

No. 20-138

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF TOHONO O'ODHAM NATION
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF *AMICUS CURIAE*
THE TOHONO O’ODHAM NATION¹**

Amicus Tohono O’odham Nation (“Nation”) submits this brief in support of Respondents. The Nation agrees with Respondents that Petitioners’ transfer of Department of Defense funds is subject to judicial review and is unlawful, and that the district court’s injunction prohibiting the use of the reprogrammed funds to construct a border wall in six different project areas along the southern border known as El Paso Sector Project 1, Yuma Sector Project 1, El Centro Project 1, and Tucson Sector Projects 1-3 should be affirmed. The Nation writes separately to underscore the independent and substantial harm that the Tucson Sector Project construction, which is taking place on either side of the Nation’s Reservation within its traditional homelands, has caused and will continue to cause to the Nation.

The Tohono O’odham Nation is a federally recognized Indian tribe with more than 34,000 members. The O’odham have lived in what is now Arizona and northern Mexico since time immemorial. The Nation’s Reservation in southern Arizona is one of the largest in the country, comprising nearly 2.8 million acres. When the international line marking the boundary between the United States and Mexico was drawn in 1854, it sliced through the Nation’s ancestral territory, separating its people. As a result, the Nation’s

¹ Respondents provided written consent to the filing of this *amicus* brief. Petitioners have filed a letter with the Clerk indicating blanket consent to the filing of *amicus* briefs. No counsel for any party authored this *amicus* brief in whole or in part, and no person or entity other than *Amicus* the Tohono O’odham Nation made a monetary contribution to its preparation or submission.

Reservation shares a 62-mile border with the Republic of Mexico, and approximately two thousand of the Nation's members live on the Mexican side of the border. The Nation's ancestral territory and traditional homelands include the Organ Pipe Cactus National Monument (adjacent to the western boundary of the Nation's Reservation), and Cabeza Prieta National Wildlife Refuge, and stretch east to include the San Bernardino National Wildlife Refuge. The Nation has deep, well-documented connections to these lands and the plants, animals and cultural resources within them.

The Nation's location on the Mexican border exposes its Reservation and members to major impacts from border crossing traffic, including border-related burglaries and thefts, litter, land desecration, destruction of natural resources and protected species, migrant rescues, migrant deaths, drug trafficking, and human smuggling. While the Nation works closely with U.S. Customs and Border Patrol ("CBP") and U.S. Immigration and Customs Enforcement on a variety of state-of-the-art border security measures, it strongly opposes Petitioners' border wall construction in the Tucson Sector, as it serves to divide the Nation's historic lands and communities, hamper the Nation's traditional crossings for domestic, ceremonial, and religious purposes, prevent the migration of wildlife, exacerbate flooding, harm wildlife and natural resources sacred to the O'odham, and militarize the Nation's border. What is more, the Nation receives extremely limited federal funding to address border impacts, forcing it to spend millions of dollars annually from its own treasury on border security and enforcement and associated costs.

SUMMARY OF ARGUMENT

Tucson Sector Projects 1 and 2 contemplate the construction of over forty miles of border wall, starting in Cabeza Prieta National Wildlife Refuge, continuing across Organ Pipe Cactus National Monument, and ending less than two miles from the western boundary of the Nation's Reservation. The Petitioners argue that, even though Congress denied the Executive Branch the billions of dollars it sought to build this wall, Petitioners may nevertheless funnel funds intended for the Defense Department to the Department of Homeland Security (DHS) to build it, and that no court can review Petitioners' actions in light of the supposedly limited "zone of interests" of the statutes they invoke in their defense. If this Court accepts Petitioners' argument, DHS construction of this new border wall, as well as the wall construction ongoing in the San Bernardino Valley area of Tucson Sector Project 3, will continue to injure or destroy natural and cultural resources of significant importance to the Nation, both in these sensitive areas and eventually even on the Nation's Reservation. The construction of the border walls in Tucson Sector Project 1 and 2 areas will also substantially divert migrant traffic onto the Nation's Reservation lands, and exacerbate the impacts that the Nation experiences from this traffic and the cost to the Nation to address it.

The damage and destruction of the Nation's natural, cultural, and other resources that the Tucson Sector Project border wall construction has caused and will continue to cause, coupled with the harms demonstrated by Respondents, underscore the need for judicial review to hold Petitioners accountable, and for injunctive relief to protect Respondents, the Nation,

and the general public from the impacts of Petitioners' unlawful acts.

ARGUMENT

I. THE TUCSON SECTOR PROJECTS HAVE AND WILL CONTINUE TO INJURE OR DESTROY NATURAL AND CULTURAL RESOURCES OF GREAT IMPORTANCE TO THE NATION

Tucson Sector Projects 1 and 2 involve construction of a 43-mile, 30-foot high wall, together with road improvements and lighting.² Project plans call for replacement of about 38 miles of existing vehicle barriers and another five miles of existing pedestrian fencing near the Lukeville Port of Entry.³ CBP originally installed this existing pedestrian fencing in 2008.⁴ Without action by this Court, construction of this 43-mile section of the wall has begun in Cabeza Prieta National Wildlife Refuge, has continued across Organ Pipe National Monument, and will end less than two miles from the western boundary of the Nation's Reservation. Petitioners presently are conducting similar construction for Tucson Sector Project

² See *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2715422, at *2 (N.D. Cal. June 28, 2019) (Pet. App.178a); Excerpt of Kenneth P. Rapuano action memo to the Acting Secretary of Defense (May 6, 2019) (J.A. 68); Memorandum from Patrick M. Shanahan to Under Secretary of Defense (May 9, 2019) (J.A. 75).

³ See Memorandum from Christina Bobb to Capt. Hallock N. Mohler, Jr. (Feb. 25, 2019) (J.A. 89).

⁴ 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"), available at https://www.dhs.gov/sites/default/files/publications/0001_-_bw6_foia_cbp_000899_-_001536_part2.pdf.

3 to the east of the Nation's Reservation, to include the San Bernardino National Wildlife Refuge.⁵ Petitioners' construction of a border wall through Tucson Sector Projects 1, 2, and 3 has and will continue to wreak havoc on cultural and natural resources of vital importance to the Nation, both in terms of damage to the resources from construction and associated impacts at the Project sites off-reservation, and damage caused by increased migrant traffic and interdiction on-reservation.

A. The Nation's Significant Interest in Natural and Cultural Resources on its Reservation and in Areas Affected by the Tucson Sector Projects.

Like many Native American tribes, the preservation and protection of the natural and cultural environment of its homelands is profoundly important to the Tohono O'odham Nation. The Nation has enshrined these values in its Constitution, which states, at Article XVIII, Sec. 1:

It shall be the policy of the Tohono O'odham Nation to encourage productive and enjoyable harmony between members of the nation and their environment; to promote efforts which will preserve and protect the natural and cultural environment of the Tohono O'odham Nation, including its lands, air, water, flora and fauna, its ecological systems, and natural

⁵ Testimony of the Hon. Ned Norris Jr., Chairman, Tohono O'odham Nation, U.S. House Committee on Natural Resources Subcommittee on Indigenous Peoples of the United States (Feb. 26, 2020) at 4, *available at* <https://naturalresources.house.gov/imo/media/doc/SCIP%202022.26%20-%20Chairman%20Norris.pdf> (hereinafter "Testimony of the Hon. Chairman Norris").

resources, and its historic and cultural artifacts and archeological sites; and to create and maintain conditions under which members of the nation and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of members of the Tohono O’odham Nation.⁶

The Nation further has recognized that “access to and preservation of the Nation’s traditional lands and sacred sites” including in Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge, “are essential to the O’odham himdag.”⁷ “Himdag” is a word that escapes easy translation, but has been described as “a way of life; a culture; a custom or practice; traditions.”⁸

The federal government has recognized the Nation’s cultural interest in these areas. In creating the Organ Pipe Cactus National Monument, President Franklin Roosevelt explicitly provided that the “administration of the monument shall be subject to . . . [the] [r]ight of

⁶ CONSTITUTION OF THE TOHONO O’ODHAM NATION, art. XVIII, § 1 (1986), *available at* <http://tolc-nsn.org/docs/Constitution.pdf>.

⁷ Tohono O’odham Legislative Council Resolution No. 07-714 at 1, *available at* <http://www.tolc-nsn.org/docs/Actions07/07714.pdf>.

⁸ Saxton, D., Saxton, L., & Enos, S., TOHONO O’ODHAM/PIMA TO ENGLISH: ENGLISH TO TOHONO O’ODHAM/PIMA DICTIONARY. Tucson, AZ: The University of Arizona Press (2d ed. 1998) at 22; *see also* Woods, Teri Knutson; Blaine, Karen; and Francisco, Lauri, *O’odham Himdag as a Source of Strength and Wellness Among the Tohono O’odham of Southern Arizona and Northern Sonora, Mexico*, 29 J. OF SOCIOLOGY & SOCIAL WELFARE 1, 41-49 (2002), *available at* <https://scholarworks.wmich.edu/jssw/vol29/iss1/4>. “Himdag” is alternately transliterated “himthag.” *See id.* at 41.

the Indians of the Papago Reservation⁹ to pick the fruits of the organ pipe cactus and other cacti, under such regulations as may be prescribed by the Secretary of the Interior” Proclamation 2232, 50 Stat. 1827 (Apr. 13, 1937). The National Park Service General Management Plan for the Monument repeatedly recognizes land within the Monument as “sacred” to the O’odham, underscores the cultural importance of multiple sites within the Monument, and acknowledges the Nation’s continued cultural use of Monument Lands.¹⁰

Quitobaquito Spring, located 200 yards from the border, is of particular importance:

There are 11 springs in the monument, eight of which are located at Quitobaquito, by far the largest source of water. The pond and dam at Quitobaquito were constructed in 1860, and the resulting body of water is one of the largest oases in the Sonoran Desert. The site is also sacred to the O’odham, who have used the water from this spring for all of their residence in the area.

. . . .

There still exist sites within the monument which are sacred to the O’odham, including Quitobaquito Springs . . . *Even to the present day, the O’odham continue to visit the monument to collect sacred water from the*

⁹ The Nation was formerly known as the Papago Tribe.

¹⁰ U.S. National Park Service, *Organ Pipe Cactus National Monument, Final General Management Plan, Development Concept Plans, Environmental Impact Statement* (Feb. 1997), at s-iv, 15, 17, 25, 30, 33, 51, 78-80, available at <https://www.nps.gov/orpi/learn/management/upload/fingmp.pdf> (emphasis added).

*Springs, to gather medicinal plants, and to harvest the fruit of the organ pipe and saguaro cactus.*¹¹

The General Management Plan also acknowledges that “the general geography of the monument itself includes . . . numerous archeological features, including significant Hohokam and O’odham settlements.”¹² And the National Park Service explicitly has acknowledged its understanding of the “O’odham world view . . . that the O’odham believe they have been in the area since time immemorial, and that all parts of the ecosystem – water, land, and culture – are integrated, cannot be separated and are sacred.”¹³

Given the Nation’s historical presence throughout Southern Arizona, it is not surprising that the Tucson Sector Project areas also contain sensitive archeological resources of significant importance to the Nation. An archeological survey of the Organ Pipe Cactus National Monument in the 1990s revealed numerous archeological sites, including several within the construction zone contemplated for Tucson Sector Project 1 and 2.¹⁴ The U.S. Forest Service prepared an

¹¹ *Id.* at 30, 33 (emphasis added); see also Bell, F., Anderson, K., and Stewart, Y., *The Quitobaquito Cemetery and Its History*, U.S. National Park Service, (Dec. 1980), at 3, available at <http://npshistory.com/series/anthropology/wacc/quitobaquito/report.pdf> (noting that Quitobaquito Spring is located 200 yards from the border).

¹² U.S. National Park Service, *supra* n.10, at 25. “The Hohokam are regarded as the ancestors of the Tohono O’odham Nation” Notice of Intent to Repatriate Cultural Items: Sternberg Museum of Natural History, Hays, KS, 83 Fed. Reg. 52537, 52538 (Oct. 17, 2018).

¹³ U.S. National Park Service, *supra* n.10, at 66.

¹⁴ See Rankin, Adrienne G., *Archeological Survey of Organ Pipe Cactus National Monument, Southwestern Arizona: 1989-1991*,

archeological report in 2006 that similarly shows notable archeological sites in the immediate vicinity of Tucson Sector Project 3 in the San Bernardino Valley.¹⁵ The U.S. Fish and Wildlife Service’s 2006 Comprehensive Plan for Cabeza Prieta National Wildlife Refuge confirms that “[e]thnographically, the refuge was the homeland of the Hia C-ed O’odham,”¹⁶ most of whom are members of the Nation, and that “the Tohono O’odham Nation and Hia-Ced O’odham band . . . have cultural links to the refuge lands.”¹⁷

Existing survey work in these areas underscores significant cross-border activity on the part of the Nation’s ancestors. Both Cabeza Prieta and Organ Pipe Cactus National Monument show substantial evidence of the early desert southwest shell trade, whereby “the Hohokam and other southwestern cul-

Publications in Anthropology 61, Tucson, Arizona: Western Archeological and Conservation Center (1995) at 24, 119 (describing the survey of seventy acres in the Dos Lomas area on the border, noting that “[a]rtifact density is quite high with over 650 flakes recorded in a 5-m-diameter collection unit”), available at <https://core.tdar.org/document/4301/archeological-survey-at-organ-pipe-national-monument-southwestern-arizona-1989-1991>. *Id.* at 557-60 (site description for numerous artifacts immediately north of the border).

¹⁵ Fish, Paul R., Fish, Suzanne K., Madsen, John H., *Prehistory and early history of the Malpai Borderlands: Archaeological synthesis and recommendations*, U.S. Department of Agriculture, Forest Service (2006) at 29-30, available at https://www.fs.fed.us/rm/pubs/rmrs_gtr176.pdf.

¹⁶ U.S. Fish and Wildlife Service, *Cabeza Prieta National Wildlife Refuge: Comprehensive Conservation Plan, Wilderness Stewardship Plan and Environmental Impact Statement* (Aug. 2006) at 172, 586, available at <https://www.fws.gov/uploaded/Files/CPNWREIS.pdf>.

¹⁷ *Id.* at 172.

tural groups obtained marine shell primarily from the Pacific Ocean,” and principally in the Gulf of California.¹⁸ Unfortunately, these areas remain under-surveyed, and it is highly likely that significantly more cultural resources are at risk. For example, according to the U.S. Fish and Wildlife Service, the Malpai Borderlands area of the San Bernardino Valley “is rich in archeological resources. Archeological investigation, however, while not insignificant, has been spotty, often poorly documented, and involved many small-scale studies by professionals and amateurs, but relatively few large-scale, systematic efforts.”¹⁹ And at Cabeza Prieta, while “45 prehistoric and historic sites have been recorded by statewide survey . . . [l]ess than one percent of the refuge has been inventoried for archeological and historic sites.”²⁰

B. The Construction of a Border Wall in the Tucson Sector Project Areas Has and Will Continue to Injure or Destroy Valuable Cultural and Natural Resources.

If this Court does not affirm the judgment below, ongoing border wall and associated road construction in the Tucson Sector Project areas will continue to

¹⁸ Rankin, *supra* n.14, 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.”).

¹⁹ U.S. Fish and Wildlife Service, *Environmental Assessment of the Malpai Borderlands Habitat Conservation Plan* (July 26, 2008) at 17, available at <https://www.fws.gov/southwest/es/arizona/Documents/HCPs/Malpai/MBHCP%20EA%20w%20FONSI.pdf>.

²⁰ U.S. Fish and Wildlife Service, *supra* n.16, at 170.

destroy numerous trees, cacti, and other plants of significant and recognized interest to the Nation, disturb or destroy archaeological sites of O’odham ancestors, and hamper or eliminate wildlife migration and access to vitally important sources of water. See, e.g., Eilpern, Juliet and Miroff, Nick, *Border fence construction could destroy archaeological sites, National Park Service finds*, The Washington Post (Sept. 17, 2019), https://www.washingtonpost.com/immigration/border-fence-construction-could-destroy-archaeological-sites-national-park-service-finds/2019/09/17/35338b18-d64b-11e9-9343-40db57cf6abd_story.html (noting that the National Park Service determined that additional sites would be destroyed by the border wall construction); Rankin, *supra* n.14 at 557-60 (noting presence of archeological artifacts in close proximity to border in Organ Pipe Cactus National Monument); Fish, *supra* n.15 at 29-30 (noting presence of archeological artifacts in proximity to border in San Bernardino Valley, Arizona); Hudson Decl. at ¶ 8 (J.A. 110) (noting that “Quitobaquito Springs is extremely important to wildlife in the area. The replacement of penetrable vehicle barriers with pedestrian fencing [*i.e.*, a wall] will have a tremendous impact on the species that rely on this water source.”). Construction impacts to Quitobaquito have impeded – and threaten to eliminate – traditional O’odham use of this sacred spring by limiting access (through CBP restrictions), by destroying sacred sites near the spring, and by permanently altering this sensitive ecosystem.

On February 26, 2020, Tohono O’odham Nation Chairman Ned Norris Jr. testified before the House Natural Resources Committee Subcommittee for Indigenous Peoples of the United States regarding the destruction of the Nation’s sacred sites as a result of

ongoing border wall construction.²¹ As explained by Chairman Norris in his testimony, in February 2020 “federal contractors working on the Tucson Sector border wall bulldozed and bladed a large area near Quitobaquito Springs, destroying a burial site that the Nation had sought to protect and irreparably damaging the most unique and significant oasis in the Sonoran Desert.”²² The bulldozing and blading was conducted with “no advance consultation about the destruction of this site, no advance notice given, and no effort to mitigate or avoid the irreparable damage done to this sacred site.”²³ In addition, because much of the land impacted by the Tucson Sector Project construction is under-surveyed from a cultural and archeological perspective, it is likely that construction will continue to disturb or destroy additional cultural resources that have yet to be ascertained.

As noted above, these harms have been and continue to be particularly acute near the border in Cabeza Prieta and Organ Pipe, where ancestral O’odham trade routes involved significant cross-border traffic from the Gulf of California. As Chairman Norris testified, in early February 2020 federal contractors conducted blasting during wall construction that significantly disturbed a culturally significant site within Organ Pipe known as Monument Hill.²⁴ Historically, the Hia-C’ed O’odham used Monument Hill for religious

²¹ Testimony of the Hon. Chairman Norris, *supra* n.5.

²² *Id.* at 4-5.

²³ *Id.* at 5.

²⁴ *Id.* See also Firozi, Paulina, *Sacred Native American Burial Sites are being Blown Up for Trump’s Border Wall, Lawmaker Says*, The Washington Post (Feb. 9, 2020), available at <https://www.washingtonpost.com/immigration/2020/02/09/border-wall-native-american-burial-sites/>.

ceremonies.²⁵ Additionally, Monument Hill “is the site of historical battles involving the O’odham and Apache and is believed to be the final resting place for many tribal ancestors, as recovered bone fragments there attest.”²⁶ The desecration of sacred sites at Quitobaquito Springs and Monument Hill at the hands of the federal government is irreversible and has been “deeply painful” for the Nation.²⁷

Completed border walls are also likely to increase flooding near the Project areas, permanently altering nearby vegetation and hydrological and cultural resources on a massive scale. The National Park Service detailed similar impacts in 2008 following a summer monsoon storm (an event exceedingly common in Southern Arizona) that delivered 1-2 inches of rain in the area of the newly-constructed 5.2 miles of Lukeville border wall.²⁸ Contrary to the earlier published Finding of No Significant Impact that accompanied the Lukeville Environmental Assessment (“EA”), the National Park Service found that, in actuality, flooding led to significant blockage and sedimentation along the fence line, along with elevated ponding in blocked areas and corresponding water deprivation on the other side of the fence.²⁹ The Park Service concluded that “[d]uring the next few decades, vegetation

²⁵ Testimony of the Hon. Chairman Norris at 5, *supra* n.5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ U.S. National Park Service, *Effects of the International Boundary Pedestrian Fence in the Vicinity of Lukeville, 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_July_2008_final.pdf.

²⁹ *Id.* at 12-15.

change will occur in those areas along the northern edge of the patrol road that receive and retain runoff,” and that “natural resources [of the Monument] and [Park Service] infrastructure will be impacted, as well as resources and infrastructure on neighboring lands in the U.S. and Mexico.”³⁰ The Park Service anticipated that other short- and long-term impacts would include the following:

- Riparian vegetation will change in response to increase sedimentation.
- Channel morphology and floodplain function will change over time.
- Channelized waters will begin a gullying process that has the potential to transform land surfaces in the affected watersheds.³¹

Given that ongoing construction in Tucson Sector Projects 1 and 2 will result in a wall that is nearly eight times as long, these effects will surely be magnified, with corresponding harm to resources beyond the construction footprint. The impact on Quitobaquito Springs is particularly worrisome given that it is located in immediate proximity to the Project area. As the Park Service has acknowledged, the pond fed by the Springs – one of the largest sources of water in the Sonoran Desert – sits only 200 yards north of the International Boundary.³² A September 2020 study found that forty-seven species of birds that depended on the Springs are no longer returning to the area as a result of the depletion of the Springs and

³⁰ *Id.* at 15-16.

³¹ *Id.* at 16.

³² *See* Bell F., et al., *supra* n.11, at 3.

degradation to the surrounding habit caused by border wall construction.³³

What is more, as discussed below in Section II, the wall construction associated with Tucson Sector Projects 1 and 2 will also harm natural resources, wildlife, and archeological and cultural resources on the Nation's Reservation because it will result in increased migrant traffic in these areas. Indeed, in its Environmental Impact Statement for an earlier border wall in the Rio Grande Valley Sector, CBP acknowledged that this increased traffic in areas without border wall would "reduce vegetation, disturb soils, and lead to increased soil erosion," adversely impact wildlife and wildlife habitat, "uncover and destroy unknown" archeological resources, and cause "long-term major adverse impacts" to sensitive species.³⁴ Infliction of similar harms to resources on

³³ Nabhan, Dr. Gary and Johnson, Dr. R. Roy, *Dramatic Decline in Wetland Wildlife Has Occurred at Quitobaquito Oasis Since Border Wall*, (Sept. 2, 2020), available at <https://www.garynabhan.com/news/2020/09/dramatic-decline-in-wetland-wildlife-has-occurred-at-quitobaquito-oasis-since-border-wall/>.

³⁴ See U.S. Border Patrol, *Environmental Impact Statement for Construction, Maintenance, and Operation of Tactical Infrastructure, Rio Grande Valley Sector, Texas* (Nov. 2007) ("Rio Grande EIS"), at BW1 FOIA CBP 000795, available at 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, and lead to increased soil erosion"); *id.* at 000805 (noting that "wildlife and wildlife habitat between the 21 proposed tactical infrastructure sections would be adversely impacted by the funneling of cross border violators into the areas where there would be no fence and concentrated USBP operations."); *id.* at 000808 (noting that "funneling of cross-border violators into occurrences of [listed species] could have long-term major adverse impacts on these species."); *id.* at 000816 ("Archaeological resources between the

the Nation's Reservation are extremely likely given that the Nation's western boundary is less than two miles from the eastern terminus of the Tucson Sector Project 1 and 2 wall.

C. Protection of These Resources is Vital Both for the Nation and the Public Interest.

Courts repeatedly have found that the protection and preservation of the cultural resources of Native American tribes is of great importance both for tribes and the general public. *See, e.g., Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1039 (9th Cir. 2007) (affirming decision recognizing the “significance [of site that] derives from its role as a sacred site for the Washoe people, Native Americans” in context of APA and NEPA challenges); *South Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 721, 728 (9th Cir. 2009) (reversing a District Court order denying injunctive relief regarding NEPA claims because the “likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high” in a case concerning a “mountain [that] has religious significance for Indian tribes”); *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817-18 (10th Cir. 1999) (recognizing federal policy to value and protect tribal governments and cultures); *Rupert v. U.S. Fish and Wildlife Serv.*, 957 F.2d 32, 34-35 (1st Cir. 1992)

21 proposed tactical infrastructure sections could be 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* Lukeville EA, *supra* n.4 at 001030.

(recognizing federal interest in protecting tribal religious resources); *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (“The court is also mindful of the advancement of the public interest in preserving these resources. They represent a means by which to better understand the history and culture of the American Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians.”); *United States v. Jenkins*, 714 F. Supp. 2d 1213, 1222 (S.D. Ga. 2008) (finding that “[h]arming Native American artifacts would constitute an irreparable injury because artifacts are, by their nature, unique, and their historical and cultural significance make them difficult to value monetarily.”).³⁵

These preservation concerns have heightened significance here because Petitioners purport to have waived, under Section 102 of the Illegal Immigration

³⁵ Courts have likewise recognized interests in preserving environmental resources. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008) (recognizing the “seriousness” of “ecological, scientific, and recreational interests”); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (noting that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often . . . irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (“the public interest in careful consideration of environmental impacts before major federal projects go forward, and . . . suspending such projects until that consideration occurs ‘comports with the public interest.’”), quoting *South Fork Band Council v. U.S. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005) (affirming preliminary injunction because “once the desert is disturbed, it can never be restored.”).

Reform and Immigrant Responsibility Act, laws aimed at protecting these resources in order to fast-track border wall construction.³⁶ Given the breadth and significance of existing and potential future damage to resources at issue in this case, and the elimination of statutory safeguards against such damage, the Court should view with particular skepticism Petitioners' argument that their reprogramming actions are effectively immune from review.

II. THE TUCSON SECTOR PROJECTS WILL HARM THE NATION'S PUBLIC SAFETY AND RELATED RESOURCES

In addition to the harms to cultural and natural resources identified in Section I, the construction of border wall in Tucson Sector Projects 1 and 2, once completed, will cause serious injury to the Nation's public safety resources, increasing costs and further straining already overburdened law enforcement and border security resources, and further will cause significant damage to the Nation's roads and physical infrastructure as a result of increased migrant traffic and associated law enforcement vehicle use on the Reservation.

A. Impacts of Increased Border Crossing Activity on the Nation.

The Nation has supported the federal government with a wide variety of border security enforcement

³⁶ See 84 Fed. Reg. 21800-01 (May 15, 2019) (waiving, *inter alia*, the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*), the National Historic Preservation Act (52 U.S.C. § 100101 note and 54 U.S.C. § 300101 *et seq.*), and the Archaeological and Historic Preservation Act (54 U.S.C. § 312502 *et seq.*)

measures, working cooperatively with it in connection with the construction of extensive vehicle barriers, the operation of two CBP forward operating bases on the Reservation, the development of border security technologies such as integrated fixed towers, and the authorization of CBP checkpoints on Reservation highways.³⁷ Despite the Nation's strong and continuing support for federal border security, federal funding to assist the Nation with border security-related law enforcement on the Nation's Reservation is extremely limited. As a result, the Nation spends in excess of \$3 million of its own money annually to help meet the United States' border security responsibilities, and spends more than a third of the Tohono O'odham Police Department budget on border security.³⁸

For example, the Nation's Police Department investigates on average more than 75 immigrant deaths per year, and provides funding for autopsies at a cost of \$2,600 per autopsy, as well as funding for supplies and detective investigative hours, with no financial assistance from CBP.³⁹ The Nation also absorbs all costs to address damage to its natural

³⁷ 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 "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> (reprt. in U.S. Border Patrol FOIA Response, *supra* n.4 at CBP 000892). The Nation recently approved construction of integrated fixed towers specifically aimed at providing increased border security while obviating the need for additional physical border barriers. *See* Tohono O'odham Legislative Council Resolution No. 19-088, *available at* <http://tolc-nsn.org/docs/Actions19/19088.pdf>.

³⁸ Testimony of the Hon. Chairman Norris at 2.

³⁹ *Id.*

resources, including the removal of vehicles used and abandoned by smugglers and the control of wildland fires attributed to cross-border illegal activity.⁴⁰ Much of the Nation's 734.8 miles of federal reservation roads are riddled with sinkholes, potholes, broken and cracked pavement, and washed-out bridges, damage that is caused or at least exacerbated by significant and extensive CBP vehicle use.⁴¹ Maintenance and repair of these roads is inadequate, in part due to the inability of CBP and the Bureau of Indian Affairs, the agency charged with supervision of Indian reservations, to agree on a permanent source of federal funding for repairs.⁴²

B. The Construction of a Border Wall in Tucson Sector Project Areas 1 and 2 Will Result in Increased Migrant Traffic and Harms to the Nation.

Completion of the 43-mile long, 30-foot high concrete-filled steel wall in Tucson Sector Projects 1 and 2, which is designed to prevent migrants from crossing the border on foot, surely will redirect migrants onto the Nation's lands since the border wall is less than two miles from the Nation's western border. This migrant "funneling" effect is well documented⁴³ and has been shown to cause increased migrant traffic

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See, e.g.,* Lukeville EA, *supra* n.4 at 000977, 001000-11, 001012-41, (describing effect of migrant "circumvention" of pedestrian fencing); Rio Grande EIS, *supra* n.34, at 00792, 00795, 00802, 00805, 00806, 00808, 00816, 00817.

and associated adverse impacts to areas near where border wall are in place.

For example, in 2006, the Congressional Research Service found that in the San Diego sector, construction of the border wall caused a significant shift in the flow of migrants as they had to navigate around the newly constructed border wall. Migrants essentially were forced into more remote areas of the Arizona desert, causing an increase in migrant deaths and an increase in crime in these more isolated areas:

. . . there is considerable evidence that the flow of illegal immigration has adapted to this enforcement posture and has shifted to the more remote areas of the Arizona desert. Over the 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%.⁴⁴

The Congressional Research Service further reported:

One unintended consequence of [the construction of additional border wall in the San Diego and El Paso sectors] and the shift in migration pattern has been an increase in the number of migrant deaths each year; on average 200 migrants died each year in the early 1990s, compared with 472 migrants [sic] deaths in 2005. Another unintended consequence of this enforcement posture may have been a relative increase, compared to

⁴⁴ 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>.

the national average, in crime along the border in these more-remote regions.⁴⁵

In 2007 in its Environmental Impact Statement for wall construction in the Rio Grande Valley Sector in Texas, *CBP itself* explicitly acknowledged the potential negative impacts that could be inflicted by the “funneling of illegal cross border activities” into areas located between sections of proposed border wall.⁴⁶ Then in 2008, CBP again explicitly acknowledged the problems caused by migrant “circumvention” of the border wall in its Environmental Assessment analyzing the impacts of the border wall that runs on either side of the Lukeville Port of Entry, an earlier border wall construction project in the Organ Pipe Cactus National Monument.⁴⁷ There, CBP stated that as “IAS [illegal aliens] attempt to avoid detection and circumvent the proposed infrastructure”,⁴⁸ areas outside the project corridor could suffer negative impacts on land use, soils, wildlife habitat, unique and sensitive areas, biological resources, protected species like the Sonoran pronghorn, critical habitat, socioeconomic resources and aesthetics (trash and debris from undocumented migrants).

⁴⁵ *Id.* at CRS-26.

⁴⁶ Rio Grande EIS, *supra* n.34, at 00792, 00795, 00802, 00805, 00806, 00808, 00816, 00817, 00818 (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.”).

⁴⁷ Lukeville EA, *supra* n.4 at 000977, 001000-11, 001012-41.

⁴⁸ *Id.* at 001000-01, 001026-28, 001030, 001032, 001034, 001041, 001043.

But even as CBP acknowledged these funneling impacts in this portion of Organ Pipe Cactus National Monument, it failed to provide a full assessment of the likely harm, asserting that the funneling “impacts cannot be quantified at this time because IA patterns and migration routes are completely out of USBP’s control.”⁴⁹ CBP further sidestepped the issue by suggesting that these harms would be mitigated because the “pedestrian fence [border wall] would act as a force multiplier and allow USBP [CBP] to deploy agents to areas without pedestrian barriers [border wall], therefore, minimizing potential adverse indirect impacts.”⁵⁰

The Lukeville EA also specifically acknowledged that the funneling effect of border wall construction could impact the Nation. It explicitly discussed the potential socioeconomic impacts to the Nation that could occur from a shift in illegal pedestrian traffic as a result of constructing that portion of the border wall,⁵¹ but again tried to dismiss those impacts as insignificant based on CBP’s assertion that it was “impossible” to determine the flow of illegal pedestrian traffic and “the primary pedestrian fence [border wall] would allow USBP to deploy agents to those areas lacking infrastructure to minimize impacts from any potential shift in IA traffic.”⁵²

⁴⁹ *Id.* at 001026-28, 001030, 001032, 001034, 001036, 001040, 001041, 001043.

⁵⁰ 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.4 at 000972.

⁵¹ *See id.* at 001041.

⁵² *Id.* at 001041, 001042.

CBP made these assertions despite its earlier experience in the San Diego Sector and the documented increase in migration and related negative impacts to more remote areas outside that project area. The fact that CBP now proposes to extend for over 40 miles the border wall that was the subject of its own 2008 Lukeville EA merely underscores the hollowness of CBP's claim that the Lukeville wall project would minimize adverse impacts outside the project area through the deployment of additional agents in those areas. Instead, the border wall at the Lukeville Port of Entry had the impacts that the EA predicted (but that CBP dismissed as uncertain): increased migration outside the project area as migrants circumvented the wall, with resulting negative impacts on natural and socioeconomic resources and increased illegal activity and crime in those outside areas, just as the Congressional Research Service previously documented.⁵³

If CBP continues border wall construction in Tucson Sector Projects 1 and 2, there is no question that the Tohono O'odham Nation, whose Reservation is within two miles of the endpoint of the 43-mile border wall in Organ Pipe National Monument, will suffer those same kinds of harms on its Reservation, and will incur exorbitant costs in its struggle to address them. The potential socioeconomic impacts to the Nation from

⁵³ See, e.g., Memorandum from Christina Bobb to Capt. Hallock N. Mohler, Jr. (Feb. 25, 2019) at 5-6 (J.A. 84-85)(noting high number of apprehensions and drug smuggling between border crossings in Tucson Sector, and lack of pedestrian fencing in Tucson Sector resulting in increased drug trafficking and border violence, *i.e.*, increases in the areas that were "outside" the project area in the 2008 EA); Memorandum from Patrick M. Shanahan to Under Secretary of Defense (May 9, 2019) (J.A. 75) (noting DOD approval of funding to block drug-smuggling corridors, including Tucson Sector Projects 1 and 2).

forcing migrants around the border wall and on to its Reservation, as recognized in the Lukeville EA, are far more likely to occur from the construction of Tucson Sector Projects 1 and 2, and can no longer be dismissed as “insignificant.” In many ways Petitioners’ insistence on building a physical wall in these sections creates a self-fulfilling prophecy – the Lukeville EA demonstrates that the circumvention of existing portions of the border wall leads to the justification for additional wall construction, rather than having any “force multiplier” effect. There is a very strong likelihood that history will repeat itself, this time on the Nation’s Reservation, resulting in further injury to the Nation.⁵⁴

Increases in the number of migrants attempting to cross the border on the Nation’s Reservation, migrant deaths, illegal activity and crime, damage to the Nation’s natural and cultural resources, trash and debris, wildland fires caused by migrants – all can be expected as migrants attempt to circumvent 43 miles of a border wall that ends on the Nation’s doorstep. The Nation’s public safety and border security resources will be stretched beyond the breaking point in an effort to address these injuries. The Nation’s Police Department and emergency responders, as well as the Nation’s public works department and other

⁵⁴ The irony is that the construction of additional border wall will not result in the desired increase in apprehensions of undocumented migrants. In fact, increased illegal crossing arrests in the Tucson Sector have recently been reported by CBP, despite new border wall construction. See Loew, Morgan, *Illegal border crossings up in some areas of Arizona with new wall*, CBS 5 (Jan. 13, 2021), https://www.azfamily.com/news/investigations/cbs_5_investigates/illegal-border-crossings-up-in-some-areas-of-arizona-with-new-wall/article_cb5d081e-554b-11eb-b75a-63a6147b7e9d.html.

government agencies will be forced to divert even more of their already limited resources to border security as the Nation attempts to respond to these significant negative impacts to its Reservation lands, its natural and cultural resources, and its members. CBP use of the Nation's Reservation roads will also increase, further damaging those roads, without any realistic possibility that adequate funding will be available for their repair.

The federal government's long history of failing to provide adequate resources to address border security issues on the Nation's lands will only further exacerbate the injury to the Nation as a result of the funneling effects caused by Tucson Sector Projects 1 and 2. As explained above, the Nation already spends millions of tribal dollars every year to help fulfill the federal government's border security obligations, but receives very little federal funding to assist with border security, law enforcement, and infrastructure, including the repair of roads damaged by heavy CBP usage. The additional public safety and related resources that the Nation will be forced to expend in response to the likely increase of migrants and attendant damages to Reservation resources and infrastructure will cause serious harm and injury to the Nation.

III. THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY TO THE NATION AMPLIFIES THE NATION'S INTEREST IN THIS CASE.

The nature and weight of the injury and harm to the Nation are further amplified when considered against the backdrop of the United States' trust responsibility to Indian tribes and its obligation to protect trust assets, which Petitioners clearly have failed to honor.

See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (“The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.”); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (“It is fairly clear that *any* Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian tribes”) (emphasis original). Courts have found that this responsibility extends to a wide variety of resources and tribal property, including wildlife resources, see *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987); off-reservation water resources, see *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 254-58 (D.D.C. 1972); and actions taken off-reservation that impact tribal rights on-reservation, see *Parravano v. Babbitt*, 70 F. 3d 539, 546-47 (9th Cir. 1995). In fact, the actions taken by Petitioners in carrying out Tucson Projects 1 and 2 have and will continue to injure and destroy, rather than protect, the Nation’s on- and off-Reservation resources – including lands, cultural and natural resources, roads, and other trust property.

CONCLUSION

For the reasons set forth above, the district court's judgment and injunction should be affirmed.

Respectfully submitted,

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