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WAIVED: THE DETRIMENTAL IMPLICATIONS OF U.S. IMMIGRATION AND BORDER SECURITY MEASURES ON SOUTHERN BORDER TRIBES – AN ANALYSIS OF THE IMPACT OF PRESIDENT TRUMP’S BORDER WALL ON THE TOHONO O’ODHAM NATION

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I. INTRODUCTION

On February 15, 2019, President Donald J. Trump formally declared a national emergency over the “national security crisis at the southern border.” This declaration came after the President’s campaign promise to “build the wall,” followed by a 35-day government shutdown from December 2018 to January 2019 due to Congress’ inability to grant Trump \$5.7 billion dollars for border security measures, which left over 380,000 federal employees without work or pay for weeks.¹ While polarized news media outlets continue to debate the President’s motivations for declaring this national emergency, the detrimental impact on American Indian tribes across the southern border and into Mexico has gone overlooked.

In the time since the President declared a national emergency in early 2019, the government has looked to multiple methods to circumvent the democratic process for authorizing the construction

* J.D. Candidate, 2020, Seattle University School of Law. This article would not have taken shape without Seattle University School of Law’s *Exercises in National Security* intersession course, which I participated in shortly after President Trump declared a national emergency at the southern border in January 2019. This article was written with my grandfather in mind, Charles “Chuck” Clingan, who has always shared stories with me about his experiences growing up as a member of the Delaware Nation in Oklahoma. It is a privilege to be your granddaughter and I am so grateful for your support. Finally, thank you to Jessica Roberts, Julie Kim, Cloie Chapman, Phoebe Millsap, Professor Monika Batra Kashyap, and the incredibly talented staff of editors at American Indian Law Journal. It is a privilege to get to work with you all and learn from you every day, and I sincerely appreciate your constructive feedback and support.

¹ Nevbahar Ertas, *Who are the federal workers affected by the shutdown? 5 questions answered*, THE CONVERSATION (Jan. 14, 2019, 6:32 AM), <http://theconversation.com/who-are-the-federal-workers-affected-by-the-shutdown-5-questions-answered-109631> [<https://perma.cc/NMC2-GBEJ>].

of a border wall. Many of these methods are based on waiver clauses, which were granted to the government after September 11, 2001. This article analyzes the federal powers that allow for construction of a border wall to encroach on indigenous lands on the southern United States border, specifically with respect to Tucson Sector Projects 1-3 on Tohono O’odham tribal land in southern Arizona. Further, this article will look to the Tohono O’odham Nation’s *amicus curiae* brief filed in *Donald J. Trump, President of the United States, et al. v. Sierra Club, et al.*, to provide an analysis of the impact that a southern border wall would have on the Tohono O’odham Nation’s natural and environmental resources, freedom of movement and tribal sovereignty, and sacred cultural resources. Finally, this article will provide an analysis of the United Nations’ Human Rights Committee’s decision in *Poma Poma v. Peru* as an example of what is to come at the Arizona-Mexico border, and provide an analysis on the impacts that southern border tribes will feel for generations if access to natural resources and sacred lands is removed by the federal government.

II. A BRIEF HISTORY ON HOW TREATIES AND IMMIGRATION LAWS HAVE DIVIDED THE TOHONO O’ODHAM NATION’S ANCESTRAL LANDS

The Tohono O’odham Nation (“the Nation”) resides on a vast expanse of land in the Sonoran Desert, stretching 2.8 million acres and 4,460 square miles between south central Arizona and the Republic of Mexico.² Approximately equivalent to the size of Connecticut³, the Nation is acknowledged as the second largest tribe in the United States by land holdings.⁴ Historically, the ancestral territory of the Nation sits on a landscape known as a “wide desert valley, interspersed with plains and marked by mountains that rise abruptly to nearly 8,000 feet.”⁵ This compelling desert stretches across a 62-mile international border, beginning south of Sonora, Mexico, extending just north of Phoenix, Arizona, west to the Gulf

² *Location*, TOHONO O’ODHAM NATION, www.tonation-nsn.gov/location/ [<https://perma.cc/P7T7-7ZHH>] (last visited November 12, 2019).

³ *Id.*

⁴ *About Tohono O’odham Nation*, TOHONO O’ODHAM NATION, www.tonation-nsn.gov/about-tohono-oodham-nation/ [<https://perma.cc/5BMA-CK5M>] (last visited May 26, 2019).

⁵ *Supra* note 2.

of California, and east to the San Pedro River.⁶ The ancestral lands of the Tohono O’odham Nation cover wildlife refuges and national parks, including Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge.⁷

Across the United States and the Republic of Mexico, the Nation is made up of 34,000 federally recognized tribal members, including 2,000 members living in Mexico.⁸ What was once one a single nation is now four federally recognized tribes – the Tohono O’odham Nation, the Gila River Indian Community, the Ak-Chin Indian Community, and the Salt River (Pima Maricopa) Indian community, which are all “geographically distinct and separate.”⁹ The fifth historical branch of the tribe, the Hia-C’ed O’odham, resides throughout southern Arizona, but is not federally recognized. This land, known to the Nation as “Papagueria,” from the tribe’s roots as the “Papago” Nation, has been home to the Tohono O’odham tribe for thousands of years, or according to archeologist Maren Hopkins, “since time immemorial.”¹⁰

For thousands of years, Tohono O’odham tribal members could travel freely across their lands before the international boundary was drawn between the United States and Mexico with the Gadsden Purchase in 1854.¹¹ Without consultation from the Nation, this agreement between the United States and the Republic of Mexico created the 62-mile border that separates tribal lands existing today. The creation of this international boundary in 1854 “sliced through the Nation’s ancestral territory, separating its

⁶ *History & Culture*, TOHONO O’ODHAM NATION, www.tonation-nation.gov/history-culture/ [<https://perma.cc/4WXF-5SLP>] (last visited November 12, 2019).

⁷ Motion for Leave to File Brief and Brief of the Tohono O’odham Nation as *Amicus Curiae* in Support of Respondents and their Opposition to Application for A Stay, p. 6, *Trump v. Sierra Club*, 140 S.Ct. 1 (2019).

⁸ *Id.* at pg. 1.

⁹ *Supra* note 6.

¹⁰ Maren Hopkins, Univ. of Ariz. Dept. of Anthropology, Archaeology and Ethnohistory of the Western Papagueria: Let’s Not Forget the People. Maren Hopkins, Presentation Before the 82nd Annual Meeting of the Society for American Archaeology (Apr. 12, 2018) in THE DIGITAL ARCHAEOLOGICAL RECORD, id: 443725.

¹¹ The Gadsden Purchase was an agreement between the United States and Mexico in which the U.S. agreed to pay Mexico \$10 million for a 29,670 square mile portion of Mexico, encompassing the Tohono O’odham lands, which would eventually become Arizona and New Mexico. Office of the Historian, *Gadsden Purchase, 1853-54*, UNITED STATES DEPARTMENT OF STATE, <https://history.state.gov/milestones/1830-1860/gadsden-purchase> [<https://perma.cc/AP77-KSRP>] (last visited May 26, 2019).

people.”¹² This treaty divided the Nation’s land nearly in half between the United States of America and Mexico.¹³ As the United States government looked toward future industry, the Gadsden Purchase furnished the country with room to build a new southern transcontinental railroad, the ability to promote infrastructure, and an opportunity to lay the foundation for the industrial revolution.

Though the terms of the Gadsden Purchase agreed to honor all land rights held by Mexican citizens and the Tohono O’odham people, and provided that tribal members would retain the same constitutional rights and protections of other United States citizens, demand for land to promote industrial growth stripped these protections away.¹⁴ With the heavy influx of development in the eighteenth century through mining and the construction of the transcontinental railroad through ancestral O’odham lands, the tribe lost land holdings on both sides of the U.S.-Mexico border to industry and infrastructure.¹⁵ Today, tribal members on both sides of the line face hardships imposed by U.S. Border Patrol, including the inability of tribal members to move across the border and access their ancestral lands freely.

Initially, when the Gadsden Purchase was finalized in 1854, the designation of a new border had “little effect” on the O’odham Nation because the tribe was not even informed that the United States had purchased their lands from Mexico.¹⁶ For many years, travel across the border was not uniformly enforced.¹⁷ As immigration and national security measures have progressed from the Reagan Administration to today, the implementation and enforcement of border security policies have intensified in impact upon the Tohono O’odham Nation.¹⁸ Under the current administration, strict enforcement of the U.S.-Mexico border is clearly of the highest priority, which continues to prevent Tohono O’odham Nation members from accessing their ancestral lands on both sides of the international border.

Beginning with the Reagan Administration and intensifying during the demand for increased national security measures

¹² *Supra* note 7, at pg. 1.

¹³ *Supra* note 6.

¹⁴ *Supra* note 11.

¹⁵ *Supra* note 4.

¹⁶ *Supra* note 7.

¹⁷ *Supra* note 4.

¹⁸ *Infra* note 23.

following 9/11, the Department of Homeland Security (DHS) was formed and immigration policies and procedures such as the Secure Fence Act and Real ID Act were enacted with the ultimate goal of “protecting the homeland.”¹⁹ Policies such as these have ultimately prevented tribal members from crossing their ancestral lands freely without presenting a passport or tribal identification card to a U.S. Border Patrol agent.²⁰ As the enactment of such national security measures have progressed, so have the limitations on Tohono O’odham tribal members’ ability to access sacred and historic lands that have been their home for thousands of years.²¹ It is because of these policies and procedures that the tribe holds the opinion that the U.S.-Mexico border has become “an artificial barrier to the freedom of the Tohono O’odham... to traverse their lands, impairing their ability to collect foods and materials needed to sustain their culture and to visit family members and traditional sacred sites.”²²

A. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

In 1996, the Clinton Administration passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRIRA”) to show that Clinton was a Democratic president who would be “tough on immigration,” after President Reagan’s 1986 amnesty law.²³ Section 102 of the IIRIRA granted the Attorney General special powers to take action to improve the barriers at the United States border in order to “deter illegal crossings in areas of high illegal entry into the United States.”²⁴ The IIRIRA also provided provision §102(b)(1), which held, “In carrying out subsection (a), the Attorney General shall provide for the construction along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending

¹⁹ *Creation of the Department of Homeland Security*, U.S. DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/creation-department-homeland-security> [<https://perma.cc/RHA4-M9UV>] (last visited Dec. 14, 2019).

²⁰ *Infra* note 87.

²¹ *Infra* note 39.

²² *Supra* note 6.

²³ Dara Lind, *The Disastrous, Forgotten 1996 Law That Created Today’s Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> [<https://perma.cc/B665-X75N>].

²⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, §102(a), 110 Stat. 3009 (codified as 8 U.S.C.A. § 1103).

eastward, of second and third fences, in addition to the existing reinforced fence, and for roads between the fences.”²⁵ In constructing fencing and road improvements along the southern border in San Diego, California, IIRIRA §102(b)(2) allows for the “prompt acquisition of necessary easements... as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).”²⁶

The most alarming sections of the IIRIRA with respect to tribal sovereignty and fundamental tribal interests, however, are provided in §102(c), on waiver, and §102(d), on the Attorney General’s land acquisition authority.²⁷ IIRIRA §102(c) provides that the federal government can fundamentally ignore any protections for endangered wildlife or the environment, holding: “The provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section.”²⁸ IIRIRA §102(d) provides that the Attorney General retains land acquisition authority, and may “contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be reasonable.”²⁹ Today, portions of IIRIRA §102 are provided as notes to 8 U.S.C. §1103, codifying the powers and duties of the Secretary, the Under Secretary, and the Attorney General, providing the Attorney General vast land acquisition authority for immigration security purposes.³⁰

The Congressional Research Service’s October 2, 2019 updated report on the *Legal Authority to Repurpose Funds for Border Barrier Construction* (hereinafter “the Report”) explicitly states that Section 102 of the IIRIRA as amended, “generally authorizes DHS to construct barriers and roads along the international borders in order to deter illegal crossings at locations of high illegal entry, and further directs the agency to construct

²⁵ IIRIRA §102(b)(1).

²⁶ IIRIRA §102(b)(2).

²⁷ IIRIRA §102(c), and IIRIRA §102(d).

²⁸ IIRIRA §102(c).

²⁹ IIRIRA §102(d)(b)(2).

³⁰ 8 U.S.C. §1103.

fencing along no less than 700 miles of the U.S.-Mexico border.”³¹ The report further states “This law also authorizes the Secretary of Homeland Security to waive ‘all legal requirements . . . necessary to ensure expeditious construction of . . . [the] barriers.’”³²

The National Congress of American Indians (hereinafter “NCAI”) remains vehemently opposed to §102(c) of the IIRIRA on waiver.³³ Founded in 1944, the governing rules for the National Congress of American Indians provide that “the purpose of the National Congress of American Indians (NCAI) is to serve as a forum for unified policy development among tribal governments in order to: (1) protect and advance tribal governance and treaty rights; (2) promote economic development and health and welfare in Indian and Alaska Native communities; and (3) educate the public toward a better understanding of Indian and Alaska Native tribes.”³⁴ In analyzing the IIRIRA’s waiver provisions, the NCAI has held that the construction of border fencing and roads is “unnecessary, destructive, and in violation of the federal obligation to interact with Indian tribes on a government-to-government basis and respect tribal sovereignty and self-determination.”³⁵

B. 2006 Secure Fence Act

Following September 11, 2001, Congress passed acts relating to matters of national security, including the 2006 Secure Fence Act.³⁶ Passed on September 14, 2006, this act:

Directs the Secretary of Homeland Security . . . to take appropriate actions to achieve operational control over U.S. international land and maritime borders, including: (1) systematic border surveillance through

³¹ Jennifer K. Elsea and Edward C. Liu, *Legal Authority to Repurpose Funds for Border Barrier Construction* (R45908), CONGRESSIONAL RESEARCH SERVICE, available at crsreports.congress.gov/product/pdf/R/R45908 [<https://perma.cc/D4PP-TMCD>].

³² *Id.* at 7, n. 36.

³³ National Congress of American Indians [NCAI], Res. ECWS-14-002, *Border Security and Immigration Enforcement on Tribal Lands*, at 2 (2017).

³⁴ *Id.*

³⁵ National Congress of American Indians, *Border Security and Immigration Enforcement on Tribal Lands*, <http://www.ncai.org/resources/resolutions/border-security-and-immigration-enforcement-on-tribal-lands> [<https://perma.cc/PC5H-V2R9>] (citing to NCAI Res. #ECWS-08-001 and #REN-08-002) (last visited November 12, 2019).

³⁶ *Infra* note 37.

more effective use of personnel and technology, such as unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras; and (2) physical infrastructure enhancements to prevent unlawful border entry and facilitate border access by U.S. Customs and Border Protection, such as additional checkpoints, all weather access roads, and vehicle barriers. [...]

Amends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to direct the Secretary to provide at least two layers of reinforced fencing, installation of additional physical barriers, roads, lighting, cameras, and sensors extending: (1) from ten miles west of the Tecate, California, port of entry to ten miles east of the Tecate, California, port of entry; (2) from ten miles west of the Calexico, California, port of entry to five miles east of the Douglas, Arizona, port of entry (requiring installation of an interlocking surveillance camera system by May 30, 2007, and fence completion by May 30, 2008); (3) from five miles west of the Columbus, New Mexico, port of entry to ten miles east of El Paso, Texas; (4) from five miles northwest of the Del Rio, Texas, port of entry to five miles southeast of the Eagle Pass, Texas, port of entry; and (5) 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry (requiring fence completion from 15 miles northwest of the Laredo, Texas, port of entry to 15 southeast of the Laredo, Texas, port of entry by December 31, 2008). [...]

Directs the Secretary to: (1) study and report to the House Committee on Homeland Security and the Senate Committee on Homeland Security and Governmental Affairs on the necessity, feasibility, and economic impact of constructing a state-of-the-art infrastructure security system along the U.S. northern international land and maritime border; and (2) evaluate and report to such Committees on U.S.

Customs and Border Protection authority (and possible expansion of authority) to stop fleeing vehicles that enter the United States illegally, including related training, technology, and equipment reviews.³⁷

Heightened border restrictions, created in part by the 2006 Secure Fence Act, have caused substantial physical, emotional, and spiritual barriers for 2,000 of the Nation's members who live in Sonora, Mexico.³⁸ National security measures such as reinforced fencing promulgated by the Secure Fence Act have isolated Sonora-side O'odham people from sacred lands, family, and tribal members residing in Arizona, in addition to preventing tribal members from accessing important resources at the Nation's capital in Sells, Arizona.³⁹

C. *Real ID Act*

The Real ID Act, (hereinafter "the Act") passed in 2005, bolsters the federal government's efforts to increase national security and immigration enforcement through infrastructure and documentation.⁴⁰ DHS provides that the Real ID Act "set standards for the issuance of sources of identification, such as drivers licenses," and "establish[es] minimum security standards for license issuance and production and prohibits federal agencies from accepting for certain purposes driver's licenses and identifications cards from states not meeting the Act's minimum standards."⁴¹

The danger of the Act is that §102 provides a waiver clause, which allows the Secretary of Homeland Security (DHS) to waive all local, state and federal laws that the Secretary deems an

³⁷ *H.R. 6061 - Secure Fence Act of 2006*, CONGRESS.GOV available at <https://www.congress.gov/bill/109th-congress/house-bill/6061> [<https://perma.cc/936Z-ZP2W>] (last visited May 26, 2019), (citing Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified as 8 U.S.C. 1101).

³⁸ *Infra* note 39.

³⁹ Dianna M. Nanez, *A Border Tribe, and the Wall That Will Divide It*, USA TODAY: THE WALL, available at <https://www.usatoday.com/border-wall/story/tohono-oodham-nation-arizona-tribe/582487001/> [<https://perma.cc/7UBV-M3D2>] (last visited May 26, 2019).

⁴⁰ *Infra* note 41.

⁴¹ Department of Homeland Security, *Real ID*, U.S. DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/real-id> [<https://perma.cc/2TGV-EDMU>] (last visited May 26, 2019).

impediment to building walls and roads along the U.S. border.”⁴² During, and between, the Bush and Trump administrations, DHS secretaries have used Real ID Act §102 waiver powers in all four southern border states to override important environmental protections such as the National Environmental Policy Act, the Clean Air Act, and the Endangered Species Act.⁴³ While the Act was passed in 2005 as a part of the Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, President Trump has shown he is willing to utilize the Act thirteen years later to justify separating families and eliminating environmental protections for the purposes of constructing a border wall.⁴⁴

D. *Other Authorities*

The Congressional Research Service Committee’s October 2019 report cites to multiple authorities, authorizing the construction of a southern border wall.⁴⁵ The Report includes the following authorizing construction of the wall: (1) IIRIRA as amended by the Secure Fence Act, (2) the Real ID Act, and (3) 10 U.S.C. § 2808, which authorizes the Secretary of Defense to “undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces.”⁴⁶ Further, the Report provides: “President Trump stated that he would invoke his authority under this provision to repurpose \$3.6 billion allocated to ‘military construction projects’ for border barrier construction,”⁴⁷ and “this authority becomes available upon a ‘declaration by the President of a national emergency’ as authorized by the National Emergencies Act (NEA).”⁴⁸

In addition, the Committee cites to (4) 10 U.S.C. § 284, which authorizes the Department of Defense (hereinafter, “DOD”) to “support other departments’ or agencies’ counterdrug activities,

⁴² *Real ID Waiver Compromises Our Borderlands*, SIERRA CLUB, <https://www.sierraclub.org/borderlands/real-id-waiver-authority-compromises-our-borderlands> [<https://perma.cc/7FX3-PSHW>] (last visited May 26, 2019).

⁴³ *Id.*

⁴⁴ *Supra* note 31.

⁴⁵ *Id.*

⁴⁶ *Id.*, 7 n. 37.

⁴⁷ *Id.*, 7 n. 38.

⁴⁸ *Id.*, 7 nn. 39-40.

including through the construction of fencing to block drug smuggling corridors.”⁴⁹ The report states the following authority could be taken under this provision:

President Trump proposed to direct the DOD to use its authority under Section 284 to support DHS’s “counterdrug activities” through the construction of fencing across drug trafficking corridors at the southern border. These support activities would be funded by \$2.5 billion in DOD’s Drug Interdiction and Counter-Drug Activities Account (Drug Interdiction Account), which would be transferred to that account using the transfer authority in Sections 8005 and 9002 of the 2019 DOD Appropriations Act. These authorities authorize the transfer of up to \$6 billion of DOD funds for “unforeseen military requirements” but only “where the item for which funds are requested has been denied by Congress.”⁵⁰

Further, the Committee cites to (5) The Treasury Forfeiture Fund under 31 U.S.C. § 9705, which “contains funds that are confiscated by, or forfeited to, the federal government pursuant to laws enforced or administered by certain law enforcement agencies and unobligated money in this fund may be used for obligation or expenditure in connection with ‘law enforcement activities of any Federal agency.’”⁵¹ Under this option, the Report states that “The President proposed to withdraw \$601 million in unobligated funds from the Treasury Forfeiture Fund (TFF) to pay for border barrier construction.”⁵²

III. AN ANALYSIS OF UNITED STATES IMMIGRATION POLICIES ON THE TOHONO O’ODHAM TRIBE

A. *“We Never Crossed the Border, the Border Crossed Us”*

Since the U.S.-Mexico border was drawn in the Gadsden Purchase of 1854, the Tohono O’odham’s mobile way of life and tribal sovereignty has progressively been infringed upon by

⁴⁹ *Id.*, 7 n. 41.

⁵⁰ *Id.*, 8 nn. 42-44.

⁵¹ *Id.*, 8 n. 45.

⁵² *Id.*, 8 n. 46.

immigration policies that have continued to tighten border security.⁵³ In a 2019 interview with PBS, Verlon Jose, Vice-Chairman of the Tohono O’odham nation referred to the border as “just another obstacle in our path in life to go visit family, to go visit friends, to go to sacred sites in Mexico. We feel betrayed back for 160 years when this international boundary was created, without any consent or any discussion.”⁵⁴ Journalists have documented “countless” instances where U.S. Border Patrol has “detained and deported members of the Tohono O’odham Nation who were simply traveling through their own traditional lands, practicing migratory traditions essential to their religion, economy and culture.”⁵⁵ Additionally, U.S. Customs officers have “prevented Tohono O’odham from transporting raw materials and goods essential for their spirituality, economy, and traditional culture,” back into the United States, confiscating cultural and religious items such as “feathers of common birds, pine leaves or sweet grass.”⁵⁶ As the War on Terror and the War on Drugs escalated during the Clinton and Bush administrations, the IIRIRA and 2006 Secure Fence Act have been two of the mechanisms employed by the federal government to slice through tribal lands by building barbed-wire fences and surveillance towers for the purposes of furthering national security.⁵⁷

B. *Grave Concerns Voiced by the Nation Through Filing of Amicus Curiae Brief in Supreme Court Case – Donald J. Trump, President of the United States, et al. v. Sierra Club, et al.*

On July 26, 2019, the Supreme Court issued a decision in *Donald J. Trump, President of the United States, et al. v. Sierra Club, et al.*, granting an application for stay regarding the District Court’s June 28, 2019 order granting a permanent injunction on the construction of a border wall.⁵⁸ In its ruling, the Court held that “the Government has made a sufficient showing at this stage that the

⁵³ *Infra* note 58.

⁵⁴ Christopher Livesay and Melanie Saltzman, *At U.S.-Mexico Border, a Tribal Nation Fights Wall That Would Divide Them*, PUBLIC BROADCASTING SERVICE (PBS) (Jan. 13, 2019, 5:13 PM), <https://www.pbs.org/newshour/show/at-us-mexico-border-a-tribal-nation-fights-wall-that-would-divide-them> [<https://perma.cc/45Q6-TTVA>].

⁵⁵ *Supra* note 6.

⁵⁶ *Id.*

⁵⁷ *Supra* note 54.

⁵⁸ *Trump v. Sierra Club*, 140 S.Ct. 1 (2019).

plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005.”⁵⁹

Section 8005 refers to a provision of the 2019 DOD Appropriations Act, which provides authority for the federal government to repurpose funds for border barrier construction.⁶⁰ In the Report by the Congressional Research Service, Section 8005 is set forth as follows:

Sections 8005 and 9002 of the 2019 DOD Appropriations Act authorize the transfer of up to \$6 billion appropriated in that act for “military functions” arising from “unforeseen military requirements.” Funds may be transferred under these authorities only for “unforeseen military requirements” where the item for which funds will be transferred “has [not] been denied by the Congress.”⁶¹

Justice Breyer, concurring in part and dissenting in part from grant of a stay, proffered the following analysis:

This case raises novel and important questions about the ability of private parties to enforce Congress' appropriations of power. I would express no other view now on the merits of those questions. Before granting a stay, however, we must still assess the competing claims of harm and balance the equities. *Barnes v. E-Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). This Court may, and sometimes does, “tailor a stay so that it operates with respect to only ‘some portion of the proceeding.’” *Trump v. International Refugee Assistance Project*, 137 S.Ct. 2080 (2017) (per curiam) (slip op., at 10) (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)). In my view, this is an appropriate case to do so. If we grant the stay, the Government may begin

⁵⁹ *Id.*

⁶⁰ *Supra* note 31.

⁶¹ *Id.*

construction of a border barrier that would cause *irreparable harm* to the environment and to respondents, according to both respondents and the District Court. The Government’s only response to this claim of irreparable harm is that, if respondents ultimately prevail, the border barrier may be taken down (with what funding, the Government does not say). But this is little comfort because it is not just the barrier, but the construction itself (and presumably in its later destruction that contributes to respondents’ injury.)⁶²

Prior to the court’s decision in the *Sierra Club* decision, the Tohono O’odham Nation filed an *amicus* brief in support of the respondent’s position on July 19, 2019. The twenty-two page *amicus* brief provided in great detail the substantial harm that the Nation would face if the court should stay the injunction and allow the Government to begin construction on a border wall through sixty-two miles of tribal lands across the border line.⁶³ The Nation’s *amicus* brief provided extensive argument on how the proposed border wall would cause irreparable harm to both natural and cultural resources of great importance to the Tohono O’odham Nation.⁶⁴

C. Impact of Proposed Tucson Sector Projects

In its brief, the Nation refers to the proposed sections of border construction as “Tucson Sector Projects 1 and 2” which “would construct a 43-mile, 30-foot high wall, together with road improvements and lighting [...] and replacements of about 38 miles of existing vehicle barriers and another five miles of existing pedestrian fencing near the Lukeville Port of Entry.⁶⁵ The Nation provides that “without the District Court’s injunction, construction of the 43-mile section of the wall would start at Cabeza Prieta National Wildlife Refuge, continue across Organ Pile National Monument, and end less than two miles from the western boundary

⁶² *Trump v. Sierra Club*, 140 S.Ct. 1 (2019) (*Emphasis added*).

⁶³ *See Motion*, *supra* note 7, at 2.

⁶⁴ *Id.*

⁶⁵ *Id.*, 4 nn. 3-4.

of the Nation's Reservation.”⁶⁶ Further, Tucson Sector Project 3 would allow for similar construction to begin to the east of the Nation's Reservation, including construction through the San Bernardino National Wildlife Refuge.⁶⁷

The Nation emphasizes the position that “construction of a border wall through Tucson Sector Projects 1, 2, and 3 will cause irreparable harm to the 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.”⁶⁸ The imposition of these sections of the border wall through Tohono O’odham lands would cause irreparable harm to the Nation in several ways, including: (a) implications on the tribe’s sacred lands and environmental resources; (b) implications to the tribe on free movement and tribal sovereignty; and (c) stripping the tribe of sacred natural resources for spiritual and cultural practice.

1. Devastation of Natural and Environmental Resources

The significance of preservation and protection of the natural and cultural environment of the Tohono O’odham’s ancestral lands is of such profound significance to the Nation, it is enshrined in the tribe’s Constitution. In its *amicus* brief, the Nation cites to Article XVIII, Sec. 1 of the Nation’s Constitution, which provides:

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 resources, and its historic and cultural artifacts and archaeological sites; and to create and maintain conditions under which members of the nation and nature can exist in productive harmony

⁶⁶ *Id.*, 4 n. 6.

⁶⁷ *Id.*

⁶⁸ *Id.* at 5.

and fulfill the social, economic, and other requirements of present and future generations of members of the Tohono O’odham Nation.⁶⁹

One of the Tohono O’odham Nation’s greatest concerns is the severe harm that Trump’s border wall will cause to the environment. Of utmost importance to the Nation is “access to and preservation of the Nation’s traditional lands and sacred sites” including access to Organ Pipe Cactus National Monument and Cabeza Prieta National Wildlife Refuge, “are essential to the O’odham himdag.”⁷⁰ In Tohono O’odham culture, “himdag” means “a word that escapes easy translation, but has been described as ‘a way of life; a culture; a custom or practice; traditions.’”⁷¹ In the tribe’s *amicus* brief, the Nation refers to the heart of why access to these wildlife refuges is so critical to the tribe, informing the court that access to the monument was specifically granted to the tribe by President Franklin D. Roosevelt in the creation of the Organ Pipe Cactus National Monument. In Proclamation 2232, 50 Stat. 1827 (Apr. 13, 1937), President Roosevelt specifically provided that the Nation should be granted access to the lands 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...”⁷² Further, the National Park Service General Management Plan for the Monument recognizes land within the Monument as “sacred” to the Tohono O’odham tribe, noting the cultural importance of “multiple sites within the Monument, and acknowledges the Nation’s continued cultural use of Monument Lands.”⁷³ One such sacred monument to the tribe is Quitobaquito Spring.

Of the eleven springs within the Monument, the site of Quitobaquito Spring is sacred for the Tohono O’odham Nation, and tribal members continue to visit the oases to gather water for their residences in the area, gather medicinal plants, and harvest the fruit of the organ pipe and saguaro cactus.⁷⁴ The National Park Service has further acknowledged the sacred nature of these lands in the Service’s “understanding of the ‘O’odham world view...that the

⁶⁹ *Id.*, 6 n. 7.

⁷⁰ *Id.*, 6 n. 8.

⁷¹ *Id.*, 6 n. 9.

⁷² *Id.*

⁷³ *Id.* at 7.

⁷⁴ *Id.*, 9 n. 11.

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.”⁷⁵ In addition to the sacredness of these natural resources, the U.S. Forest Service prepared an archaeological report in 2006 that shows notable archeological sites in the immediate vicinity of the Tucson Sector 3 wall project through the San Bernardino Valley.⁷⁶ Prior to the O’odham Nation, the U.S. Fish and Wildlife Service’s 2006 Comprehensive Plan for Cabeza Prieta National Wildlife Refuge provides that “[e]thnographically, the refuge was the homeland of the Hia C-ed O’odham,’ most of whom are members of the Nation,” and that both the Tohono O’odham Nation and Hia-Ced O’odham have cultural ties to these sacred lands, of which the Tucson Sector Projects would slice through.⁷⁷

At the time the injunction was stayed in the *Sierra Club* decision, the Nation provided thorough analysis in its *amicus* brief that, should the injunction be stayed, the impact on the tribe’s natural resources and sacred lands would be undoubtedly detrimental.⁷⁸ The Nation asserted: “If the District Court’s injunction is stayed, the ensuing border wall and associated road construction in the Tucson Sector Project areas will undoubtedly destroy numerous trees, cacti, and other plants of significant or recognized interest to the Nation, disturb or destroy archeological sites of O’odham ancestors, and hamper or eliminate wildlife migration and access to vitally important sources of water.”⁷⁹ Further, the Nation is concerned about additional short and long-term impacts, including riparian vegetation changing in response to an increase in sedimentation; channel morphology in floodplain function changing over time; and channelized waters beginning to “gully,” which could transform land surfaces in affected watersheds.⁸⁰

According to a 2017 interview given to American Indian Magazine by Tohono O’odham Nation Vice-Chairman Verlon Jose and Chairman Edward Manu, “farmers and ranchers living near the border rely on water sources located on the Sonoran side. Likewise, a wall would disrupt the natural flow of rainwater washes and animal

⁷⁵ *Id.*, 8 n. 13.

⁷⁶ *Id.*, 9 n. 15.

⁷⁷ *Id.*, 9 nn. 16-17.

⁷⁸ *Id.*

⁷⁹ *Id.*, 8 n. 14.

⁸⁰ *Id.*, 12 n. 21.

migrations along the border.”⁸¹ Every year, Tohono O’odham members pray for the earth and everything on it, which President Trump could essentially bulldoze through with the utilization of a IIRIRA §102(c), the Real ID Act §102 waiver clause, or any of the DOD authorities cited to in the October 2019 Congressional Research Service’s report.

2. Implications on Free Movement and Tribal Sovereignty

As fences and towers have gone up at the border and severed Tohono O’odham lands, the San Miguel Gate on both the U.S. and Mexico side of Sonora has provided an access point for tribal members to be able to cross through to sacred tribal lands on both sides. Today, the gate “connects family members who live on both sides of the border. It is used by tribal members who travel for sacred pilgrimages and ceremonies in Mexico, as well as those living in Mexico who travel to the U.S. for tribal services, to buy or sell goods, or to visit the hospital at the Nation’s capital in Sells, Arizona.”⁸²

In its *amicus* brief, the Nation provides that they have “supported the federal government with a wide variety of border security enforcement measures, working cooperatively with it relating to 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.” However, despite the Nation’s cooperative efforts, federal funding to assist the tribe in these expenses is “extremely limited,” causing the tribe to spend in excess of \$3 million annually to help meet U.S. border security responsibilities.⁸³ This amount requires spending of more than one third of the Tohono O’odham Nation’s Police Department budget on border security. Further, the Nation provides in its *amicus* brief that the Nation

⁸¹ Anya Montiel, *The Tohono O’odham and the Border Wall*, AMERICAN INDIAN MAGAZINE (Summer 2017), <https://www.americanindianmagazine.org/story/tohono-oodham-and-border-wall> [<https://perma.cc/CZA4-BRAZ>] (last visited November 22, 2019).

⁸² Mark Henle, *Silent and Sacred*, USA TODAY, <https://www.usatoday.com/border-wall/story/tohono-oodham-nation-arizona-tribe/582487001/> [<https://perma.cc/VBJ9-LUEZ>] (last visited November 16, 2019).

⁸³ *Supra* note 7, 15 n. 28.

absorbs the costs of addressing all damage to the natural resources on tribal lands, including damage to roadways caused by “significant and extensive CBP vehicle use.”⁸⁴

The Real ID Act also comes into play, as a lone U.S. Border Patrol officer is stationed at the San Miguel Gate, requiring that Tohono O’odham members show their purple and gold tribal identification cards to be able to use the pass-through between the United States and Mexico.⁸⁵ Even with a regulated border checkpoint, tribal members have experienced significant hardships and frustrations from not being able to travel freely across sacred lands the way their ancestors have for many generations; even with the Nation’s tribal members on both sides of the border line.⁸⁶ Additionally, Tohono O’odham tribal members report that after presenting their tribal identification cards to U.S. Customs and Border Patrol officers, they have been denied entrance into the United States; arrested; deported; or even incarcerated when trying to cross their ancestral lands.⁸⁷

3. Spiritual and Cultural Concerns

Beyond the construction of a border wall through Tucson Sector Projects 1-3’s further stripping the tribe’s freedom of movement and detrimental environmental impact, the spiritual and cultural rights of many Tohono O’odham members would be crushed by President Trump’s plan to build a fortified steel border wall through sacred tribal lands. Each year, catholic Tohono O’odham members make a spiritual pilgrimage to the town of Magdalena in Sonora to pray to and touch the statue of their patron saint, St. Francis.⁸⁸ In addition to this spiritual pilgrimage, the Tohono O’odham tribe has maintained sacred religious and burial

⁸⁴ *Id.*, 15 nn. 28-32.

⁸⁵ See Alden Woods, *Story Spreads of Tohono O’odham Brothers’ Arrest, Deportation After Using Tribal Border Gate*, ARIZONA REPUBLIC (Aug. 2, 2018, 2:03 PM), <https://www.azcentral.com/story/news/politics/border-issues/2018/08/02/oodham-brothers-arrested-deported-after-using-tribal-border-gate/798715002/> [<https://perma.cc/39UP-9REN>].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Kendal Blust, Fronteras Desk, *‘Nothing Will Deter’ Catholic Pilgrims Walking to Magdalena, Mexico* (Oct. 4, 2018, 2:24 PM), <https://www.azpm.org/p/home-articles-news/2018/10/4/138397-nothing-will-deter-catholic-pilgrims-walking-to-magdalena-mexico/> [<https://perma.cc/T7VM-N2S7>].

sites on the Mexico-side of the border that they would be unable to access if the San Miguel Gate was blocked off by a fortified steel border wall. In an interview with *The Washington Post*, tribal member Amy Juan characterized the impacts of a border wall as “bigger than ourselves, . . . As a people, as a community, it would be a literal separation from our home. Half of the traditional lands of our people lie in Mexico.”⁸⁹

IV. THE DAKOTA ACCESS PIPELINE REVISITED

Between Trump’s declaration of a national emergency in early 2019 to the publication of this article, construction on Tucson Sector Projects 1-3 has already begun at the southern border. Community members are showing up to construction sites with signs proclaiming that there have been “41 laws waived” in Arizona alone, citing to the National Parks Conservation Association’s (NPCA) May 2019 resource published on *Laws Waived for Border Wall Construction*.⁹⁰ The NPCA’s list of the 41 laws waived include:

- The National Environmental Policy Act
- The Endangered Species Act
- The Federal Water Pollution Control Act (commonly known as the Clean Water Act)
- The National Historic Preservation Act
- The Migratory Bird Treaty Act
- The Migratory Bird Conservation Act
- The Clean Air Act
- The Archeological Resources Protection Act
- The Paleontological Resources Preservation Act
- The Federal Cave Resources Protection Act of 1988
- The Safe Drinking Water Act

⁸⁹Samantha Schmidt, *A 75-Mile-Wide Gap in Trump’s Wall? A Tribe Says It Won’t Let It Divide Its Land*, *THE WASH. POST* (Nov. 15, 2016, 2:41 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/11/15/a-75-mile-wide-gap-in-trumps-wall-a-tribe-says-it-wont-let-the-wall-divide-its-land/> [https://perma.cc/XA68-YZU2].

⁹⁰*Laws Waived for Border Wall Construction*, NATIONAL PARKS CONSERVATION ASSOCIATION, <https://www.npca.org/resources/3295-laws-waived-for-border-wall-construction> [https://perma.cc/J8V2-XFKQ] (last visited November 16, 2019).

- The Noise Control Act
- The Solid Waste Disposal Act
- The Comprehensive Environmental Response, Compensation, and Liability Act
- The Archaeological and Historic Preservation Act
- The Antiquities Act
- The Historic Sites, Buildings, and Antiquities Act
- The Wild and Scenic Rivers Act
- The Farmland Protection Policy Act
- The Federal Land Policy and Management Act
- The Wilderness Act
- The National Wildlife Refuge System Administration Act
- The National Fish and Wildlife Act of 1956
- The Fish and Wildlife Coordination Act
- The National Trails System Act
- The Administrative Procedure Act
- The Wild Horse and Burro Act
- The Rivers and Harbors Act of 1899
- The National Park Service Organic Act and the National Park Service General Authorities Act
- Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978
- Sections 301(a)-(f) of the Arizona Desert Wilderness Act
- Arizona-Idaho Conservation Act of 1988
- The National Forest Management Act of 1976
- The Multiple-Use and Sustained-Yield Act of 1960
- The Eagle Protection Act
- The Native American Graves Protection and Repatriation Act
- The American Indian Religious Freedom Act
- 43 U.S.C. 387, part of the Reclamation Project Act of 1939
- 50 Stat. 1827, presidential proclamation for Organ Pipe Cactus National Monument
- 16 U.S.C. 450y, presidential proclamation for Coronado National Memorial

- 67 Stat. c18, establishment of Coronado National Memorial⁹¹

With respect to the 2016 protests at Standing Rock, North Dakota over the Dakota Access Pipeline, it is likely that a fortified border wall could draw a similar situation between U.S. law enforcement agents and members of different tribes around the country. Just like negotiations over the Gadsden Purchase over 160 years ago, the sovereignty of American Indian tribes is infringed upon by a federal government who bulldozes through sacred lands using waiver clauses authorized under the guise of national security.⁹² Though the Tohono O’odham Nation has complied with the 2006 Secure Fence Act and seen their lands cut through by checkpoints, watch towers, CBP agents, and fences, the Nation has complied and even assisted with such regulations, though they were never consulted on whether their lands would be a part of Mexico or the United States back when the lines were drawn in 1854.

The Tohono O’odham people have been here since “time immemorial,” long before America was America; long before the border existed, long before railroads were conceptualized, and long before the United States could fathom the broad impact of the implementation of broad-reaching national security measures. The Tohono O’odham people have been nomadic for centuries and wish to reside on their ancestral lands peacefully, to respect the environment that they pray to, and be able to access their family members and sacred sites as they please. The power and discretion of waiver powers that the federal government has allowed for the Attorney General to be able to access are a frightening opportunity to forego essentially waive any protective act in place in order to destroy sacred lands and the environment for the purposes of “national security,” which were implemented at a time when the country was in a heightened state of fear. The Trump Administration, in accordance with earlier administrations, has cited to provisions in these acts and waiver clauses to bypass the democratic process in order to quickly begin border wall construction. Such waiver clauses should be amended so the President cannot so easily identify a loophole to destroy indigenous people’s homes, cultures, and livelihoods.

⁹¹ *Id.*

⁹² *Supra* note 28.

V. AN EXAMPLE OF HUMANITY – THE U.N. DECISION IN POMA
POMA V. PERU

We can look to the U.N. for an example on the rights inherent to indigenous tribes around the globe. From July 10-14, 2017, the Human Rights Council for the Expert Mechanism on the Rights of Indigenous People (hereinafter, “EMRIP”) provided a report for the United Nations Declaration on the Rights of Indigenous Peoples, entitled *Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007-2017*.⁹³ In this report, the UN committee held that indigenous people “still report numerous and growing violations of their human rights,” including denial of: (1) political recognition by states and international actors; (2) protection of their lands, territories, resources and environment, particularly from “development activities;” (3) consultation and free prior and informed consent between indigenous peoples, states, and others, regarding activities that affect them; and (4) the protection of their cultures, including their languages, religion, and way of life, highlighting that indigenous women and disabled persons face particular challenges.⁹⁴

With respect to the challenges the Tohono O’odham tribe face along the southern U.S. border, each of the violations of human rights cited by the UN committee in the EMRIP are directly aligned with the difficulties the Nation faces on a daily basis. The Tohono O’odham Nation’s lands are threatened to be cut through by “development activities,” cited to in the EMRIP; prior and informed consent (FPIC) was never given by tribal members to state actors for these ominous impending developments beginning with the drawing of southern borderline during the Gadsden Purchase in 1854; the Tohono O’odham way of life, culture, and sacred religious sites are threatened by permanent inaccessibility, and the potential destruction of significant cultural and ceremonial activities spanning thousands of years.

The United States is still a permanent member of the United Nations, and therefore the United States government maintains

⁹³ U.N. HRC Expert Mechanism on the Rights of Indigenous Peoples [EMRIP], 10th Sess., Item 8 of provis. ag. U.N. DOC. A/HRC/EMRIP/2017/CRP.2 (July 10-14, 2017).

⁹⁴ *Id.*

social obligations under UN treaties and declarations. The 2016 EMRIP was reviewed by the UN committee during this 2017 report, and the following recommendation was provided by the committee:

The Declaration reaffirms and clarifies international human rights standards to ensure respect for indigenous peoples' right to self-determination, cultural rights, languages, land rights, natural resources, environmental protection, consultation and FPIC. Thus, recommendations and observations to States, seeking the implementation of Declaration rights, by UN agencies, treaty bodies, the UN Permanent Forum on Indigenous Issues ("UNPFII"), special procedures of the Human Rights Council, such as the UN Special Rapporteurs², working groups, and the Universal Periodic Review Mechanism ("UPR"), should be implemented.⁹⁵

The UN Human Rights Council has spent the last ten years working towards tackling the issue of access to justice and the enjoyment of basic human rights for indigenous peoples. The Declaration cites pointedly to the UN's role in *Poma Poma v. Peru*.⁹⁶ In *Poma Poma*, an indigenous author who owned farmland in rural Peru brought forth a complaint alleging that the State party violated Article 1, Section 2 on the International Covenant on Civil and Political Rights by diverting groundwater from her land, which then destroyed the ecosystem of her lands, degraded the lands, and dried out the surrounding wetlands.⁹⁷ In turn, Poma Poma asserted that the depletion of her community's natural resources caused thousands of livestock to perish, which was the indigenous community's only means of income and survival. Thus, the state party's access of the ground water through construction of wells depleted Poma Poma's community of their natural resources, and put the community in a position of peril.⁹⁸ The state party alleged that they had acted in accordance with the General Water Act when accessing the groundwater, in compliance with legislative decrees,

⁹⁵ *Id.*

⁹⁶ *Poma Poma v. Peru*, Views HRC, U.N. Doc. CCPR/C/95/D/1457/2006 (2009).

⁹⁷ *Id.*

⁹⁸ *Id.*

and in accordance to the Constitution and legislation in Peru.⁹⁹ When the matter was heard at the United Nations, the Committee found under Article 27 of the EMRIP that an indigenous author's rights were violated when infrastructure was implemented to divert water from the Aymara pasture land, ultimately removing her right to enjoy her culture and craft with members of her indigenous community.¹⁰⁰

Like the 2009 violation found in *Poma Poma*, the Tohono O'odham could potentially bring a petition for injunction to the UN Human Rights Council, arguing that implementation of a border wall would violate article 1, section 2 of the EMRIP, upholding environmental interests of indigenous peoples, and a presumptive violation of article 17, as the construction of a border wall would sever Tohono O'odham lands and has the potential to detrimentally impact Tohono O'odham culture and tribal customs forever.

VI. CONCLUSION

Since 1854, the Tohono O'odham Nation has been subjected to the turmoil of American fears and volatility without ever being consulted. From the Gadsden Purchase, through the height of the War on Terror and the enactment of more restrictive immigration measures under the broad umbrella of national security, to Trump's dream of building a 30-foot-steel border wall, the federal government's utilization of such waiver powers would significantly infringe upon the Nation's tribal sovereignty and destroy access to sacred ancestral lands, cultural touchstones, and inhibit the ability for tribal members to see loved ones on both side of the international border. Should Trump utilize such a waiver clause to bulldoze through the Nation's ancestral lands and wildlife refuges with a fortified-steel wall, the federal government will create just one more example of how this country has delegated itself loopholes to strip indigenous communities of their sacred lands and cause pain and suffering. As of publication of this article, construction has already begun through wildlife refuges and sacred indigenous lands at the southern border, and indigenous communities are seeing and feeling the immediate and devastating impacts.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

If Congress wants to move towards more positive steps with respect to environmental impact, the government must revise such waiver clauses to promote a system of holding the Attorney General and the Department of Homeland Security accountable when it comes to national security measures such as these. While it is possible that the UN Human Rights Council for the Expert Mechanism on the Rights of Indigenous People (EMRIP) could hear the Tohono O’odham nation’s petition and prevent the frivolous use of these federal waiver provisions, the powers being utilized by our federal government to circumvent democratic processes to build this wall are actively waiving the rights of our indigenous communities along the southern United States border. Countless times has our nation stripped indigenous communities of their lands, and with the construction of Tucson Projects 1-3, our country continues to promote a dangerous narrative.
