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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 OAKLAND DIVISION

14 SIERRA CLUB and SOUTHERN BORDER  
15 COMMUNITIES COALITION,

16 Plaintiffs,

17 v.

18 DONALD J. TRUMP, et al.,

19 Defendants.  
20

Case No. 4:19-cv-00892-HSG

**AMICUS CURIAE BRIEF OF TOHONO  
O’ODHAM NATION IN SUPPORT OF  
PLAINTIFFS’ MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

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**INTRODUCTION AND INTEREST OF *AMICUS CURIAE*  
THE TOHONO O’ODHAM NATION**

1  
2  
3 *Amicus* Tohono O’odham Nation (“Nation”) is a federally recognized Indian tribe with  
4 more than 34,000 members. The O’odham have lived in what is now Arizona and northern  
5 Mexico since time immemorial. The Nation’s Reservation in southern Arizona is one of the  
6 largest in the country, comprising nearly 2.8 million acres. When the international line marking  
7 the boundary between the United States and Mexico was drawn in 1854, it sliced through the  
8 Nation’s aboriginal territory, separating its people. As a result, the Nation’s Reservation shares a  
9 62-mile border with the Republic of Mexico, and approximately two thousand of the Nation’s  
10 members live on the Mexican side of the border. The Nation’s ancestral territory and traditional  
11 homelands include Cabeza Prieta National Wildlife Refuge, which is the subject of a substantial  
12 portion of Defendants’ contemplated Yuma Sector Project 3 and related Tucson Sector Project 1  
13 border wall construction, and Organ Pipe Cactus National Monument (also subject to Tucson  
14 Sector Project 1 and 2 border wall construction), which sits between Cabeza Prieta and the  
15 western boundary of the Nation’s Reservation. The Nation has significant and well-documented  
16 connections to these lands and the plants, animals, and cultural resources within these areas.

17 The Nation’s location on the Mexican border exposes its Reservation and members to  
18 major impacts from border crossing traffic, including border-related burglaries and thefts, litter,  
19 land desecration, destruction of natural resources and protected species, migrant rescues, migrant  
20 deaths, drug trafficking, and human smuggling. While the Nation works closely with U.S.  
21 Customs and Border Patrol (“CBP”) and U.S. Immigration and Customs Enforcement on a  
22 variety of state-of-the-art border security measures, it strongly opposes construction of a physical  
23 wall on its southern boundary, as it would divide the Nation’s historic lands and communities,  
24 hamper the Nation’s traditional crossings for domestic, ceremonial, and religious purposes,  
25 prevent the migration of wildlife, exacerbate flooding, harm wildlife and natural resources sacred  
26 to the O’odham, and militarize the Nation’s border. What is more, the Nation receives extremely  
27 limited federal funding to address border impacts, and therefore is forced to spend millions of  
28 dollars annually from its own treasury on border security and enforcement and associated costs.

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1 The Nation agrees with Plaintiffs that the Defendants’ planned border wall construction  
2 contemplated by Yuma Sector Project 3 must be enjoined for the reasons stated in Plaintiffs’  
3 Motion for Partial Summary Judgment (Oct. 11, 2019) (Dkt. No. 210), and writes separately to  
4 articulate the substantial and irreparable harm that the planned border wall construction will cause  
5 to the Nation. Yuma Sector Project 3 contemplates the construction of over thirty miles of border  
6 wall, through approximately half of Cabeza Prieta National Wildlife Refuge, to connect with the  
7 planned construction of border wall in Tucson Sector Projects 1 and 2, which calls for  
8 construction across both Cabeza Prieta and Organ Pipe Cactus National Monument, ending less  
9 than two miles from the western boundary of the Nation’s Reservation. This new border wall will  
10 cause irreparable harm to natural and cultural resources of significant importance to the Nation,  
11 both in these sensitive areas and on the Nation’s Reservation. The construction of the border wall  
12 in these areas also will substantially increase migrant traffic on the Nation’s Reservation lands,  
13 and exacerbate the impacts that the Nation experiences from this traffic and the cost to the Nation  
14 to address it.

15 These harms also speak directly to the public interest factor for Plaintiffs’ requested  
16 injunctive relief, which properly focuses on the impact of the challenged conduct on non-parties  
17 like the Nation. *See California v. Azar*, No. 19-CV-01184, 2019 WL 1877392, at \*13 (N.D. Cal.  
18 Apr. 26, 2019) (“Plaintiffs are not the only ones that will suffer hardship absent an injunction... In  
19 considering the public interest, we may consider the hardship to all individuals covered by the  
20 [challenged law], not limited to parties....”), quoting *Golden Gate Rest. Ass’n v. City & Cty. of*  
21 *San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008); *see also Ramos v. Nielsen*, 336 F. Supp. 3d  
22 1075, 1085-86 (N.D. Cal. 2018) (noting that “[t]he amicus briefs underscore that the harms to  
23 [Plaintiffs] will also harm the public interest.”). The Nation’s interest is particularly relevant  
24 because the United States has a special responsibility for the Tribe as its federal trustee, a  
25 responsibility that extends to the protection of tribal reservation lands and resources. The harms to  
26 the Nation and its trust resources that this border wall construction will cause, coupled with the  
27 harm Plaintiffs already have identified, decidedly tips this factor in favor of injunction. *Id.* at  
28 1089 (noting “that, without a preliminary injunction, there is a strong likelihood that Plaintiffs



1 would suffer irreparable injury, with concomitant harm to state and local communities as well.”).

2  
3 **ARGUMENT**

4 **I. YUMA SECTOR PROJECT 3 WILL CAUSE IRREPARABLE HARM TO**  
5 **NATURAL AND CULTURAL RESOURCES OF GREAT IMPORTANCE TO THE**  
6 **NATION.**

7 Yuma Sector Project 3 would create a 31-mile long, 30-foot high wall, together with road  
8 improvements and lighting in Cabeza Prieta National Wildlife Refuge.<sup>1</sup> This construction would  
9 connect with other planned border wall construction (which is the subject of this Court’s previous  
10 injunction)<sup>2</sup> creating a 74-mile long wall that ends less than two miles from the western boundary  
11 of the Nation’s Reservation. Defendants’ construction of this border wall will cause irreparable  
12 harm to cultural and natural resources of vital importance to the Nation, both in terms of damage  
13 to the resources from construction and associated impacts at the Project sites off-reservation, and  
14 damage caused by increased migrant traffic and interdiction on-reservation.

15 **A. The Nation’s Significant Interest in Natural and Cultural Resources on its**  
16 **Reservation and in Areas Affected by the Planned Construction.**

17 Like many Native American tribes, the preservation and protection of the natural and  
18 cultural environment of its homelands is profoundly important to the Tohono O’odham Nation.

19 The Nation has enshrined these values in its Constitution, which states, at Article XVIII, Sec. 1:

20 It shall be the policy of the Tohono O’odham Nation to encourage  
21 productive and enjoyable harmony between members of the nation  
22 and their environment; to promote efforts which will preserve and  
23 protect the natural and cultural environment of the Tohono  
24 O’odham Nation, including its lands, air, water, flora and fauna, its  
25 ecological systems, and natural resources, and its historic and  
26 cultural artifacts and archeological sites; and to create and maintain  
27 conditions under which members of the nation and nature can exist  
28 in productive harmony and fulfill the social, economic, and other  
requirements of present and future generations of members of the  
Tohono O’odham Nation.<sup>3</sup>

<sup>1</sup> See Dkt. No. 201, Notice of Decision by the Department of Defense to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808, Exhibit 1 at 3 (Sept. 3, 2019).

<sup>2</sup> Dkt. No. 185, Order Granting in Part and Denying in Part Plaintiffs’ Motion for Partial Summary Judgment, Denying Defendants’ Motion for Partial Summary Judgment, Certifying Judgment for Appeal and Denying Request to Stay (June 28, 2019).

<sup>3</sup> CONSTITUTION OF THE TOHONO O’ODHAM NATION, art. XVIII, § 1 (1986), available at <http://tolc-nsn.org/docs/Constitution.pdf>.

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1 The Nation further has recognized that “access to and preservation of the Nation’s traditional  
 2 lands and sacred sites” including in Cabeza Prieta National Wildlife Refuge, “are essential to the  
 3 O’odham himdag.”<sup>4</sup> “Himdag” is a word that escapes easy translation, but has been referred to as  
 4 “a way of life; a culture; a custom or practice; traditions.”<sup>5</sup>

5 In 1990, Congress set aside the vast majority of the Cabeza Prieta Wildlife Refuge  
 6 (including portions impacted by Defendants’ border wall construction) as protected wilderness  
 7 area through the Arizona Desert Wilderness Act of 1990.<sup>6</sup> The U.S. Fish and Wildlife Service’s  
 8 2006 Comprehensive Plan for Cabeza Prieta National Wildlife Refuge notes that  
 9 “[e]thnographically, the refuge was the homeland of the Hia C-ed O’odham,”<sup>7</sup> most of whom are  
 10 members of the Nation, and that “the Tohono O’odham Nation and Hia-Ced O’odham band ...  
 11 have cultural links to the refuge lands.”<sup>8</sup> Existing survey work in these areas underscores  
 12 significant cross-border activity on the part of the Nation’s ancestors. Cabeza Prieta lands show  
 13 substantial evidence of the early desert southwest shell trade, whereby “the Hohokam and other  
 14 southwestern cultural groups obtained marine shell primarily from the Pacific Ocean,” and  
 15 principally in the Gulf of California.<sup>9</sup> But while “45 prehistoric and historic sites have been  
 16 recorded by statewide survey ... [l]ess than one percent of the refuge has been inventoried for  
 17 archeological and historic sites.”<sup>10</sup>

18  
 19 <sup>4</sup> Tohono O’odham Legislative Council Resolution No. 07-714 at 1, available at <http://www.tolc-nsn.org/docs/Actions07/07714.pdf>.

20 <sup>5</sup> Saxton, D., Saxton, L., & Enos, S., TOHONO O’ODHAM/PIMA TO ENGLISH: ENGLISH TO TOHONO O’ODHAM/PIMA  
 21 DICTIONARY, Tucson, AZ: The University of Arizona Press (2d ed. 1998) at 22; *see also* Woods, Teri Knutson;  
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 24 49 (2002), available at <https://scholarworks.wmich.edu/jssw/vol29/iss1/4>. “Himdag” is alternately transliterated  
 25 “himthag.” *See id.* at 41.

26 <sup>6</sup> 16 U.S.C. § 1132 note; Pub. L. No. 101-628, 104 Stat. 4478 (Nov. 28, 1990), title III.

27 <sup>7</sup> U.S. Fish and Wildlife Service, *Cabeza Prieta National Wildlife Refuge: Comprehensive Conservation Plan,  
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<sup>8</sup> *Id.* at 172.

<sup>9</sup> Rankin, Adrienne G., *Archeological Survey of Organ Pipe Cactus National Monument, Southwestern Arizona:  
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 southwestern-arizona-1989-1991](https://core.tdar.org/document/4301/archeological-survey-at-organ-pipe-national-monument-southwestern-arizona-1989-1991) at 631; *see also id.* at 59 (noting that “Charlie Bell Well, also in the Cabeza Prieta  
 Refuge, and several Sedentary-period sites identified during the present survey of Organ Pipe, appear to have played  
 a key role in the shell trading network.”).*

<sup>10</sup> U.S. Fish and Wildlife Service, *supra* n.7, at 170.

1           **B.       The Construction of a Border Wall in Yuma Sector Project 3 Will Cause**  
 2           **Irreparable Harm to Valuable Cultural and Natural Resources**

3           In addition to violating the requirements of 10 U.S.C. § 2808, as Plaintiffs argue in their  
 4 motion [Dkt. No. 210 at 8-13], Defendants’ use of military construction funds to build border  
 5 walls in Cabeza Prieta is entirely inconsistent with Congress’ explicit directive in creating Cabeza  
 6 Prieta as a wilderness area. The Arizona Desert Wilderness Act of 1990 specifies that the only  
 7 military activities permitted within Cabeza Prieta wilderness areas are the continuation of “low-  
 8 level overflights by military aircraft” or “maintenance of existing associated ground  
 9 instrumentation.” § 301(f)(1) and (2). In contrast, border operations within these areas are  
 10 allowed to continue through the Immigration and Naturalization Service (now U.S. Citizenship  
 11 and Immigration Services), the Drug Enforcement Administration, and the United States Customs  
 12 Service (now CBP). *Id.* at § 301(g)(1) and (2). Defendants’ planned construction in Yuma Sector  
 13 Project 3 violates Congress’ careful directive in separating military and civilian border and law  
 14 enforcement activities.

15           This construction also will undoubtedly destroy numerous trees, cacti, and other plants of  
 16 significant and recognized interest to the Nation, disturb or destroy archaeological sites of  
 17 O’odham ancestors, and hamper or eliminate wildlife migration and access to vitally important  
 18 sources of water. *See, e.g.*, Dkt. 210-1, Exh. 4, Second Broyles Decl. ¶¶ 6, 15-17 (impacts to  
 19 wildlife, water sources, biological resources), Exh. 9, Second Hartmann Decl. ¶¶ 9, 15-16  
 20 (impacts to water sources, wildlife, indigenous people), Exh. 16, Tuell Decl. ¶¶ 4, 7, 13 (impacts  
 21 to wildlife, water, soil, and native plants). In addition, because much of the impacted land is  
 22 under-surveyed from a cultural and archeological perspective, it is likely that construction will  
 23 disturb or destroy additional cultural resources that have yet to be ascertained. As noted above,  
 24 these harms may be particularly acute near the border in Cabeza Prieta, where ancestral O’odham  
 25 trade routes involved significant cross-border traffic from the Gulf of California.

26           Completed border walls are also likely to increase flooding near the Project area,  
 27 permanently altering nearby vegetation and hydrological and cultural resources on a massive  
 28 scale. The National Park Service detailed similar impacts in 2008 following a summer monsoon

1 storm (an event exceedingly common in Southern Arizona) that delivered 1-2 inches of rain in the  
 2 area of the then newly-constructed 5.2 miles of Lukeville pedestrian fencing in Tucson Project  
 3 Sector 2.<sup>11</sup> Contrary to the Finding of No Significant Impact that accompanied the Lukeville EA,  
 4 the Park Service found that, in actuality, flooding led to significant blockage and sedimentation  
 5 along the fence line, along with elevated ponding in blocked areas and corresponding water  
 6 deprivation on the other side of the fence.<sup>12</sup> The Park Service concluded that “[d]uring the next  
 7 few decades, vegetation change will occur in those areas along the northern edge of the patrol  
 8 road that receive and retain runoff,” and that “natural resources [of the Monument] and [Park  
 9 Service] infrastructure will be impacted, as well as resources and infrastructure on neighboring  
 10 lands in the U.S. and Mexico.”<sup>13</sup> The Park Service anticipated that other short- and long-term  
 11 impacts would include the following:

- 12 • Riparian vegetation will change in response to increase sedimentation.
- 13 • Channel morphology and floodplain function will change over time.
- 14 • Channelized waters will begin a gullying process that has the potential to transform land surfaces in the affected watersheds.<sup>14</sup>

15 Given that the proposed construction contemplates a wall that, together with Tucson  
 16 Sector Projects 1 and 2 is more than fourteen times as long, these effects will surely be magnified,  
 17 with corresponding harm to resources beyond the construction footprint.

18 What is more, as discussed below in Section II, the planned wall construction will also  
 19 cause harm to natural resources, wildlife, and archeological and cultural resources on the Nation’s  
 20 Reservation because it will result in increased migrant traffic in these areas. Indeed, in its  
 21 Environmental Impact Statement for pedestrian fencing (*i.e.*, a wall) in the Rio Grande Valley  
 22 Sector, CBP acknowledged that this increased traffic in areas without pedestrian fencing would  
 23  
 24  
 25

26 <sup>11</sup> U.S. National Park Service, *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville,*  
 27 *Arizona, on Drainage Systems and Infrastructure, Organ Pipe Cactus National Monument, Arizona* (Aug. 2008) at 1,  
 available at [https://www.nps.gov/orpi/learn/nature/upload/FloodReport\\_July2008\\_final.pdf](https://www.nps.gov/orpi/learn/nature/upload/FloodReport_July2008_final.pdf).

28 <sup>12</sup> *Id.* at 12-15.

<sup>13</sup> *Id.* at 15-16.

<sup>14</sup> *Id.* at 16.

1 “reduce vegetation, disturb soils, and lead to increased soil erosion,” adversely impact wildlife  
 2 and wildlife habitat, “uncover and destroy unknown” archeological resources, and cause “long-  
 3 term major adverse impacts” to sensitive species.”<sup>15</sup> Similar harms to resources on the Nation’s  
 4 Reservation are extremely likely given that the Nation’s western boundary is less than two miles  
 5 from the eastern terminus of the planned wall construction associated with Yuma Sector Project 3  
 6 and Tucson Sector Projects 1 and 2.<sup>16</sup>

7 **C. A Preliminary Injunction to Protect these Resources is in the Public Interest.**

8 Courts repeatedly have found that the public interest favors injunctive relief to protect  
 9 cultural resources of Native American tribes. *See, e.g., S. Fork Band Council of W. Shoshone of*  
 10 *Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718, 721, 728 (9th Cir. 2009) (reversing a District  
 11 Court order denying injunctive relief regarding NEPA claims because there is high “likelihood of  
 12 irreparable environmental injury without adequate study of the adverse effects” concerning a  
 13 “mountain that has religious significance for Indian tribes”); *Colorado River Indian Tribes v.*  
 14 *Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (“The court is also mindful of the advancement  
 15 of the public interest in preserving these resources. They represent a means by which to better  
 16 understand the history and culture of the American Indians in the past, and hopefully to provide  
 17 some insight and understanding of the present day American Indians.”); *Quechan Tribe of Fort*  
 18

19 <sup>15</sup> *See* U.S. Border Patrol, *Environmental Impact Statement for Construction, Maintenance, and Operation of*  
 20 *Tactical Infrastructure, Rio Grande Valley Sector, Texas* (Nov. 2007) (“Rio Grande EIS”), at BW1 FOIA CBP  
 21 000795, available at [https://www.dhs.gov/sites/default/files/publications/0006\\_bw1\\_foia\\_cbp\\_000649-](https://www.dhs.gov/sites/default/files/publications/0006_bw1_foia_cbp_000649-001186_part1.pdf)  
 22 [001186\\_part1.pdf](https://www.dhs.gov/sites/default/files/publications/0006_bw1_foia_cbp_000649-001186_part1.pdf), (noting that “Increased foot traffic between fence sections would reduce vegetation, disturb soils,  
 23 and lead to increased soil erosion...”); *id.* at 000805 (noting that “wildlife and wildlife habitat between the 21  
 24 proposed tactical infrastructure sections would be adversely impacted by the funneling of cross border violators into  
 25 the areas where there would be no fence and concentrated USBP operations.”); *id.* at 000808 (noting that “funneling  
 26 of cross-border violators into occurrences of [listed species] could have long-term major adverse impacts on these  
 27 species.”); *id.* at 000816 (“Archaeological resources between the 21 proposed tactical infrastructure sections could be  
 28 adversely impacted by the funneling of cross border violators into the areas where there would be no fence. Increased  
 foot traffic around the ends of sections of fence in remote areas would reduce vegetation, disturb soils, and could  
 uncover and destroy unknown resources.”); *see also* U.S. Border Patrol FOIA Response, *Environmental Assessment*  
*for the Proposed Installation, Operation, and Maintenance of Primary Pedestrian Fence Near Lukeville, Arizona*  
 (Jan. 2008) (Lukeville EA) at 001030, available at [https://www.dhs.gov/sites/default/files/publications/0001\\_bw6\\_foia\\_cbp\\_000899\\_001536\\_part1.pdf](https://www.dhs.gov/sites/default/files/publications/0001_bw6_foia_cbp_000899_001536_part1.pdf).

<sup>16</sup> *See id.*, *see also* Lukeville, EA001012-41, available at [https://www.dhs.gov/sites/default/files/publications/0001\\_bw6\\_foia\\_cbp\\_000899\\_001536\\_part2.pdf](https://www.dhs.gov/sites/default/files/publications/0001_bw6_foia_cbp_000899_001536_part2.pdf) (describing effect of migrant “circumvention” of pedestrian fencing);  
 Nunez-Neto, B. and Vina, S., Congressional Research Service, *Border Security: Barriers Along the U.S. International Border*, (Sept. 21, 2006), 2, CRS-26, available at: <https://trac.syr.edu/immigration/library/P1065.pdf>.  
 (noting shift in migration patterns and related crime outside newly constructed border barriers).

1 *Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1122 (S.D. Cal. 2010)  
 2 (public interest favored protection of cultural resources where plaintiffs raised “serious questions  
 3 going to the merits of the federal action”), quoting *All. for Wild Rockies v. Cottrell*, 622 F.3d  
 4 1045, 1049 (9th Cir. 2010); *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138  
 5 (9th Cir. 2011) (“the public interest in careful consideration of environmental impacts before  
 6 major federal projects go forward, and ... suspending such projects until that consideration occurs  
 7 ‘comports with the public interest.’”), quoting *South Fork Band Council v. U.S. Dep't of Interior*,  
 8 588 F.3d 718, 728 (9th Cir. 2009); *cf. Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124  
 9 (9th Cir. 2005) (affirming preliminary injunction because “once the desert is disturbed, it can  
 10 never be restored.”). Given the breadth and significance of potential damage to resources at issue  
 11 in this case, the Court should similarly find that the public interest favors injunctive relief here.

## 12 **II. THE PLANNED CONSTRUCTION WILL CAUSE IRREPARABLE HARM TO** 13 **THE NATION’S PUBLIC SAFETY AND RELATED RESOURCES**

14 In addition to the harms to cultural and natural resources identified in Section I, the  
 15 construction of border wall in Yuma Sector Project 3, coupled with the construction in Tucson  
 16 Project Sectors 1 and 2 would cause irreparable harm to the Nation’s public safety resources,  
 17 increasing costs and further strain on already overburdened law enforcement and border security  
 18 resources and significant damage to the Nation’s roads and infrastructure as a result of increased  
 19 migrant traffic (and associated law enforcement vehicle use) on the Reservation.

### 20 **A. Impacts of Increased Border Crossing Activity on the Nation**

21 The Nation has supported the federal government with a wide variety of border security  
 22 enforcement measures, working cooperatively with it relating to the construction of extensive  
 23 vehicle barriers, the operation of two CBP forward operating bases on the Reservation, the  
 24 development of border security technologies like integrated fixed towers, and the authorization of  
 25 CBP checkpoints on reservation highways.<sup>17</sup> Despite the Nation’s strong and continuing support

26 \_\_\_\_\_  
 27 <sup>17</sup> Tohono O’odham Legislative Council Resolution No. 18-032, available at <http://tolc-nsn.org/docs/actions18/18032.pdf>; Tohono O’odham Nation Issue Brief: The Tohono O’odham Nation Opposes a  
 28 “Border Wall” (Feb. 2017), available at: <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/Issue-Brief-Tohono-Oodham-Nation-Opposes-Border-Wall.pdf> (rept. in U.S. Border Patrol FOIA Response, *supra* n.15 at 000892). The Nation recently approved construction of integrated fixed towers specifically aimed at providing

1 for federal border security, federal funding to assist the Nation with border security-related law  
 2 enforcement on the Nation's Reservation is extremely limited. As a result, the Nation spends in  
 3 excess of \$3 million of its own money annually to help meet the United States' border security  
 4 responsibilities, and spends more than a third of the Tohono O'odham Police Department budget  
 5 on border security.<sup>18</sup>

6 For example, the Nation's Police Department investigates on average more than 75  
 7 immigrant deaths per year, and provides funding for autopsies at a cost of \$2,600 per autopsy,  
 8 along with supplies and detective investigative hours, with no financial assistance from CBP.<sup>19</sup>  
 9 The Nation also absorbs all costs to address damage to its natural resources, including the  
 10 removal of vehicles used and abandoned by smugglers and the control of wildland fires attributed  
 11 to cross-border illegal activity.<sup>20</sup> Much of the Nation's 734.8 miles of federal reservation roads  
 12 are riddled with sinkholes, potholes, broken and cracked pavement, and washed-out bridges,  
 13 damage that is caused or at least exacerbated by significant and extensive CBP vehicle use.<sup>21</sup>  
 14 Maintenance and repair of these roads is inadequate, in part due to the inability of CBP and the  
 15 Bureau of Indian Affairs, the agency charged with supervision of Indian reservations, to agree on  
 16 a permanent source of federal funding for repairs.<sup>22</sup>

17 **B. The Planned Construction Will Result in Increased Migrant Traffic and**  
 18 **Harms to the Nation**

19 Construction of the 74-mile long, 30-foot high concrete-filled steel wall contemplated by  
 20 Yuma Sector Project 3 and Tucson Project Sectors 1 and 2, which are designed to prevent  
 21 migrants from crossing the border on foot, will instead redirect migrant traffic onto the Nation's  
 22 lands, particularly since the wall is less than two miles from the Nation's western border. This  
 23

24 \_\_\_\_\_  
 25 increased border security while obviating the need for additional physical border barriers. *See* Tohono O'odham  
 26 Legislative Council Resolution No. 19-088, available at <http://tolc-nsn.org/docs/Actions19/19088.pdf>.

26 <sup>18</sup> Testimony of The Hon. Edward Manuel, Chairman, Tohono O'odham Nation, U.S. House Committee on  
 27 Appropriations, Subcommittee on Interior, Environment and Related Agencies (Mar. 6, 2019) at 2, available at  
 28 <https://docs.house.gov/meetings/AP/AP06/20190306/109006/HHRG-116-AP06-Wstate-ManuelE-20190306.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

1 effect, which CBP refers to as “circumvention” or “funneling” is well documented,<sup>23</sup> and causes  
 2 increased migrant traffic and associated adverse impacts to areas near border wall construction.  
 3 For example, in 2006, the Congressional Research Service concluded that the flow of illegal  
 4 immigration had adapted to the construction of border barriers and increased enforcement in the  
 5 San Diego sector (known as Operation Gatekeeper), causing an enormous shift in illegal  
 6 immigration to the more remote areas of the Arizona desert and an increase in migrant deaths and  
 7 crime in these remote areas:

8           ...there is considerable evidence that the flow of illegal  
 9 immigration has adapted to this enforcement posture and has  
 10 shifted to the more remote areas of the Arizona desert. Over the  
 11 twelve year period between 1992 and 2004, overall apprehensions  
 in the San Diego sector declined by 75% while apprehensions in  
 the Yuma sector increased by 591%.<sup>24</sup>

12 The Congressional Research Service similarly noted that:

13           One unintended consequence of [increased San Diego and El Paso  
 14 sector barriers and enforcement] and the shift in migration pattern  
 has been an increase in the number of migrant deaths each year; on  
 15 average 200 migrants died each year in the early 1990s, compared  
 with 472 migrants deaths in 2005. Another unintended  
 16 consequence of this enforcement posture may have been a relative  
 increase, compared to the national average, in crime along the  
 border in these more-remote regions.<sup>25</sup>

17           CBP explicitly acknowledged the potential negative impacts from “funneling of illegal  
 18 cross border activities” into areas between sections of proposed fencing in its 2007 EIS for wall  
 19 construction in the Rio Grande Valley Sector in Texas.<sup>26</sup> A year later, CBP again explicitly  
 20 acknowledged migrant “circumvention” of pedestrian barriers in the 2008 Environmental

21 \_\_\_\_\_  
 22 <sup>23</sup> See, e.g., Lukeville EA, *supra* n.15 at 000977, 001000-11, available at  
 23 <https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part1.pdf>, 001012-41,  
 available at <https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf>,  
 24 (describing effect of migrant “circumvention” of pedestrian fencing); Rio Grande EIS, *supra* n.15, at 00792, 00795,  
 00802, 00805, 00806, 00808, 00816, 00817, available at [https://www.dhs.gov/sites/default/files/publications/0006 -](https://www.dhs.gov/sites/default/files/publications/0006 - bw1 foia cbp 000649-001186 part1.pdf)  
[bw1 foia cbp 000649-001186 part1.pdf](https://www.dhs.gov/sites/default/files/publications/0006 - bw1 foia cbp 000649-001186 part1.pdf).

25 <sup>24</sup> Nunez-Neto, B. and Vina, S., Congressional Research Service, *Border Security: Barriers Along the U.S.*  
*International Border*, (Sept. 21, 2006), 2, available at: <https://trac.syr.edu/immigration/library/P1065.pdf>.

26 <sup>25</sup> *Id.* at CRS-26.

27 <sup>26</sup> Rio Grande EIS, *supra* n.15, at 00792, 00795, 00802, 00805, 00806, 00808, 00816, 00817, 00818, available at  
 28 <https://www.dhs.gov/sites/default/files/publications/0006 - bw1 foia cbp 000649-001186 part1.pdf>, (adverse,  
 long-term impacts to land use, vegetation, soils, wildlife, habitat, federally listed species and cultural resources from  
 funneling of migrants resulting in increased foot traffic between fence sections; impacts considered “minor” because  
 fence locations “were based on USBP operational requirements including the ability to make apprehensions.”).



1 Assessment that was prepared to analyze the impacts of construction of the primary pedestrian  
 2 fence that runs on either side of the Lukeville Port of Entry in the Organ Pipe Cactus National  
 3 Monument.<sup>27</sup> CBP’s Lukeville EA recognized that “indirect” negative impacts to land use, soils,  
 4 wildlife habitat, unique and sensitive areas, biological resources, protected species like the  
 5 Sonoran pronghorn, critical habitat, socioeconomic resources and aesthetics (trash and debris  
 6 from undocumented migrants) could occur in areas outside the project corridor as “IAs [illegal  
 7 aliens] attempt to avoid detection and circumvent the proposed infrastructure.”<sup>28</sup> CBP did not  
 8 directly address these adverse impacts to areas outside the project corridor, asserting that the  
 9 “impacts cannot be quantified at this time because IA patterns and migration routes are  
 10 completely out of USBP’s [CBP’s] control.”<sup>29</sup> It suggested, however, that these harms would be  
 11 mitigated because “the primary pedestrian fence would act as a force multiplier and allow USBP  
 12 to deploy agents to areas without pedestrian barriers, therefore, minimizing potential adverse  
 13 indirect impacts.”<sup>30</sup> The EA specifically acknowledged potential socioeconomic impacts to the  
 14 Nation that could occur from a shift in illegal pedestrian traffic as a result of constructing the  
 15 primary pedestrian fence near the Lukeville Point of Entry,<sup>31</sup> but CBP dismissed those impacts as  
 16 insignificant because it was “impossible” to determine what they might be, as the direction of  
 17 illegal pedestrian traffic “is solely at the discretion of the IAs” and “the primary pedestrian fence  
 18 would allow USBP to deploy agents to those areas lacking infrastructure to minimize impacts  
 19 from any potential shift in IA traffic.”<sup>32</sup>

20 CBP reached these conclusions despite its earlier experience with Operation Gatekeeper

21  
 22 <sup>27</sup> Lukeville EA, *supra* n.15 at 000977, 001000-11, available at  
 23 <https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part1.pdf>, 001012-41,  
 available at <https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf>.

24 <sup>28</sup> *Id.* at 001000-01, available at [https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 -](https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part1.pdf)  
 25 [001536 part1.pdf](https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf), 001026-28, 001030, 001032, 001034, 001041, 001043, available at

26 <https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf>.

27 <sup>29</sup> *Id.* at 001026-28, 001030, 001032, 001034, 001036, 001040, 001041, 001043, available at  
 28 <https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf>.

<sup>30</sup> The Finding of No Significant Impact (FONSI) for the Lukeville Primary Pedestrian Fence project issued by CBP reaches the same conclusion. Lukeville EA, *supra* n.15 at 000972.

<sup>31</sup> See Lukeville EA, *supra* n.15 at 001041, available at [https://www.dhs.gov/sites/default/files/publications/0001 -](https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf)  
[bw6 foia cbp 000899 - 001536 part2.pdf](https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf).

<sup>32</sup> *Id.* at 001041, 001042, available at [https://www.dhs.gov/sites/default/files/publications/0001 -](https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf)  
[bw6 foia cbp 000899 - 001536 part2.pdf](https://www.dhs.gov/sites/default/files/publications/0001 - bw6 foia cbp 000899 - 001536 part2.pdf).

1 and the documented increase in migration and related negative impacts to more remote areas  
 2 outside that project area. The fact that CBP now proposes to construct new border wall to replace  
 3 and extend the wall that was the subject of the 2008 Lukeville EA merely underscores the  
 4 hollowness of CBP’s claim that the Lukeville wall would minimize adverse impacts outside of  
 5 the fenced areas through the deployment of additional agents in those areas. Instead, the primary  
 6 fencing had the impacts that the EA predicted (but that CBP dismissed as uncertain): increased  
 7 migration outside the project area as migrants circumvented the barriers, with resulting negative  
 8 impacts on natural and socioeconomic resources and increased illegal activity and crime in those  
 9 outside areas, just as the Congressional Research Service previously documented.<sup>33</sup>

10 If CBP constructs the planned border wall, there is no question that the Tohono O’odham  
 11 Nation, whose Reservation is within two miles of its endpoint, will suffer those same kinds of  
 12 harms on its Reservation, and will incur exorbitant costs attempting to address them. In  
 13 particular, the potential socioeconomic impacts to the Nation from migrant circumvention  
 14 recognized in the Lukeville EA are far more likely to occur on the Nation’s Reservation and can  
 15 no longer be dismissed as “insignificant.” In many ways this is a self-fulfilling prophecy – the  
 16 Lukeville EA shows that the circumvention of existing barriers leads to the justification for  
 17 additional barriers, rather than having any “force multiplier” effect. There is a very strong  
 18 likelihood that history will repeat itself, this time on the Nation’s land, resulting in further  
 19 irreparable harm to the Nation.<sup>34</sup>

20 Increases in the number of migrants attempting to cross the border on the Nation’s  
 21 reservation, migrant deaths, illegal activity and crime, damage to the Nation’s natural and cultural  
 22 resources, trash and debris, wildland fires caused by migrants — all can be expected as migrants  
 23

24 <sup>33</sup> See, e.g., Dkt. No. 64-8, Rapuano Decl., Exhibit A, DHS Memorandum to Department of Defense (DOD) (Feb. 25,  
 25 2019) at 5-6 (noting high number of apprehensions and drug smuggling between border crossings in Tucson Sector,  
 26 and lack of pedestrian fencing in Tucson Sector resulting in increased drug trafficking and border violence, *i.e.*,  
 27 increases in the areas that were “outside” the project area in the 2008 EA); Dkt. No. 118-1, Rapuano Second Decl., ¶  
 28 6 (noting DOD approval of funding to block drug-smuggling corridors, including Tucson Projects 1 and 2) (May 13,  
 2019).

<sup>34</sup> The irony is that the deployment of additional barriers likely will not result in the desired increase in apprehensions  
 of undocumented migrants. As reported by CRS, national statistics demonstrated that CBP made 1.2 million  
 apprehensions in 1992 and again in 2004, strongly suggesting that the increased enforcement in San Diego sector had  
 little impact on overall apprehensions. Congressional Research Service, *Border Security*, *supra* n.16 at 2.

1 attempt to circumvent 74 miles of a border wall that ends on the Nation’s doorstep. The Nation’s  
 2 public safety and border security resources will be stretched beyond the breaking point in an  
 3 effort to address these harms. The Nation’s Police Department and emergency responders, as  
 4 well as the Nation’s public works department and other government agencies will be forced to  
 5 divert even more of their already limited resources to border security as the Nation attempts to  
 6 respond to these significant negative impacts to its reservation lands, its natural and cultural  
 7 resources, and its members. CBP use of the Nation’s reservation roads also is likely to increase,  
 8 further damaging those roads, without any realistic possibility that adequate funding will be  
 9 available for their repair.

10 The federal government’s long history of failing to provide adequate resources to address  
 11 border security issues on the Nation’s lands will only further exacerbate the harms that the Nation  
 12 will experience as a result of the funneling effects caused by the new border wall construction.  
 13 As explained above, the Nation already spends millions of tribal dollars every year to help fulfill  
 14 the federal government’s border security obligations, but receives very little federal funding to  
 15 assist with border security, law enforcement, and infrastructure, including the repair of roads  
 16 damaged by heavy CBP usage. The additional public safety and related resources that the Nation  
 17 will be forced to expend in response to the likely increase of migrants and attendant damages to  
 18 reservation resources and infrastructure will inflict serious and irreparable harm on the Nation.

19 **C. The Harms to the Nation are Inconsistent with the Public Interest**

20 As described above, the likely harms to the Nation’s public safety and related resources  
 21 (as well as natural and cultural resources on the reservation<sup>35</sup>) that the Nation will face if  
 22 Defendants proceed with border wall construction constitute irreparable harms that are sufficient  
 23 to support a preliminary injunction, particularly as they affect the public interest inquiry. The  
 24 weight of the evidence regarding funneling or circumvention, based on the fencing constructed  
 25 near Lukeville and in the San Diego Sector, makes it clear that the resulting harms to the Nation  
 26 are very likely, if not inevitable. *See All. for the Wild Rockies*, 632 F.3d at 1131 (irreparable harm  
 27

28 <sup>35</sup> *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (“Preserving environmental resources is certainly in the public’s interest.”).

1 is likely, not just possible, in the absence of an injunction). This Court and others also regularly  
 2 consider public safety and economic harms like those that the Nation will experience in the  
 3 context of the public interest factor in granting injunctive relief, *see, e.g., Ramos*, 336 F. Supp. 3d  
 4 at 186 (economic harms to state *amici* favored preliminary injunction); *California v. Azar*, 911  
 5 F.3d 558, 582 (9th Cir. 2018) (finding “potentially dire public health and fiscal consequences”  
 6 resulting from government’s actions favored injunction); *Spiegel v. City of Houston*, 636 F.2d  
 7 997, 1002 (5th Cir. 1981) (plaintiff may assert economic harms in challenging overbroad  
 8 injunction to address law enforcement practices not in the public interest); *Cty. of Santa Clara v.*  
 9 *Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017) (fear of losing federal funding under  
 10 Executive Order and interference with County’s ability to operate, provide key services, budget  
 11 and plan for the future justified injunction); *United States v. North Carolina*, 192 F.Supp.3d 620,  
 12 629 (M.D.N.C. 2016) (irreparable harm where the unavailability of funds was “likely to have an  
 13 immediate impact on [the state’s] ability to provide critical resources to the public, causing  
 14 damage that would persist regardless of whether funding [was] subsequently reinstated”).<sup>36</sup>

### 15 **III. THE FEDERAL GOVERNMENT’S TRUST RESPONSIBILITY TO THE** 16 **NATION AMPLIFIES THE NATION’S INTEREST IN THIS CASE.**

17 The nature and weight of the harms to the Nation are further amplified when considered  
 18 against the backdrop of the United States’ trust responsibility to Indian tribes and its obligation to  
 19 protect trust assets, which Defendants clearly have failed to honor. *See, e.g., Morton v. Ruiz*, 415  
 20 U.S. 199, 236 (1974) (“The overriding duty of our Federal Government to deal fairly with Indians  
 21 wherever located has been recognized by this Court on many occasions.”); *Nance v. EPA*, 645  
 22 F.2d 701, 711 (9th Cir. 1981) (“It is fairly clear that *any* Federal government action is subject to  
 23 the United States’ fiduciary responsibilities toward the Indian tribes”) (emphasis original). This  
 24 responsibility extends to a wide variety of resources and tribal property, including wildlife

25 \_\_\_\_\_  
 26 <sup>36</sup> *See also Azar*, 2019 WL 1877392, at \*13 (N.D. Cal. Apr. 26, 2019) (public health harms to municipal *amici*  
 27 favored preliminary injunction); *Earth Island Inst. v. Elliott*, 290 F. Supp. 3d 1102, 1125 (E.D. Cal. 2017)  
 28 (examining public safety implications of proposed injunction on Forest Service tree removal project); *Cty. of Santa Clara*, 250 F. Supp. 3d at 537 (harm to public services); *Morris v. N. Haw. Cmty. Hosp.*, 37 F. Supp. 2d 1181, 1188-89 (D. Haw. 1999) (discussing public interest in ensuring that eligible people receive home health care benefits). The extent of harm that construction in the Tucson Sector will cause to the Nation clearly weighs in favor of the public interest and the granting of the injunction.

1 resources, see *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987); off-  
2 reservation water resources, see *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp.  
3 252, 254-58 (D.D.C. 1972); and actions taken off-reservation that impact tribal rights on-  
4 reservation, see *Parravano v. Babbitt*, 70 F. 3d 539, 546-47 (9<sup>th</sup> Cir. 1995). In fact, the actions  
5 contemplated by Defendants in carrying out the planned border wall construction will injure and  
6 destroy, rather than protect, the Nation’s on- and off-Reservation resources – including lands,  
7 cultural and natural resources, roads, and other trust property.

8 **CONCLUSION**

9 The Court should grant Plaintiffs’ Motion for Partial Summary Judgment.

10 Dated: October 18, 2019

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11 By: /s/

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 22, 2019, I caused the foregoing document to be filed via the U.S. District Court for the Northern District of California’s CM/ECF system, which I understand caused service on all registered parties.

DATED: October 22, 2019

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