup> 16 U.S.C. § 470 et seq.

<sup>6</sup> 16 U.S.C. § 470aa et seq.

<sup>7</sup> 25 U.S.C. § 3001 et seq.

<sup>8</sup> National Environmental Policy Act, 16 U.S.C. §§ 1531-1544.

<sup>9</sup> Endangered Species Act, 42 U.S.C. §§ 4321-4370h.

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> The Obama administration did not exercise the waiver at all. President Trump's executive order--

<sup>10</sup> 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.

<sup>11</sup> Pub. L. No. 109-367, 120 Stat. 2638.

<sup>12</sup> See *Environmental Impacts on the Border Wall*, David Roche, et al., 47 *Env'tl. L. Rep. News & Analysis* 10477 (2017).

<sup>13</sup> See Kenneth D. Madsen, *Department of Homeland Security Border Barriers Legal Waivers*, Available at: [https://cph-us-w2.wpmucdn.com/u.osu.edu/dist/2/14781/files/2019/10/waivers-DHS-poster\\_v306.pdf](https://cph-us-w2.wpmucdn.com/u.osu.edu/dist/2/14781/files/2019/10/waivers-DHS-poster_v306.pdf).

supporting a wall across all 1,954 miles of the southern border—was signed on January 25, 2017, shortly after his inauguration.<sup>14</sup> Congress never authorized the wall’s construction nor the funding for it. Instead the 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 fifteen 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.<sup>15</sup>

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 reengage with the Tohono O’odham and other tribes and conduct serious government-to-government consultations that would avert further devastation to cultural,

<sup>14</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

<sup>15</sup> *See id.*

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.