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“THE DESERT IS OUR HOME”

Kayla Molina*

Introduction

The U.S.–Mexico border divides the Tohono O’odham Nation in southern Arizona.¹ The Nation governs and provides services for its members on both sides of the countries’ borders.² It is the “second-largest [tribal nation] in the U.S., by land holdings—sit[ting] on an estimated 2.7 million acres in southern Arizona’s Sonoran Desert.”³ According to the Tohono O’odham, the Nation has “inhabited the lands of what is now central and southern Arizona and northern Sonora, Mexico since time immemorial.”⁴ Today, though, that Nation is divided by “75 miles of the U.S.–Mexico border, with tribal members residing on both sides of the border.”⁵ The Tohono O’odham people predate European colonialism, Mexico, and the United States.⁶ However, its territory is divided by an international border, placing it “on the front line of border issues for over 160 years.”⁷ As a place where two sovereigns meet (the Nation and the federal government), the Tohono O’odham Nation faces increased pressures on its sovereignty from the federal government—those of border enforcement and militarization. However, the border is, at best, an “imaginary line” where additional tensions of tribal sovereignty and the effects of climate change clash with those other objectives.⁸ The federal government and the Tohono O’odham Nation must develop more partnerships aligning with the self-determination values of the United

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1. Dianna M. Nájiz, *A Border Tribe, and the Wall That Will Divide It*, USA TODAY, <https://www.usatoday.com/story/tohono-oodham-nation-arizona-tribe/582487001/> (last visited Sept. 28, 2019).

2. *Id.*

3. *Id.*

4. Press Release, Tohono O’odham Nation Off. of the Chairman & Vice Chairman, Statement on President Trump’s Executive Order on Border Security (Jan. 26, 2017), <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/Press-Release-Statement-on-Border-Security-Executive-Order.pdf>.

5. *Id.*

6. *Id.*

7. *Id.*

8. Christina Leza, *Native Americans See Border as ‘Imaginary Line,’* SENTINEL-RECORD (Sept. 3, 2019, 4:00 AM), <https://www.hotsr.com/news/2019/sep/03/native-americans-see-border-as-imaginar/>.

Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It is possible to preserve the Nation's sovereignty and help bring a people together again as the federal government concerns itself with national security issues in the era of climate change.

The Tohono O'odham's unique geographic position and history made the reservation a focal point for borderlands historians. Historians continue to grapple with the reservation as a microcosm of national and international politics.⁹ Historians look back with 20/20 hindsight, while the law must look forward to the problems of the 2020s.

The latest affront to the Nation is the Trump Administration's push for a border wall. President Trump issued Executive Order 13767 on January 25, 2017, declaring that a border wall would be built.¹⁰ The president signed the order "without consultation with the Nation or many other border communities."¹¹ The Tohono O'odham responded: the "Nation does not support a large scale fortified wall, [but] it has worked closely for decades with U.S. Customs and Border Patrol [(CBP)] and other agencies to secure the U.S. homeland."¹² In response to the Executive Order, the Nation, as a "first responder on the border," invited the president to visit and participate in some "in depth discussions [to] be held on the impacts of such actions."¹³ The Trump Administration broke a decades-long tradition of the federal government and Tohono O'odham Nation working together on border enforcement.¹⁴ Despite the executive snub, the Nation remained committed to "its part to ensure the security of the U.S. border."¹⁵

Though members of the Nation reside on both sides of the border, the Nation does not have an open border. In fact, within the past few years, the Tribe "invested more than \$3 million annually of their own tribal funds to secure the U.S.–Mexico border and stemmed human trafficking and drug smuggling through partnerships with Border patrol."¹⁶ At least visually, the Tohono O'odham reservation interrupts the stark physical federal

9. Geraldo L. Cadava, *Borderlands of Modernity and Abandonment: The Lines Within Ambos Nogales and the Tohono O'odham Nation*, 98 J. AM. HIST. 362, 365 (2011).

10. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

11. Press Release, Tohono O'odham Nation Off. of the Chairman & Vice Chairman, *supra* note 4.

12. *Id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. Nández, *supra* note 1.

militarization of the 2000-mile-long border.¹⁷ However, that soon may change.

Life at the border exemplifies this microcosm concept. In 2014, Alex Soto, a Tohono O’odham Nation resident, described life at the border on the Tohono O’odham Nation as a “Berlin Wall-like” experience.¹⁸ When a Tohono O’odham Nation member crosses the Mexican-U.S. border, the CPB will demand documentation. But, scholars argue, demanding documentation “strikes at the heart of Indian sovereignty.”¹⁹ Even before the Trump Administration’s increased pressure on the border, the Tohono O’odham expressed that “[e]nhanced and restrictive border crossing[s] . . . [were] an assault on . . . the cultural integrity.”²⁰ The Tohono O’odham Nation offers all of its tribal members access to medical and other services.²¹ The Nation’s Mexican tribal members use the resources of the Tribe by traveling into the United States.²² However, new laws and regulations restrict the Mexican Tohono O’odham members’ access to those services²³ and “increase the level of danger for the indigenous. Those who continue to use traditional border crossing areas are in danger of being shot by U.S. Border Patrol personnel, U.S. military, or vigilante citizen groups.”²⁴

The Tohono O’odham Nation’s border reveals the incompatibility of building a border wall with the future problems that the Nation, Mexico, and the United States could face in the coming years. Climate change and militarization have gone hand-in-hand with the intensification of anti-immigrant sentiment. Additionally, the desert is a dynamic environment. While the physical environment has already changed over the past twenty years, climate change will likely bring even more radical and dangerous human and environmental changes in the future.

Four pillars heavily influence the development of the Tohono O’odham Nation: immigration concerns, climate change, militarization, and the Nation’s sovereignty. There are distinct tensions between each of these

17. See Cadava, *supra* note 9, at 362–63.

18. *Caught in the Crossfire: U.S.-Mexico Border Militarization Threatens Way of Life for Native Tribe*, DEMOCRACY NOW! (Mar. 14, 2014), http://www.democracynow.org/2014/3/14/caught_in_the_crossfire_us_mexico.

19. Eileen M. Luna-Firebaugh, *The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas*, WICAZO SA REV., Spring 2002, at 159, 159.

20. *Id.* at 160.

21. *Id.* at 159.

22. *Id.*

23. *Id.* at 160.

24. *Id.*

concerns. However, by balancing those concerns with distinct interplay in the joints of administrative agencies, taking the threat of climate change seriously, empowering the Tohono O’odham Nation to have access to all of their tribal members, and reducing the presence of the CBP, the United States can improve its own national security and commitment to the United Nations Declaration on the Rights of Indigenous Peoples.

This Comment will move forward by detailing, first, the history and present conditions of the Tohono O’odham peoples. Next, multiple sections will discuss the border wall, the physical environment, and the increased police presence of the Tohono O’odham peoples on the reservation. Finally, this paper will conclude with an analysis and policy proposal. The federal government and the Tohono O’odham Nation must develop more partnerships aligning with the values of the United Nations Declaration on the Rights of Indigenous Peoples; it is possible to preserve the Nation’s sovereignty and help bring a people together again as the federal government concerns itself with national security issues in the era of climate change.

I. The Tohono O’odham People and the Borderlands

A. A Brief History of the Tohono O’odham

The Tohono O’odham are a desert people—it is even in their name. “Tohono’o wud t-ki” translates as “The desert is our home.”²⁵ Throughout the southwest United States and into central Mexico, the Tohono O’odham people “occupied and practiced irrigation farming,” and were closely related to Pima and Papago throughout the southwest, all connected by a strong Uto-Aztecan language family.²⁶

25. Helen J. Ramon, *Tohono/Desert*, in *WHEN IT RAINS: TOHONO O’ODHAM AND PIMA POETRY* 52, 52–53 (Ofelia Zepeda ed., 2d ed. 2019). The English translation is:

The desert is our home.
There where saguaro are many,
Where greasewood is green,
Smelling nice.
The desert is cactus fruit,
Prickly pear, cholla, mesquite beans.
The desert is work, but for our good
The desert is for our good.

Id. at 53.

26. Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States About the Border: The Rhetoric and the Realities*, 5 *INTERCULTURAL HUM. RTS. L. REV.* 241, 291–92 (2010).

In 1821, Mexico gained independence from Spain.²⁷ Then, Mexico made all Native Americans Mexican citizens under its *Plan de Iguala*.²⁸ At the same time, Mexico required that all people apply for land grants from the government in order to “secure title to land.”²⁹ Spaniards quickly applied for these land grants to the Tohono O’odham lands.³⁰ At the same time, many Tohono O’odham tribal members did not apply for the grants or secure title to their lands on a large scale.³¹ The Nation’s lands within Mexican borders were largely subsumed by Spaniard (now Mexican) cattle ranchers.³² The Tohono O’odham “lack[ed] . . . notice and knowledge of new Mexican law” and were far from the centers of knowledge in early nineteenth-century Mexico.³³

In 1853, the United States bought 30,000 acres along the Gila River in the Gadsden Purchase,³⁴ which included approximately half of the Tohono O’odham traditional homelands.³⁵ The effect of overlaying an imaginary political line over the reservation devastated the Mexican O’odham peoples’ access to the northern side of the Nation.³⁶ However, O’odham Mexican citizens are full members of the Tribe.³⁷ Cut off from the northern side of the reservation, the Nation “adopted and enrolled the Mexican members in the tribe. The Mexican O’odham vote in tribal elections and receive services provided in the U.S. O’odham health clinic.”³⁸ Tohono O’odham on both sides of the border attempted to maintain their relationship as a single tribe. Up until the 1970s, buses crossed into Mexico just so the Mexican Tohono O’odham children could go to school on the northern side of the border.³⁹

27. Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O’odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT’L & COMPAR. L., no. 2, 1991, at 97, 98.

28. *Id.*

29. *Id.* at 99.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 98–99.

34. Luna-Firebaugh, *supra* note 19, at 166.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Courtney E. Ozer, Note, *Make It Right: The Case for Granting Tohono O’odham Nation Members U.S. Citizenship*, 16 GEO. IMMIGR. L.J. 705, 708 (2002).

The story of the Tohono O’odham in the United States took a decidedly different turn. Today, the Nation is federally recognized with 24,000 enrolled members.⁴⁰ This recognition gives the Nation rights to work both with and independently of the executive branch.⁴¹ These rights reflect a policy judgment by the federal government to preserve the integrity of the Tohono O’odham sovereignty.

Yet, around 7000 Tohono O’odham reside in Mexico; though “born in the U.S., [they] do not have a birth certificate to establish that fact.”⁴² Here, danger exists. In federal immigration law, being an immigrant has a negative implication; and people suspected of being immigrants must affirmatively prove that they are, in fact, citizens to the CPB. The Tohono O’odham, therefore, are under constant suspicion and subject to constant inspection by agents of the federal government.

B. The Border Wall

The Trump Administration is not the first administration to attempt to build a wall. Under the Obama Administration, the U.S. boundary enforcement budget went from “\$263 million in 1990 to \$3.8 billion in 2015.”⁴³ The Trump Administration’s focus on a physical wall is symbolic of more than populism and nationalism that won the election; it emphasizes the weaknesses of the federal protections for the Nation’s sovereignty based on agency discretions that can change with every new presidential term.

The Tohono O’odham Nation stands against the physical border wall and instead sees this wall as a threat to the sovereignty of the Nation.⁴⁴ The Vice Chairman stated that he would see a wall built “over [his] dead body.”⁴⁵ In 2010, scholar Gloria Valencia-Weber identified some practical problems of building a physical barrier in a community.⁴⁶ “[P]hysical barriers . . . [and] closing reservation gates [would] force tribal members to travel additional miles, 100 miles in some instances, to reach a processing gate.”⁴⁷ Essentially, Valencia-Weber posits that, “[w]hat is practical now with

40. *Id.* at 705.

41. Valencia-Weber & Lopez, *supra* note 26, at 293.

42. *Id.* at 292.

43. Juanita Sundberg, *The Nature of Border Control*, NACLA.ORG (May 12, 2017), <https://nacla.org/blog/2017/05/12/nature-border-control>.

44. Molly Hennessy-Fiske, *Arizona Tribe Refuses Trump’s Wall, but Agrees to Let Border Patrol Build Virtual Barrier*, L.A. TIMES (May 9, 2019, 5:00 AM), <https://www.latimes.com/nation/la-na-arizona-tribe-border-patrol-trump-wall-20190509-htmllstory.html>.

45. *Id.*

46. Valencia-Weber & Lopez, *supra* note 26, at 292.

47. *Id.* at 294.

walking will require a vehicle to visit family members and friends, to participate in the social and civil life of the community, and to access to [sic] services such as schools, health care, and agricultural resources.”⁴⁸

The legal recourse for Nation residents may be limited. The REAL ID Act exempts the executive branch from specific laws; however, it may not waive all constitutional protections. Sarah Krakoff, a University of Colorado Law School professor specializing in American Indian and natural resources law, argues that “[t]he U.S. has no power to assert eminent domain over tribal lands, so if that is raised as a way to complete the border wall, it will fail.”⁴⁹ Krakoff also argues that taking land from the Tribe to build a wall requires congressional approval, and that the “executive cannot do it on its own.”⁵⁰ Scholars are engaged in this problem and willing to address it head-on, unlike Congress.

One solution could be for the United States to adhere to the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP), a multinational agreement, on a moral and political basis that could force the Mexican, United States, and Tohono O’odham governments to work together. Such adherence could create a zone of interaction that gives the Tohono O’odham Nation freedom within its own traditional lands while respecting the external borders.⁵¹ As the United States increasingly focuses its resources to secure the border, this would create yet another internal border that adds another line between the Tohono O’odham U.S. citizens and the United States.

C. The Physical Landscape at the Border

Federal officials worried that fences would not actually inhibit the movement of people. However, it is possible that much of the impact of a physical border would be on the environment and wildlife at the border.⁵² There are some animals that would be at risk, in addition to the people.⁵³ Today, that border is mostly a political line whose firmness is continuously

48. *Id.*

49. *Experts Available for State of the Union News Interviews on Border Wall, Impeachment*, CU BOULDER TODAY (Feb. 5, 2019), <https://www.colorado.edu/today/2019/02/05/experts-available-state-union-news-interviews-border-wall-impeachment>.

50. *Id.*

51. Peter Heidepriem, *The Tohono O’odham Nation and the United States-Mexico Border*, 4 AM. INDIAN L.J. 107, 127 (2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1118&context=ailj>.

52. *Id.*

53. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12572 (Mar. 5, 2014).

renegotiated by CBP, the Nation, and both internal and external political forces. Yet, this political border leaves physical marks. Dividing a people has an indelible impact. In the case of the Tohono O'odham Nation, that impact is seen on the physical landscape even if, as of 2014, there was no "impermeable" fence in the areas designated as critical habitats.⁵⁴

Borders are not natural. They are products of war, diplomacy, and localized negotiations. Humans, unlike all other animals, may recognize borders' importance. However, wildlife near a border leads to a transnational existence: the Mexican lizard does not recognize when it crawls into the United States. The Mexican gray wolf and the Sonoran pronghorn roam the borderlands, crossing from Mexico and into California in search of food, water, and genetically diverse mates.⁵⁵ Because wildlife is a cultural and economic resource, a border wall will impede Tohono O'odham cultural and economic development.⁵⁶ Biologists and university professors argue that a "continuous border wall could disconnect more than 34% of U.S. non-flying native terrestrial and freshwater animal species . . . from the 50% or more of their range that lies south of the border."⁵⁷ Essentially, a wall would not only put currently endangered species at risk of extinction but would also place thriving animal populations at risk of becoming endangered.⁵⁸ Moreover, a wall that towers above the ground—the Trump Administration hopes to build a thirty-foot-tall wall for 2,000 miles—would block some low-flying bird species.⁵⁹ The Quino checkerspot butterfly is an endangered species that has difficulty surmounting a wall.⁶⁰ The Center for Biological Diversity argued in a 2017 lawsuit that a border wall would endanger already-endangered species and threaten those at risk.⁶¹

54. *Id.*

55. Robert Peters et al., *Nature Divided, Scientists United: U.S.-Mexico Border Wall Threatens Biodiversity and Binational Conservation*, 68 *BIOSCIENCE* 740, 740–41 (2018), <https://academic.oup.com/bioscience/article-pdf/68/10/740/26119313/biy063.pdf>.

56. *Id.* at 743.

57. *Id.* at 741.

58. *Id.*

59. Lucy Rodgers & Dominic Bailey, *Trump Wall – All You Need to Know About US Border in Seven Charts*, BBC NEWS (Sept. 27, 2019), <https://web.archive.org/web/20190930030733/https://www.bbc.com/news/world-us-canada-46824649>.

60. Peters et al., *supra* note 55, at 741.

61. Press Release, Ctr. for Biological Diversity, *Border Wall Prototype Lawsuit Expanded to Include San Diego Border Wall* (July 10, 2017), https://www.biologicaldiversity.org/news/press_releases/2017/border-wall-07-10-2017.php.

Physical barriers have different effects on different species depending on an animal's size, instincts, territorial behavior, and skittishness toward human-built things. The gray wolf, the Sonoran pronghorn, and the Quino checkerspot butterfly would each experience the border wall (or fence) in different ways.⁶² These ground animals and flying animals would have to reallocate territories for mating and food that have taken a millennium to develop, and the border wall threatens to “cut[] off mule deer, javelina, bighorn sheep, and the Sonoran pronghorn antelope from their food and water sources.”⁶³

A 2001 North American Congress on Latin America report stated that, since 1989, with an increased focus on the border and policing, “10,600 acres of Chihuahuan desert scrublands and Sonoran desert scrublands has [sic] been destroyed and an estimated 215,000 lizards, 6,000 birds, and 36,000 small mammals had been killed . . . primarily due to the construction of thousands of miles of roads” for police in the borderlands area.⁶⁴ However, when the Department of Homeland Security (DHS) absorbed the Immigration and Naturalization Service (INS), it failed to follow “up with supplemental environmental impact studies.”⁶⁵ Therefore, there is a lack of information within the agencies about what a border wall will mean for the physical environment.

In addition to abandoned environmental studies, the REAL ID Act, according to Tohono O'odham Nation's Vice Chairman Verlon Jones, stripped the Nation of its federal protections in the delicate desert environment.⁶⁶ The 2005 Act “effectively turned parts of the U.S.–Mexico border into a region without civil and environmental rights.”⁶⁷ DHS can, in its pursuit of border security, waive federal laws such as the Endangered Species Act, the Clean Air Act, the Native American Graves Protection and

62. Peters et al., *supra* note 55, at 741.

63. Myles Traphagen, *Local Opinion: Border Wall Will Destroy Quitobaquito Springs, a 'Gem of the Sonoran Desert,'* TUCSON.COM (Sept. 1, 2019), https://tucson.com/opinion/local/local-opinion-border-wall-will-destroy-quitobaquito-springs-a-gem/article_96a041da-8658-5270-a906-12e7ea5308b5.html.

64. Sundberg, *supra* note 43.

65. *Id.*

66. Jimmy Tobias, *The Little-Known Law That the Trump Administration Is Using to Build a Border Wall*, PAC. STANDARD (Jan. 21, 2019), <https://psmag.com/environment/the-little-known-law-that-the-trump-administration-is-using-to-build-a-border-wall>.

67. *Id.*

Repatriation Act, and the Safe Drinking Water Act.⁶⁸ Congress originally passed section 102 of the REAL ID Act in 2005 to give the Secretary of the DHS the opportunity to quickly build a wall in San Diego, unencumbered by restrictive environmental laws.⁶⁹

DHS's waivers to environmental laws "have only been used a handful of times since 2005, but the Trump Administration has now latched onto them as it seeks to build hundreds of miles of new wall[s]."⁷⁰ By January 2019, the administration had used five of those waivers.⁷¹ On January 22, 2018, Former Secretary of DHS Kirstjen Nielsen "waived approximately 20 laws . . . to build new border barriers."⁷² On October 10, 2018, Nielson waived "roughly 25 laws [to] build gates and new physical barriers."⁷³ On October 11, 2018, Nielson "bypassed another slew of laws to build 18 miles of 30-foot-high walls in Texas."⁷⁴

When the local land uses are controlled by distant forces lacking environmental information, the Tohono O'odham lose control over their own resources development. Residents in these areas convey the feeling that "no laws apply here . . . [p]eople should be outraged."⁷⁵

In addition to a lack of information about the borderlands' environment, DHS lacks information about the borderlands desert as an increasingly dynamic space in the age of climate change.⁷⁶ The reality of the borderlands, according to Stanford biologist Rodolfo Dirzo, is that it "is an ecological theater where evolution has engendered a plethora of plays," and "climatic conditions, topography, geological history, [and] soil types . . . converge to create an amazing mosaic of ecosystems."⁷⁷ That fragile mosaic is sometimes violently changing.⁷⁸

68. *Id.*; Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544; Clean Air Act, 42 U.S.C. §§ 7401–7671q; Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001-3013; Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26.

69. *Borderlands Policy*, E-PIC, http://www.enviro-pic.org/Enviro-pic.org/Policy_Border_wall_and_wildlife.html (last visited Oct. 3, 2019); Real ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (codified in scattered sections of 49 U.S.C.).

70. Tobias, *supra* note 66.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See Peters et al., *supra* note 55, at 740–41.

77. *Id.*

78. *Id.*

As the climate changes in unpredictable and often extreme ways, scientists, professors, and environmentalists advocate for increased focus on the borderland's biodiversity—a diversity at risk by the wall.⁷⁹ Biologists have called for action, stating that “construction of the wall and associated infrastructure, such as roads, lights, and operating bases, eliminates or degrades natural vegetation, kills animals directly or through habitat loss, fragments habitats[, and] . . . reduces habitat connectivity.”⁸⁰ The group proposed that Congress should condition waivers under the REAL ID Act, requiring: “adherence to all environmental laws”; that DHS “complete rigorous pre-planning and pre-implementation surveys to identify species, habitats, and ecological resources at risk”; that DHS should prioritize mitigation of possible “environmental harm resulting from projects”; and, finally, that DHS should make a positive effort to support scientific research by making Border Patrol Agents aware—versus immediately suspect—of field scientists.⁸¹ These proposals, though, do not incorporate the government's security concerns.

As evidenced by this conflict of concerns, without an obligatory mediation process, cooperative land management between the federal and tribal governments is sorely lacking.⁸² The black jaguar “roams the Southwest boundary region.”⁸³ This transboundary feline “cross[es] international and state borders as it seeks food, mates, and general habitat.”⁸⁴ The U.S. Endangered Species Act (ESA) classifies the jaguar as an endangered species.⁸⁵ In addition to the jaguar, the Peninsular big horn sheep would be prevented from crossing into its natural roaming area.⁸⁶ Even when the federal government is committed to protecting these endangered species, those concerns wane quickly by administrative priorities. The waivers and lack of cooperation endanger the existing physical environment.⁸⁷ In a call for action by the scientific community, a group of scientists, professors, and environmentalists argued that “construction of the wall and associated infrastructure . . . reduces habitat

79. Peters et al., *supra* note 55, at 742–43.

80. *Id.* at 740.

81. *Id.* at 742–43.

82. Kevin R. Kemper, *Environmental Information Policy and Secrets About Jaguars: Why Trusting Arizona Tribes Is the Best Strategy for Jaguar Protection*, 4 ARIZ. J. ENVTL. L. & POL'Y 187, 192 (2014).

83. *Id.* at 190.

84. *Id.*

85. *Id.*; see Endangered Species Act, 16 U.S.C. §§ 1531–1544.

86. Peters et al., *supra* note 55, at 740–41.

87. *Id.* at 740.

connectivity, erodes soils, changes fire regimes, and alters hydrological processes (for example by causing floods).”⁸⁸

The Tohono O’odham’s control over the land is an important consideration in a world of changing climates. Despite being “technically federally owned . . . [land-use] is decidedly more local in nature.”⁸⁹ Researchers suggest this is because of the “historic relations among O’odham on both sides, common usage[s] of the land, a narrower gap in the socio-economic status on both sides, and relative inaccessibility . . . to outsiders,” contributing to a “more consistent cross-border usage of the land.”⁹⁰ Today, the Arizonan O’odham are experiencing a resurgence in traditional farming, rejecting the federal government’s farming “modernization” projects.⁹¹ The experience is not shared by the O’odham on the Mexican side of the border because the Mexican government insists on “modernization” projects that promote a “use it or lose it” mentality.⁹²

The disparate incentives of Mexico and the United States have an indelible impact on the landscape.⁹³ A Landsat TM image (an imaging technology) comparison showed that there were distinct, overall tonal differences suggesting that the Sonoran (Mexican) side had more bare ground while there was greener land north of the border.⁹⁴ This is because the resurgence of traditional farming uses traditional knowledge and land-use developed over centuries by the Tohono O’odham.⁹⁵

Farming is not just a relic or local interest; it connects all Tohono O’odham. Multiple rivers run through the reservation, and any attempt to physically divide the river at the border creates distinct farming problems in the view of all Tohono O’odham.⁹⁶ In a desert environment, a river provides a rare source of fresh water.⁹⁷ Interruptions in that traditional source of water disrupt the Tohono O’odham in determining their own

88. *Id.*

89. Mariela Soto-Berelov & Kenneth D. Madsen, *Continuity and Distinction in Land Cover Across a Rural Stretch of the U.S.-Mexico Border*, 39 HUM. ECOLOGY 509, 516 (2011).

90. *Id.*

91. *Id.* at 517.

92. *Id.* at 516, 518.

93. *Id.* at 518.

94. *Id.*

95. *Id.*

96. Nellie Jo David, *Tohono O’odham Invaded By Border Patrol & Israeli Surveillance Tech*, REAL NEWS NETWORK (Sept. 4, 2019), <https://therealnews.com/stories/tohono-oodham-invaded-by-border-patrol-israeli-surveillance-tech>.

97. *Id.*

destinies and relationship with the environment.⁹⁸ One Tohono O’odham stated: “we still are farmers, but it’s a lot more difficult to navigate with the land and do ancestral farming when there’s a border that interferes with the water and interferes with how we’re doing the farming.”⁹⁹

Additionally, a border wall threatens culturally important parts of the environment. The border wall threatens to destroy Quitobaquito, a spring “still visited and used by indigenous groups, including the binational Tohono O’odham ceremonial salt pilgrimage.”¹⁰⁰ The Tohono O’odham view “[t]he Trump Administration’s decision to waive the Native American Graves Protection and Repatriation Act, as well as the American Indian Religious Freedom Act [as] an insult to indigenous peoples with deep cultural ties to the spring.”¹⁰¹

Moreover, the border walls would increase the threat of deadly flooding. In 2008, “a five-mile-long segment of 15-foot-high wire mesh fence trapped debris flowing through a natural wash during a 90-minute summer thunderstorm.”¹⁰² This short-lived summer shower caused “water to pool two-to-seven feet high.”¹⁰³ The border wall has consequences on both sides of the border. The storm also caused “millions of dollars in property damage in Nogales, Sonora on the Mexican side” of the border.¹⁰⁴ Then, “in 2014, the twin cities of Nogales flooded again after border barriers clogged with debris during a rainstorm.”¹⁰⁵

The Tohono O’odham barriers also place a disturbing barrier on the connections of a desert people to cultural heritage sites. Access to these sacred areas is essential, but the new restrictions on border crosses disturbed “access [to] sacred sites, especially south of the U.S. border, at which the cultural obligations and ceremonies must be performed.”¹⁰⁶ One scholar noted that “[f]or the tribal elders responsible for these ceremonies, the new restrictions and procedures are personally offensive and discouraging.”¹⁰⁷ Inspection at the border is invasive, and “in some

98. *Id.*

99. *Id.*

100. Traphagen, *supra* note 63.

101. *Id.*

102. Laura Parker, *6 Ways the Border Wall Could Disrupt the Environment*, NAT’L GEOGRAPHIC (Jan. 10, 2019), <https://www.nationalgeographic.com/environment/2019/01/how-trump-us-mexico-border-wall-could-impact-environment-wildlife-water/>.

103. *Id.*

104. *Id.*

105. *Id.*

106. Valencia-Weber & Lopez, *supra* note 26, at 295.

107. *Id.*

instances, destroys the sacred bundles of plant life and objects required for the ceremonies.”¹⁰⁸ Tohono O’odham handle the sacred bundles with extreme care, and “[e]xposure of and handling of this matter is restricted, and profane treatment can nullify their use for ceremonies.”¹⁰⁹

The REAL ID Act, which gives the CBP sweeping policing authority along the border, presents special problems to local governance and national environmental efforts. In response, Senators Tom Udall and Martin Heinrich attempted to “introduce[] three bills to protect the private property rights of residents and safeguard important habitat for wildlife, tribal interests, and religious freedoms” for New Mexico that would extend in application to areas across the borderlands.¹¹⁰ The first bill, entitled the “Full Fair and Complete Exchange Act,” would require the federal government to fully compensate all persons or entities whose land it thought needed to build the border infrastructure.¹¹¹ Until this was done, the proposed Act suggested the border wall could not be built.¹¹² The second act Udall intended to propose included a “Limitation on Border Infrastructure in Wildlife Areas” that would carefully consider environmental studies and “prohibit the construction of certain elements of the physical barrier along the southern border in national wildlife” areas.¹¹³ Finally, the third proposed act that Udall promised, the “Repealing the Vast Legal Waiver Authority for Construction of a Wall or Barriers along the Southern Border,” would “remove unprecedented authority [by DHS] to waive any and all federal laws for construction of border barriers and ensure that impacts . . . are analyzed and minimized.”¹¹⁴ By the time the senators made this proposal, “DHS ha[d] waived nearly 50 federal laws to

108. *Id.*

109. *Id.* at 295–96.

110. *Udall, Heinrich Introduce Bills to Safeguard NM Residents and Wildlife Against Trump Border Wall*, TOM UDALL: SENATOR FOR N.M. (Jan. 30, 2019), <https://www.tomudall.senate.gov/news/press-releases/udall-heinrich-introduce-bills-to-safeguard-nm-residents-and-wildlife-against-trump-border-wall>; see also “NM Senators Udall and Heinrich Introduce Legislation That Will Protect Border Wildlife and Communities from Broder Wall Construction,” SW. ENV’T CTR. (Jan. 31, 2019), <https://www.wildmesquite.org/node/1229>.

111. *Udall, Heinrich Introduce Bills to Safeguard NM Residents and Wildlife Against Trump Border Wall*, *supra* note 110; Full Fair and Complete Exchange Act of 2019, S. 263, 116th Cong. § 1 (2008).

112. *Udall, Heinrich Introduce Bills to Safeguard NM Residents and Wildlife Against Trump Border Wall*, *supra* note 110.

113. *Id.*

114. *Id.*

construct border barriers.”¹¹⁵ The Secretary of DHS would be prohibited from waiving any provision of “Federal law to facilitate the construction of any type of barrier along the border.”¹¹⁶ The bill would also benefit the nation and encourage Tribal economic development as the U.S. Fish and Wildlife Service estimates “hunting, fishing and wildlife-watching contributed nearly \$26 billion to border state economies in 2011.”¹¹⁷ Those benefits, according to Stanford biologist Ehrlich, would be lost.¹¹⁸

The problem of local governance implicates constitutional and policy-oriented solutions. One article proposed creating room for “[c]ooperative management” that could “be as simple as allowing tribes to regulate matters on tribal land.”¹¹⁹ The federal regulation of wild animals, thus far, has “survived constitutional challenge, as a ‘constitutional exercise of congressional power.’”¹²⁰ When it comes to tribes, one circuit court of appeals held that Congress “barred federal subject matter jurisdiction when tribes bring claims that involve statutes like [the Endangered Species Act].”¹²¹ Thus, if the federal government “adjusts habitats for jaguars in a way that harms the jaguars, [it] could commit an illegal taking.”¹²²

However, tribes in the U.S. work cooperatively with the EPA, giving tribes experience in managing wildlife. Native American tribes are familiar with the animals and the lands of their local environment and are more informed about having a unique sovereignty in the federal structure.¹²³ In *Anderson v. Evans*, the court held that federal environmental law applied to tribal lands.¹²⁴ “[W]hen reasonable conservation statutes affect Indian treaty rights: (1) the sovereign has jurisdiction in the area where the activity occurs; (2) the statute is non-discriminatory; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purpose.”¹²⁵

115. *Id.*

116. S. 254, 116th Cong. § 1 (2019).

117. Rob Jordan, *How Would a Border Wall Affect Wildlife?*, STAN. EARTH (July 24, 2018), <https://earth.stanford.edu/news/how-would-border-wall-affect-wildlife#gs.dgmrqg>.

118. *Id.*

119. Kemper, *supra* note 82, at 192; *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng’rs*, 619 F.3d 1289, 1294 (11th Cir. 2010).

120. Kemper, *supra* note 82, at 201.

121. *Id.* at 202; *Miccosukee Tribe of Indians of Fla.*, 619 F.3d 1289.

122. Kemper, *supra* note 82, at 202.

123. See Leo KILLSBACK, *The Legacy of Little Wolf: Rewriting and Rerighting Our Leaders Back into History*, WICAZO SA REV., Spring 2011, at 85, 87.

124. 371 F.3d 475, 480 (9th Cir. 2004).

125. *Id.* at 497 (Gould, J., concurring) (citing *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980)); Kemper, *supra* note 82, at 207 (quoting *Anderson*, 371 F.3d at 497).

As a result, the federal Marine Mammal Protection Act (an Act about marine mammal protection) could regulate the Makah Tribe's whale hunting.¹²⁶ Moreover, in *Anderson*, the court "held the federal government accountable for not completing an environmental impact statement under National Environmental Policy Act."¹²⁷ This meant that federal law could, at times, preempt tribal concerns and control over their lands, even when it comes to endangered species.¹²⁸

The Supreme Court prioritizes the ESA over treaty rights.¹²⁹ The Court continued this trend in *United States v. Dion* when it held that the Bald Eagle Protection Act could not be usurped by the 1858 Yankton Sioux Tribe treaty.¹³⁰ This holding demonstrates that the Supreme Court is hesitant to allow treaties, or even federal statutes, to be usurped by tribes.¹³¹ However, the Court limits its prioritization of the ESA to the federal government.¹³² Lastly, in *New Mexico v. Mescalero Apache Tribe* and *Worcester v. Georgia*, the Court has held that the states could not regulate wild animals on reservations.¹³³

Much of the federal government's concern with the border has resulted in an increased police presence.¹³⁴ In 2014, in a Final Comment in the *Federal Register*, executive agencies did not contemplate the possibility of a border wall.¹³⁵ In fact, DHS instead focused on intentionally creating relief valves that would divert illegal trafficking (and thereby increase enforcement) in strategic locations to allow for wild animals—the jaguar, especially—to cross uninhibitedly.¹³⁶ The federal government recognized that increased law enforcement presence could threaten the environment.¹³⁷ In the 2014 Final Rule, DHS committed to "special management considerations" that should continue to be voluntary.¹³⁸ However, DHS's

126. Kemper, *supra* note 82, at 207; 16 U.S.C. §§ 1361–1421(h).

127. Kemper, *supra* note 82, at 207 (citing *Anderson*, 371 F.3d at 501).

128. *See id.*

129. *See id.*

130. 476 U.S. 734, 745 (1986).

131. Kemper, *supra* note 82, at 207.

132. *Id.* at 210. This section details the history of the Court and state regulation.

133. *Id.*; *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983). *See generally Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

134. Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12572, 12588 (Mar. 5, 2014).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

Final Rule contemplated “future national security issues” that could “require additional measures” when the “Secretary . . . invokes the waiver [of ESA compliance].”¹³⁹

However, because of the “trust relationship between the United States and Native Americans, a significant number of tribal activities involve federal funding or oversight that serve as a nexus for section 7 consultation.”¹⁴⁰ Thus,

[w]here critical habitat is designated on Tribal lands, many projects will have a Federal nexus for section 7 consultation. Communication with the Tohono O’odham Nation did not identify any specific, planned projects that may result in section 7 consultation. We are also not aware of any previous section 7 consultations regarding activities on Tohono O’odham Nation lands. However, given the likelihood of a Federal nexus and the proposal to designate unoccupied critical habitat on Tohono O’odham lands, the Tohono O’odham Nation could have incurred incremental administrative impacts as a result of the designation. Costs associated with one fully incremental formal consultation considering adverse modification of critical habitat are expected to be \$20,000, of which \$3,500 could be incurred by the Tohono O’odham Nation. However, the Secretary has used her discretion to exclude the Tohono O’odham Nation based on our ongoing and effective working partnership with the Tohono O’odham Nation to promote the conservation of listed species, including the jaguar and its habitat.¹⁴¹

DHS essentially posited that, where the Nation and the federal government interact, there is interplay within the joints of the statutes, allowing for cost-saving features that benefit the Nation and efficiency savings that benefit the agency.¹⁴² This amounts to a space where concessions can be made, albeit in a somewhat less formal way.

DHS works within the labyrinth of executive orders and statutes attempting to balance the interests of tribes and the federal government. Together, the Secretarial Order 3206, the “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities,” and the ESA require that “critical habitat shall not be designated in areas that may impact tribal trust

139. *Id.*

140. *Id.* at 12600.

141. *Id.* at 12600–01.

142. *Id.* at 12601.

resources, may impact tribally owned fee lands, or are used to exercise tribal rights unless it is determined essential to conserve a listed species.”¹⁴³ Moreover, DHS states that “in designating critical habitat, the Service shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.”¹⁴⁴

Despite tensions between various administrative agencies (DHS and the EPA) and the Nation, the agencies do work with the Tohono O’odham. The Department of the Interior stated that it will “continue to work with the Tohono O’odham Nation and the Bureau of Indian Affairs (BIA) on wildlife and plant-related projects, including recovery efforts for Sonoran pronghorn and jaguar, as well as surveys and monitoring for Pima pineapple cactus, jaguar, ocelot, lesser long-nosed bat, and cactus ferruginous pygmy owls” in light of proposed changes with both the border wall plans.¹⁴⁵ DHS reinforces its commitment to “establish[] and maintain a cooperative working relationship with the Tohono O’odham Nation and the BIA when they request review of environmental assessments, seek technical advice, and conduct consultations for Tohono O’odham Nation projects.”¹⁴⁶ Whenever a project by either the Nation or the federal government begins, a survey is typically performed by the Department of the Interior for “any listed species [that] are conducted by the BIA or Tohono O’odham Nation personnel prior to implementation of projects.”¹⁴⁷ This commitment should complement the discontinuation of the environmental surveys that the Immigration and Naturalization Service performed. However, “[i]n April of 2003, the Tohono O’odham Nation and the Service signed a Statement of Relationship, which indicate[d that] the Tohono O’odham Nation, through its Natural Resources Department, will work in close collaboration with the Service to provide effective protections for listed species.”¹⁴⁸ This close relationship remained largely an informal one.

The Environmental Protection Agency (EPA) leaned toward excluding the Tohono O’odham Nation from “critical habitat designation.”¹⁴⁹ Avoiding official designations allows DHS to give “deference to tribes to develop and implement tribal conservation and natural resource

143. *Id.* at 12602.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 12604.

management plans for their lands and resources . . . and the preservation of [the EPA's] cooperative partnership with the Tohono O'odham Nation."¹⁵⁰ The Nation and the EPA "established and maintain a cooperative conservation partnership for . . . several . . . listed species that occur on the Nation's lands."¹⁵¹ However, non-designation is a double-edged sword; it gives the EPA and the Nation more room to work informally while the executive is considerably less restrained than in areas where those designations may exist.

Already, the Tohono O'odham Nation and the federal government cooperate on specific projects. The Jaguar Recovery Team exhibits the partnerships possible between the EPA, the United States Fish and Wildlife Service (hereinafter, Service), and the Nation.¹⁵² The partnership operated between the EPA and a tribal-appointed representative.¹⁵³ Independent from the partnership, the Nation developed its own "jaguar management plan."¹⁵⁴ Yet, the Nation's own management plan contemplated Service cooperation, as it "cannot consider draft management plans for exclusions, [and] this plan demonstrates the Nations cooperative conservation partnership with the Service and their commitment to jaguar conservation."¹⁵⁵ The Nation and the Service actively worked together to "develop a memorandum of agreement to conduct a jaguar survey and monitoring study as identified in the 2012 Jaguar Recovery Outline."¹⁵⁶ Importantly, the Nation began developing these plans not only to be in compliance with the EPA but also in an attempt to retain tribal sovereignty by preemptively conforming to federal programs and rules.¹⁵⁷ Further, the Nation's "survey and monitoring plan is consistent with an approved study plan currently under contract with the Service."¹⁵⁸ Increased preemptive cooperation for the Nation often serves two functions: to address local problems and to defend tribal sovereignty.

In addition to working with the federal government to protect endangered species, the Nation adds to the EPA's surveys.¹⁵⁹ These include

150. *Id.* at 12603.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

the “culturally-sensitive species (such as the cactus ferruginous pygmy-owl)” that could be in danger because of the federal government’s border plans.¹⁶⁰ These culturally sensitive animals represent that the Nation and the federal government’s valuation of different species will not always align.¹⁶¹

For the Nation, the ability to work with federal agencies is a tenuous retention of its sovereignty to preserve those species uniquely important to the Tribe. The Tribe and the agencies “established a working relationship with the Tohono O’odham Nation through informal and formal meetings that offered information sharing and technical advice and assistance.”¹⁶² Specifically, this model relationship is seen where the Nation “recommended conservation measures for the [jaguar] species and its habitat.”¹⁶³ These proactive plans were made in accordance with the “Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997); the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2); and Secretarial Order 3317, Department of Interior Policy on Consultation with Indian Tribes (December 1, 2011).”¹⁶⁴ The agencies benefited from this relationship by continually “recogniz[ing] and endors[ing] their fundamental right to provide for tribal resource management activities, including those relating to jaguar habitat.”¹⁶⁵

These informal networks help the Nation retain a tenuous relationship with the federal government and control over its own resources.¹⁶⁶ The Nation feared that if its lands were designated as a critical habitat, then that designation could “adversely impact [the] working relationship” after years of working on informal relationships between the EPA and the Nation.¹⁶⁷ As the EPA moved through rulemaking in 2014 to designate certain habitats as critical, it received letters “inform[ing it] that the designation of critical habitat on tribal land would be viewed as an intrusion on their sovereign ability to manage natural resources in accordance with their own policies, customs, and laws.”¹⁶⁸ Not only was the Nation concerned about “perceived future restrictions (whether realized or not)” affecting

160. *Id.*

161. *Id.* at 12604.

162. *Id.* at 12603.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 12603–04.

167. *Id.* at 12603.

168. *Id.* at 12604.

sovereignty, but the EPA also worried that it may “have a damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the jaguar and other species.”¹⁶⁹ Like the EPA, the Nation agreed that it “would prefer to work with [the federal government] on a [more formal] government-to-government basis.”¹⁷⁰ The EPA insisted that the “working relationship with the Tohono O’odham Nation would be better maintained and more effective if they are excluded from the designation of critical habitat for the jaguar.”¹⁷¹ The key between the EPA and the Nation is an ability to cover more species and integrate “continued cooperation and development of data-sharing and management plans for this and other listed species.”¹⁷² The EPA explained that:

If this area is designated as critical habitat, the government-to-government relationship we have with the Tohono O’odham Nation will be damaged and this situation will affect the Service’s opportunities to assist the Tohono O’odham Nation with technical reviews, voluntary consultations, and data sharing. We view such opportunities as a substantial benefit since we have developed a cooperative working relationship with the Tohono O’odham Nation for the mutual benefit of jaguar conservation and other endangered and threatened species.¹⁷³

The EPA remained resolute that so long as it and the Nation could work together within the spaces of agency discretion, they could forego the more formalized rules.¹⁷⁴ Retaining agency discretion requires that neither Congress nor the heads of agencies revoke that discretionary movement. It also requires that the Nation be adaptable to the changes in agencies as well.

Moreover, the current border walls do not work. Border walls fail on a regular basis to prevent people from crossing the border.¹⁷⁵ Although the

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Elliot Hannon, *Smugglers Are Using \$100 Hardware Store Power Tools to Saw Holes in Trump’s \$10 Billion Wall*, SLATE.COM (Nov. 2, 2019, 11:04 AM), <https://slate.com/news-and-politics/2019/11/smugglers-usd100-hardware-store-power-tools-saw-holes-in-trumps-usd10-billion-wall.html>; Tal Axelrod, *Smuggling Gangs Have Sawed Through New Portions of Trump Border Wall: Report*, THE HILL (Nov. 2, 2019, 11:16 AM),

walls are barriers, they remain surmountable obstacles with minimal creativity.¹⁷⁶ In November of 2019, media outlets reported that “Mexican smuggling gangs have repeatedly sawed through new sections of President Trump’s border wall with commonly available power tools.”¹⁷⁷ A wall does, however, prevent animals from crossing the border in pursuit of food, water, and mates.¹⁷⁸ Although walls may not prevent physical crossings, the increased focus on walls and increased border security has real impacts on people on both sides of the border.

D. Mexican Tohono O’odham Tribal Members Coming into and Leaving the United States

The Mexican Tohono O’odham people occupy a peculiar place in the U.S. immigration regulatory framework. Because the Mexican Tohono O’odham people are Mexican citizens, they are presumed to be required to meet the same immigration criteria.¹⁷⁹ This presumption followed a long history in U.S. immigration that meant adding “extremely narrow qualitative restrictions to additional qualitative restrictions” for immigrants and then later to “ethnic [restrictions], and eventually to quantitative restrictions.”¹⁸⁰

The Tohono O’odham are like many other Native American tribes whose lands were divided by colonizers.¹⁸¹ Like the Tohono O’odham, many of the surviving tribes “are [located] in isolated rural areas and some live in climates that produce death for the inadequately prepared migrants who attempt to cross through the southwestern deserts.”¹⁸² These lands are not particularly attractive to colonizers. As a result, the Tohono O’odham and other similarly situated tribes were in the unique position of being mostly left alone, until the borderlands became a site of focused political tension.¹⁸³

Yet for much of the Tohono O’odham’s United States experience, the “official and the informal practices at the southern border generally accommodated the ordinary life needs.”¹⁸⁴ These everyday needs to cross

<https://thehill.com/latino/468671-smuggling-gangs-have-sawed-through-new-portions-of-trump-border-wall-report#.Xb2iK1J8aAU.twitter>.

176. Axelrod, *supra* note 175.

177. *Id.*

178. Sundberg, *supra* note 43.

179. *See generally* RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:1 (2019).

180. *Id.*

181. Valencia-Weber & Lopez, *supra* note 26, at 290.

182. *Id.*

183. *Id.*

184. *Id.* at 288.

the border included: seeing family and friends; attending U.S. schools; “obtaining medical services at facilities on either side; participating in cultural ceremonies at sacred sites on both sides of the border; and participating in community meetings and political events such as voting, which for U.S. federally recognized tribes occurs on the U.S. side.”¹⁸⁵ The right to continue engaging in these everyday activities is considered a basic human right that treaties and new laws recognize in “emerging international law that pertains to indigenous peoples.”¹⁸⁶

The Tohono O’odham Nation depended on the free movement of its tribal members throughout the twentieth century for its cultural development. In 1916, four Tohono O’odham schools were established on the United States’ side of the reservation.¹⁸⁷ It was common practice “[i]nto the 1970s . . . to send the school bus from the north side to the south side of the border to pick up member children to attend the schools located on the U.S. side.”¹⁸⁸ “[E]veryday life of members has always required free access to cross the border, which recently became complicated and restricted.”¹⁸⁹ Freedom of movement connected a people divided by a political boundary.

But as the twentieth century progressed, the border became less porous, and so too the Tohono O’odham Nation further divided. The increased “bureaucratic procedural and physical barriers provoke emotions anchored in cultural identity. They are experienced as insults to the tribe’s sovereignty and as the denial of core human rights involving family and community relationships.”¹⁹⁰ The Nation perceives these hurdles as obstructions to its fundamental rights to provide services for its own people.¹⁹¹

The unique geographic position of the Tohono O’odham and their cultural cohesion directly clash with the federal government’s desire to strengthen the border.¹⁹² Importantly, the “historical experience of the Tohono O’odham demonstrates the interference with community life that is critical for maintaining their culturally distinct sovereignty.”¹⁹³ A border imposed by two sovereigns other than the Tohono O’odham Nation is one

185. *Id.* at 289.

186. *Id.*

187. *Id.* at 294.

188. *Id.*

189. *Id.*

190. *Id.* at 291.

191. *Id.*

192. *Id.*

193. *Id.*

that divides a people in an impactful way. Around 1400 Mexican-born Tohono O’odham “are subject to demands for an immigration visa required of foreign nationals.”¹⁹⁴ Then, after the 9/11 terrorist attacks, the birthplace and certificate questions became significant “sources of problems.”¹⁹⁵ Now, for the past twenty years, the Tohono O’odham have become the focus of the U.S. Customs and Border Patrol (CBP).

However, the Tohono O’odham Nation’s seventy-five-mile stretch of the border cannot be abstractly removed from the context of the other 2,000 miles of the U.S.–Mexico border. The borderlands are a site of increasing militarization, where the government tends to create pressure points and relief points for illegal immigration flow through its immigration enforcement. For example, “extensive barriers and added enforcement officers at the western part of the border, such as the San Diego area, have pushed the undocumented flow eastward with negative consequences.”¹⁹⁶ The result has been an “increased flow of migrants . . . in harrowing risky experiences in the Tohono O’odham desert.”¹⁹⁷ Both migrant and Tohono O’odham deaths resulted after the Nation became a site of crossing.¹⁹⁸ Noticing what may become a pressure valve, “DHS has essentially invaded tribal lands and built facilities on tribal lands. They have treated the tribal members as ‘illegals’ when [members] cannot provide the documentation that ICE officers demand.”¹⁹⁹ The role of the Tohono O’odham Nation as a site of increased illegal immigration is a direct product of the federal government’s own policies to tamp down immigration elsewhere.²⁰⁰

The Tohono O’odham Nation is not only a site for increased illegal immigration, but its members are subject to immigration laws. Four categories of Tohono O’odham members facing new regulations include: “[1] Members born in the U.S., but unable to prove this; [2] Members born and residing south of the U.S. border; [3] Members born south of the border and now living in the U.S. without documents; and [4] Members who are the children of U.S. citizens” with undocumented births.²⁰¹ These are particularly problematic because the rules create a presumption that Tohono O’odham members are Mexican citizens and thus must affirmatively prove

194. *Id.* at 292.

195. *Id.*

196. *Id.* at 298.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 296.

their United States citizenship.²⁰² As a site of increased militarization, the Tohono O’odham people are immediately suspect, which creates an atmosphere of constant surveillance as the CBP increases its presence along the border.

Moreover, the Tohono O’odham tribal membership documents are no longer sufficient for its southern members to cross onto the northern side of the Nation, nor are these documents sufficient to satisfy the CBP.²⁰³ Now, essentially all Tohono O’odham members must have proof of their “U.S. citizenship, a passport or a federal border-crossing permit” when they “depart and enter the U.S.”²⁰⁴ Should a Tohono O’odham member lack one of those U.S. citizenship-proving documents, he or she can be presumed a Mexican citizen.²⁰⁵ However, this unique interpretation of the Immigration and Nationality Act (INA) deviates from the usual investigation process.²⁰⁶ The burden of proof is usually on the INS to prove, with clear and convincing evidence, that a person in deportation proceedings is a noncitizen.²⁰⁷ But for the Tohono O’odham Nation, this burden is reversed.²⁰⁸ A Mexican member must have a visa as a foreign national.²⁰⁹ Should a Tohono O’odham member lack an identifying document, he or she could be “categorized as an alien, unlawfully present in the U.S. All these requirements are counter to the understandings that the tribe, historically, had in its nation-to-nation relationship with the U.S.”²¹⁰ The CBP thus views each Tohono O’odham member suspiciously; each member carries a possible presumption of being illegally present within the United States while on the Nation’s lands.²¹¹

The most persistent danger for the Tohono O’odham is the federal government; particularly dangerous is the government’s CBP actors labeling tribal members as un-American. The debate surrounding the cross-border movement and “framing the issue as one of the problems of so-called illegal aliens conjures up images of criminal behavior, rather than migration of people for a myriad of reasons.”²¹² The rhetoric around

202. *Id.*

203. *Id.* at 297.

204. *Id.*; see also Immigration and Nationality Act, 8 U.S.C. § 1185.

205. Valencia-Weber & Lopez, *supra* note 26, at 297.

206. See *id.*; 8 U.S.C. § 1182.

207. Valencia-Weber & Lopez, *supra* note 26, at 297.

208. *Id.*

209. *Id.*

210. *Id.*

211. See *id.*

212. *Id.* at 248.

immigration is important because if “the metaphor is of a Mexican ‘invasion’ the political and legal connections make one think of war or occupations” and that “legal connection is a connection to lawlessness” where “[t]he primary audience is on the U.S. side of the border and the emotional response invoked is likely to be fear.”²¹³ Fear and suspicion of these communities on the border, in turn, pervade enforcement through the CBP’s agents.

The presence of so many Mexican Tohono O’odham (and around 7000 members whose birthplace is harder to discern) and the increased focus on the reservation as a place of possible illegal immigration by the CBP created a reservation where every resident is inherently suspect. In *United States v. Sam*, the Arizona district court wrote that “[m]embers of the Tohono O’odham Nation who are not United States citizens are allowed to be present upon reservation land in the United States but do not have permission to travel further into the United States.”²¹⁴ Still, the federal government and the Nation would attempt to accommodate travel between the northern and southern sides of the border.

E. The Enhanced Tribal ID Cards Allowing Tohono O’odham to Travel

The federal government recognized the Mexican Tohono O’odham people should be able to cross into the United States. Usually, “[i]dentification laws and policies often operate at the expense of indigenous groups.”²¹⁵ Immigration policies and Native American communities are interwoven because the “ability of those groups to cross the border relatively unhindered to access the other portions of their lands and community are gravely affected by immigration issues, as well as practices at the border.”²¹⁶

The reality of enforcement and the tension between a peoples’ need to be together often put border communities at risk of the worst effects of intense enforcement.²¹⁷ Some states authorized local “law enforcement to target populations that appear to be of Hispanic descent for questioning about

213. *Id.* at 250.

214. *United States v. Sam*, No. CR-16-00436-001-PHX-GMS, 2017 WL 3283393, at *2 (D. Ariz. Aug. 2, 2017), *aff’d*, 751 F. App’x 1023 (9th Cir. 2019).

215. Sara Daly, Comment, *Bordering on Discrimination: Effects of Immigration Policies/Legislation on Indigenous Peoples in the United States and Mexico*, 38 AM. INDIAN L. REV. 157, 157 (2013-2014).

216. *Id.*

217. *See id.* at 157–58.

immigration status, creating a hostile environment.”²¹⁸ Onlookers “suggest[ed] that immigration laws and policies extensively affect indigenous groups” in pervasive and pernicious ways.²¹⁹

There exists around 7000 Tohono O’odham who are “Mexican-born, born outside of hospitals, or otherwise without proof of being born within the United States.”²²⁰ A divided people with a right to access Tribal resources presents special problems with the heightened Western Hemisphere Travel Initiative (WHTI) proof requirements. The Tohono O’odham’s “[l]arge membership combined with the WHTI documentation requirements could deny a great portion of the population border access without a new program.”²²¹ However, there is one mitigating program: the “Enhanced Tribal IDs.”²²² The program allows the Nation to “control access to borderlands instead of the federal government solely controlling border access” by allowing approval of the Enhanced Tribal IDs to go through the Nation.²²³

DHS began the new program as an enhanced ID card intended to be “better than a passport.”²²⁴ The enhanced ID cards are part of the WHTI compliance efforts by the United States.²²⁵ DHS created the Western Hemisphere Travel Initiative “after recommendations from the 9/11 Commission” for increased security measures while also balancing the needs of an increasingly mobile world.²²⁶ The WHTI conforms with the congressional mandate of “requiring some documentation” of previously exempted groups, including “citizens of the United States, Canada[,] and Bermuda.”²²⁷

218. *Id.* at 158.

219. *Id.*

220. *Id.* at 179.

221. *Id.*; Western Hemisphere Travel Initiative (WHTI), 8 C.F.R. § 212 (2009).

222. Daly, *supra* note 215, at 179.

223. *Id.*

224. ICT Editorial Team, *Don’t Leave Home Without It: Enhanced Tribal ID Can Be Used Instead of Passport*, INDIAN COUNTRY TODAY (Mar. 23, 2011), <https://newsmaven.io/indiancountrytoday/archive/he-s-talking-about-the-first-in-the-nation-creation-of-an-enhanced-tribal-id-card-the-key-part-of-a-MwmNcdIDqUuQqEdJ22qx5w/>.

225. *Western Hemisphere Travel Initiative (WHTI) Frequently Asked Questions*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/us-citizens/western-hemisphere-travel-initiative/faqs> (last visited Oct. 1, 2020).

226. Daly, *supra* note 215, at 168.

227. *Id.*

The WHTI imposed increased requirements that “strengthen[ed] the infrastructure to support an integrated tribal ID system.”²²⁸ In 2009, DHS approved an “Enhanced Tribal ID Card” that included an RFID microchip and was compliant with the Western Hemisphere Travel Initiative.²²⁹ The WHTI was “the impetus for the creation of the Enhanced Tribal ID, and could eventually, with diligent training and leadership, lead to universally recognized IDs for all federally recognized tribe members.”²³⁰

The Tohono O’odham are working with DHS to help Tribe members acquire ETCs.²³¹ The WHTI went into effect in 2009.²³² After 2009, Tohono O’odham could “cross the border using tribal documents” and an “attached photo, and thereafter were required to have either an ETC or other approved identification form (U.S. passport, passport card, enhanced driver’s license, trusted traveler program identification, etc.).”²³³

The Tohono O’odham Nation also committed to complying with the ETC program, as it attempted to preemptively comply with environmental regulations. In 2019, the Tohono O’odham Nation planned to expend \$289,068.36 on the FY 2019 ETC Budget.²³⁴

F. A Nation Surveilled

The political border that crosses the Tohono O’odham Nation also created a heavily surveilled Native American nation, showing that Michele Foucault’s panopticon is alive and well in Tohono lands.²³⁵ Even before the Trump Administration, the Tohono O’odham was a surveilled nation.

The Tohono O’odham people’s experience is precarious, fraught with constant surveillance.²³⁶ Clarisa Christiansen, a Tohono O’odham

228. *Id.*; Western Hemisphere Travel Initiative (WHTI), 8 C.F.R. § 212 (2009).

229. Alice Lipowicz, *DHS Approves Enhanced Tribal ID Cards*, FCW (Nov. 4, 2009), <https://fcw.com/articles/2009/11/04/dhs-approves-enhanced-tribal-id-cards.aspx>.

230. Daly, *supra* note 215, at 168.

231. *Id.* at 178.

232. *Id.* at 179.

233. *Id.*

234. Tohono O’odham Leg. Council Res. 19-185, 2019 Leg. (Tohono O’odham 2019), <https://tolc-nsn.org/docs/Actions19/19185.pdf>.

235. Will Parrish, *The U.S. Border Patrol and an Israeli Military Contractor Are Putting a Native American Reservation Under “Persistent Surveillance,”* THE INTERCEPT (Aug. 25, 2019, 10:00 AM), <https://theintercept.com/2019/08/25/border-patrol-israel-elbit-surveillance/>; see MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan ed. & trans., 1979) (defining the panopticon as an ideal form of surveillance).

236. JAMES LYALL ET AL., AM. CIV. LIBERTIES UNION, RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL’S INTERIOR ENFORCEMENT OPERATIONS 13 (2015).

reservation resident, recounted multiple troubling experiences.²³⁷ Christiansen recounts in an article that “[b]order [p]atrol agents around here roam our country roads, supposedly on the watch for migrants and drug-runners that sneak across the border. A few times before this particular incident agents had followed me and my kids, in my soccer mom van, for no reason I know.”²³⁸ Then she was pulled over.²³⁹ The agent asked Christiansen if she was an American citizen.²⁴⁰ Christiansen asked why she was pulled over, but the agent refused to answer.²⁴¹ Then, the agent “opened [her] door, pulled out a knife, and holding it against [her] seat belt, he shouted at [her], ‘Ma’am, do I need to cut you out of your seatbelt?’ Then he reached into the car and grabbed [her] keys.”²⁴²

Ostensibly, the reasoning behind the CBP’s intensified patrols along the border seems to be that the Tohono O’odham appears to serve as a thoroughfare for illegal immigrant crossings and the drug trade; stories pervade local and national news.²⁴³ The ACLU even reported that one Tohono O’odham resident, Ernestine Josemaria, “was stopped by Border Patrol without cause, assaulted, and subjected to an unlawful search and seizure.”²⁴⁴ Additionally, she “has heard many stories of other Tohono O’odham subjected to similar abuse and mistreatment by U.S. Border Patrol.”²⁴⁵

In 2010, the National Drug Intelligence Center, now a part of the Drug Enforcement Agency (DEA), perceived the Tohono O’odham Nation as a place where drug smugglers could have more freedom to cross the

237. See Clarisa Christiansen, *Why Is the U.S. Border Patrol Terrorizing Innocent Families?*, ACLU (Apr. 3, 2014, 11:11 AM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/why-us-border-patrol-terrorizing-innocent?redirect=blog/why-us-border-patrol-terrorizing-innocent-families>.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. See Curt Prendergast, *As Retrial Decision Looms, Border-Aid Worker’s Human-Smuggling Case Stands Out*, TUCSON.COM (June 30, 2019), https://tucson.com/news/local/as-retrial-decision-looms-border-aid-worker-s-human-smuggling/article_3dea63e3-e8ac-5849-a793-24d40ba3b60f.html.

244. Letter from Am. Civil Liberties Union to Charles K. Edwards & Tamara Kessler, Dep’t of Homeland Sec. (Oct. 9, 2013), <https://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%2009%202013.pdf>.

245. *Id.*

border.²⁴⁶ The NDIC reported that the reservation was “a primary entry point and transit zone for illicit drugs and related criminal activity in the . . . region.”²⁴⁷ The NDIC identified the primary issues as the “[v]ast stretches of remote and sparsely populated desert on the reservation” that are “mostly unprotected and difficult for law enforcement to adequately patrol.”²⁴⁸ A major contributor of drugs on the Nation’s lands though came from members themselves.²⁴⁹ In fact, the federal government estimated that Tohono O’odham committed around “30% of the drug trafficking between 2004 and 2009” themselves.²⁵⁰ Although U.S. citizens may be responsible for much of the drug trafficking, the DEA focused on the Tohono O’odham Nation as a site primarily controlled by the Sinaloa Cartel—a Mexican cartel.²⁵¹ The Sinaloa Cartel “employs different methods of smuggling, from the basic backpack, to concealing illegal drugs within produce, using drones, catapults, even to the use of their infamous tunnels.”²⁵² The federal government further worries about the temptation for members to help drug traffickers because of the 31.6% unemployment rate on the reservation.²⁵³ Not only are Tohono O’odham Nation members suspected of being Mexican citizens, but they are also presumed to be uniquely tempted into lawlessness.²⁵⁴

Perhaps from the increased enforcement, the reasons behind the federal government’s enforcement policies decreased significantly. When the Nation and the CBP partnered, the rates of illegal immigration decreased.²⁵⁵ However, drug trafficking remained problematic.²⁵⁶ To combat the influx, a co-dependency between the CBP and the Tohono O’odham Police Force

246. Alejandro Ahumada, *Mexican Transnational Criminal Organizations’ Exploitation of the Sonoran Desert and the Tohono O’odham Nation*, INST. WORLD POL. (Sept. 8, 2019), <https://www.iwp.edu/active-measures/2019/09/08/mexican-transnational-criminal-organizations-exploitation-of-the-sonoran-desert-and-the-tohono-oodham-nation/>.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *See id.*

255. Tim Vanderpool, *Tribe Uneasy About Border Surveillance Plans on Their Land*, YES! MAG. (Jan. 27, 2017), <https://www.yesmagazine.org/people-power/tribe-uneasy-about-border-surveillance-plans-on-their-land-20170127>.

256. *Id.*

developed.²⁵⁷ Local law enforcement and the U.S. Border Patrol worked together to “seize a yearly average of about 300,000 pounds of illegal drugs on the reservation.”²⁵⁸ The success suggested that the Tohono O’odham Nation was better equipped with local knowledge, and the federal government was better equipped with resources to use that knowledge.²⁵⁹ However, there remain legitimate law enforcement challenges.²⁶⁰

As the fight against a physical wall persisted, the federal government opted for a more permeable solution. In 2019, the CBP “entered a \$26 million contract with . . . Israel’s largest military company.”²⁶¹ Instead of a physical wall, the federal government opted for a “virtual wall” over the seventy-five miles of Tohono O’odham reservation land by using Integrated Fixed Towers (IFTs).²⁶² In 2018, Arizona had fifty-two of these towers—none of which were on Tohono O’odham land.²⁶³ The towers that have a camera radius of ten miles are equipped with infrared imaging able to “peer through walls into homes.”²⁶⁴ The IFTs’ presence is not only imposing but incredibly invasive, as one resident noted: “if you have one of these next to a community, there’s not a whole lot it can’t see.”²⁶⁵

The physical presence of these towers would mark the Tohono O’odham landscape. The IFTs are one hundred and sixty feet tall.²⁶⁶ The towers’ surveillance systems will have “wide-area persistent surveillance” capabilities, meaning that the CBP will receive “real-time data . . . at a central operating station in Ajo, Arizona.”²⁶⁷ The CBP will place ten of these towers throughout the Nation along the border.²⁶⁸ This implementation will create a virtual wall, and the towers will pervade neighborhoods and homes located along the border.²⁶⁹ However, the towers

257. Helsey Luger, *How the U.S.-Mexico Border has Split the Tohono O’odham*, HIGH COUNTRY NEWS (Mar. 19, 2018), <https://www.hcn.org/issues/50.5/tribal-affairs-how-the-u-s-mexico-border-has-split-the-tohono-oodham>.

258. *Id.*

259. *See id.*

260. *Id.*

261. Parrish, *supra* note 235.

262. Luger, *supra* note 257.

263. *Id.*

264. Vanderpool, *supra* note 255.

265. *Id.*

266. Parrish, *supra* note 235.

267. *Id.*

268. *Id.*

269. *Id.*

are only one part of the CBP's vision of a virtual wall.²⁷⁰ The plan also includes "vehicle-mounted surveillance systems, laser range-finders and GPS tracking," all actively deployed in the Nation.²⁷¹

Nation residents living near the border feel especially intruded upon by the IFTs. One Tohono O'odham resident is fearful that a tower may be located near her neighborhood; "we won't be able to go anywhere near here without the big U.S.-Israeli eyes monitoring us, watching our every move."²⁷²

The IFTs remain controversial.²⁷³ The towers represent concessions from the Nation to the federal government according to Timothy Dunn (author of *The Militarization of the US Mexico Border 1978-1992*), who also warned that "the next administration is not going to give a damn what they want."²⁷⁴

The CBP's surveillance system for the reservation is similar to those already in place around the world, as surveilled peoples attempt to restrict their relationships to avoid suspicion. As previously discussed, the Tohono O'odham Nation is already under constant suspicion by law enforcement and the CBP. One analogous situation is the occupied region of the Xinjiang Province in China. There, China surveils the Uighur Muslim population because, the Chinese State argues, the Uighurs "pose a terrorism threat."²⁷⁵ The Uighurs are not barred from participating in society, but the "new cameras . . . are everywhere."²⁷⁶ Unlike the Tohono O'odham in the United States, the Uighurs are a persecuted population: their religious rights are suppressed by the Chinese government.²⁷⁷ However, the appearance of the police state pervading the home convinced Uighurs to stop entire, private, at-home conversations.²⁷⁸ The Uighur residents "[d]on't talk about anything that would get [them] into trouble," suspecting that the "vehicles outside with the giant antennas . . . [are] listening to conversations that are

270. Vanderpool, *supra* note 255.

271. *Id.*

272. Parrish, *supra* note 235.

273. *See* Vanderpool, *supra* note 255.

274. *Id.* For background on Dunn's commentary, see generally TIMOTHY DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* (1995).

275. *Planet Money: Stuck in China's Panopticon*, NAT'L PUB. RADIO (July 5, 2019, 4:09 PM), <https://www.npr.org/2019/07/05/738949320/episode-924-stuck-in-chinas-panopticon>.

276. *Id.*

277. *Id.*

278. *Id.*

happening in Uighur homes.”²⁷⁹ The effect of the surveillance is to chill private, in-home speech.

Despite the effects of surveillance on local communities, in August of 2018, a congressional hearing before the Subcommittee on Border and Maritime Security for Integrated Fixed Towers reported that Congress allocated \$39.2 million for the building of “IFT system[s] in Tohono O’odham Nation, including 7 surveillance towers in Casa Grande and one in Ajo-2.”²⁸⁰ The government’s attempt to enforce immigration laws effectively surveils entire communities, chills fundamental freedoms within the home, corrodes the sovereignty of the Tohono O’odham Nation, and frustrates the goals of the U.N. multilateral agreement signed by the United States.²⁸¹

G. UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) guarantees many indigenous communities “innate rights to draw on cultural and natural resources across international borders.”²⁸² The United States, however, does not guarantee these basic protections that other countries committed to the UNDRIP do.²⁸³ Federal law requires that “federally recognized sovereign tribal nations on the U.S.–Mexico border must be consulted in federal border enforcement planning.”²⁸⁴

On the Nation’s land though, as noted above, the actual ability of tribal members to interact with each other across the borders is put in constant jeopardy.²⁸⁵ The Kickapoo tribes exclusively have the right to “cross the border regardless of citizenship.”²⁸⁶ There is some recognition that “relevant tribal governments in the [United States] may also work with

279. *Id.*

280. *Border Security, Commerce, & Travel: Commissioner McAleenan’s Vision for the Future of CBP: Hearing Before the Subcomm. on Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 115th Cong. 47 (2018).

281. *Id.* at 2; see *How the UN Declaration on the Rights of Indigenous Peoples Can Be Used to Protect Against a Trump Agenda*, INDIAN L. RES. CTR., <https://indianlaw.org/implementing-undrip/how-un-declaration-rights-indigenous-peoples-can-be-used-protect-against-trump-agenda> (last visited Jan. 11, 2021).

282. Christina Leza, *How a Border Wall Would Separate Indigenous Communities*, PAC. STANDARD (Mar. 19, 2019), <https://psmag.com/social-justice/a-border-wall-would-separate-indigenous-communities>.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

Customs and Border Patrol to waive certain travel document requirements on a case-by-case basis for short-term visits” by members with Mexican citizenship.²⁸⁷

On December 16, 2010, the United States finally reversed its initial opposition to the UNDRIP.²⁸⁸ The UNDIRIP “affirms the collective rights of Indigenous Peoples as human rights across a broad range of areas including self-determination, spirituality, land rights, and rights to intellectual property.”²⁸⁹ President Barack Obama stated that, with the signing of the UNDRIP, the United States was “lending its support” for the “aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples.”²⁹⁰

The United States’ adoption of the UNDRIP meant that all federal agencies had to integrate the values of the UNDRIP into their internal policies.²⁹¹ President Trump’s threats to withdraw, and the actual withdrawal, from the Paris Climate agreement, UNICEF, and the United Nation’s Human Rights Council began to shake the foundations of these international agreements.²⁹² However, the Indian Law Resource Center sees the UNDRIP as a useful tool because the values of the UNDRIP are already interwoven in agency policies.²⁹³ The use of international pressure is weakened under the Trump Administration, but leveraging the UNDRIP still works as a “real legal obligation[] on the United States government.”²⁹⁴ Importantly, though, it is useful because “[t]hese are values that [Native Americans] can build on in [their] advocacy and organizing work.”²⁹⁵ In order to respect and honor the commitment of UNDRIP in the era of increased militarization of the border during the era of climate change, the United States committed itself to honoring the UNDRIP values.

287. *Id.*

288. *United States Finally Endorses Historic United Nation’s Declaration on the Rights of Indigenous Peoples*, NARF LEGAL REV., Winter/Spring 2011, at 1, 1, <https://www.narf.org/nill/documents/nlr/nlr36-1.pdf>.

289. *Id.*

290. *Id.*

291. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

292. *How the UN Declaration on the Rights of Indigenous Peoples Can Be Used to Protect Against a Trump Agenda*, *supra* note 281.

293. *Id.*

294. *Id.*

295. *Id.*

II. Analysis

People may move for a variety of reasons: poverty, violence, and, now, even climate change. The Tohono O’odham Nation’s border reveals the incompatibility of building a border wall with an oversimplification of the problems that the world, the United States, and the Tohono O’odham Nation will face in the future. Climate change and militarization go hand-in-hand with the intensification of anti-immigrant sentiment. Increasingly, the desert is a dynamic environment. As previously addressed, the physical environment has changed over the past twenty years, and it is projected to change even more radically and dangerously in the future.

The federal government should embrace the reality of climate change as a serious national security threat.²⁹⁶ The Quitobaquito Springs, a Tohono O’odham water reserve along the border, has survived for thousands of years.²⁹⁷ Now, the U.S. government is draining a source of water that the Tohono O’odham view as a sacred site at a rate faster than a rare desert rain can refill. As the water empties from this millennia-old stream, the fragile desert ecosystem can also be destroyed by water. The border wall threatens to create dams of debris that trap water and cause major and sometimes deadly flooding on the Nation’s grounds. Deadly floods have already happened in 2011 and 2014, and once on Tohono O’odham grounds.²⁹⁸ As the climate changes, the ability of the Tohono O’odham people to negotiate an evolving landscape will become more complicated. Their efforts will also be severely stymied by increased border enforcement because DHS can waive those environmental concerns in order to control the border.

Furthermore, anti-immigrant policies that developed into border walls and increased CBP patrols, emboldened by the militarization of the Tohono O’odham Nation, forced undocumented immigrants into the most dangerous areas of the Sonoran Desert. And it is where those undocumented, surreptitious crossings happen that extreme climates can have the deadliest, and invisible, impacts. As people crossing the border attempt to avoid official (and safer) channels, the ground dries and hardens due to climate change and is increasingly susceptible to flashfloods from even the briefest of rains—endangering migrant lives. The unpredictable

296. Mark Townsend & Paul Harris, *Now the Pentagon Tells Bush: Climate Change Will Destroy Us*, GUARDIAN (Feb. 21, 2004, 8:33 PM), <https://www.theguardian.com/environment/2004/feb/22/usnews.theobserver>; see also MIL. ADVISORY BD., CNA CORP., NATIONAL SECURITY AND THE THREAT OF CLIMATE CHANGE (2007).

297. Traphagen, *supra* note 63.

298. Parker, *supra* note 102.

environment endangers undocumented migrants while traveling. But the result has been an increased CBP presence along all areas of the border including the Tohono O'odham Nation.

Because of the increased CBP presence in the Tohono O'odham Nation, there remains a threat to the Nation's sovereignty within its own borders. However, with the enactment of the UNDRIP in December of 2010, DHS could honor its commitments and extend the same programs that it gives to the Kickapoo Tribes to the Tohono O'odham Nation. Those programs include one that allows its members to cross in and out of the United States without suspicion. Moreover, the federal government supports the Kickapoo Tribe in discovering and preserving its historic sites that will be destroyed by the construction of the border wall.²⁹⁹ Already, in 2007, the installation of vehicle barrier posts, though handled appropriately by U.S. government standards, amounted to a desecration of a 12th century burial ground.³⁰⁰ The Tribe has identified eleven at-risk culturally significant sites that would be desecrated or destroyed by the construction of a border wall. For a desert people, the imposition of a divide between their people and a physical severance from sacred grounds is a serious insult to culture and the ability to use their cultural resources as the UNDRIP values promote.³⁰¹

III. Solutions

The Tohono O'odham Nation is a sovereign at risk of incurable separation from a large portion of its members as the federal government increases its border security measures. This separation is further exacerbated, more than ever, between the Nation's members located both north and south of the border in the age of climate change.

The Nation is flanked by ports of entry on either side. It would be possible for a port of entry within the Nation itself to facilitate legal entry and reduce the uncertainties of whether members are legal or not. Additionally, DHS could reconsider its policy of presuming those Tohono O'odham members with undocumented births are Mexican citizens. These

299. ANDREW S. VEECH ET AL., NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, ARCHEOLOGICAL SURVEY OF 18.2 KILOMETERS (11.3 MILES) OF THE U.S.-MEXICO INTERNATIONAL BORDER, ORGAN PIPE CACTUS NATIONAL MONUMENT, PIMA COUNTY, ARIZONA (2019).

300. Tim Gaynor, *Indians Complain Graves Dug Up for Border Fence*, REUTERS (June 24, 2007, 6:50 AM), <https://www.reuters.com/article/us-security-usa-indians/indians-complain-graves-dug-up-for-border-fence-idUSN2216828020070624>.

301. *Id.*

policies produce dangerous interactions between the CBP and local Tohono O’odham members.

Perhaps the most important component to preserving sovereignty of the Tohono O’odham Nation is the reduction of the CBP presence within the Nation itself. The CBP has become a de facto policing regime within the Nation with the constant presence of its high-tech, militarized border patrol agents.³⁰² On the north side of the reservation exists a checkpoint that all Tohono O’odham must cross, and this already existing point of entry could suffice as a checkpoint for legal migration. The apprehension of undocumented people crossing within Tohono O’odham territory has steadily decreased over the years as the Nation itself polices within its own borders.³⁰³ Having assisted in this effort, the Tohono O’odham Nation regularly demonstrates its commitment to working with the federal government and its policies and interests, within reason, to reduce federal presence while promoting federal policies. That discretion was key to saving the endangered black jaguars and reducing the drug trade within the Nation. However, these cooperative efforts also show that the Tohono O’odham Nation can use its own resources to help achieve policies that are at least in line with the federal government’s own policies.

Part of the aligned interests of the Tohono O’odham and the federal government is preparing for a future in the shadow of climate change. Essentially, the federal government, specifically the executive branch, must take climate change seriously as a national security threat—a position for which many within the executive have already advocated. That increased support could empower the EPA to stand beside the CBP with an aligned interest along the border, instead of being disregarded in the development of policies and procedures that will anticipate increased migration in increasingly dangerous environments. If the EPA can conduct environmental impact studies and begin to work those studies into a workable climate change plan, then it is possible that the Tohono O’odham could develop localized plans to accommodate those policies. Every border wall or physical obstruction presents a unique danger when flash floods are an increasingly deadly and common occurrence on the Nation’s lands. Therefore, by recognizing the importance of climate change, the federal government can use its plenary power to develop vital environmental standards.

302. Vanderpool, *supra* note 255.

303. *Issue Brief: The Tohono O’odham Nation Opposes a “Border Wall,”* NSN.GOV, <http://www.tonation-nsn.gov/wp-content/uploads/2017/02/Issue-Brief-Tohono-Oodham-Nation-Opposes-Border-Wall.pdf> (last visited Oct. 25, 2020).

As the executive branch recalibrates its own administrative priorities to protect the United States, Congress could amend the REAL ID Act to allow for NEPA and EPA to once again apply to the border wall. However, the executive branch would likely push against this solution because it interacts with its control over immigration. Congress must balance the ability of the executive to police the borders with climate change concerns. A congressional solution would require overriding many other exceptions within the executive branch and recalibrating the EPA's own administrative resources allocation. However, that solution also implicates the idea that the executive does have real national security concerns at the border, and a strong congressional action involving border control could cut against the Executive's ability to react quickly. This means that, as problems arise, there may be trouble in reacting appropriately to those challenges.

The United States is not the only government the Tohono O'odham Nation must accommodate. The Nation's Mexican members face an additional hurdle: the Tribe is not legally recognized in Mexico.³⁰⁴ The ETC cards (the ID cards that would allow Tohono O'odham to cross the borders) will not address this problem.³⁰⁵ The U.S. and Mexico governments should come together with a transnational solution committed to promoting the interconnectivity of the Mexican and United States citizen Tohono O'odham Nation members.³⁰⁶ Ideally, the Mexican government would recognize the Tohono O'odham Nation as a tribe. Recognizing the Tohono O'odham as a tribe would facilitate both Mexico and the U.S.'s ability to work together to create a workable solution in the spirit of the UNDRIP—a commitment that both Mexico and the U.S. have made to their indigenous peoples on the international stage.

A transnational solution between the United States and Mexico could be to give Mexican members freer regional movement. Such freedom could also mean that Mexico will, at the very least, recognize the Tribe and its traditional lands. The United States would have a widened geographic scope and could possibly delay fear of simply recreating another border, or worse yet, creating a shifting border in constant dispute by the Mexican, U.S., and Tohono Nation sovereigns. With cooperation between the United States and Mexico, the Tohono O'odham could resume the programs of the 1970s and 1980s where Mexican-citizen Tohono O'odham members attended schools on the northern side of the border. Simply because the

304. Ahumada, *supra* note 246.

305. *Id.*

306. *See id.*

border serves to divide two nations does not mean that the border must continue to divide a single people.

One major problem that will persist is that the pressures from South and Central America that force immigration toward the United States are unlikely to subside. While the federal government's trend is to increase its border enforcement,³⁰⁷ many of the solutions that will reconnect a people would mean a softening of the border. Should this happen, the Tohono O'odham Nation would continue to be a point where surreptitious crossings are more likely. Adding to the burden will be climate change. Climate change migrants will increase as climate change persists. As climate change migrants increase pressure on the border, the Tohono O'odham Nation could experience another resurgence in migrations. Here, there are two possible solutions: an external location at the southern border of the entire Nation's traditional lands, or a stronger checkpoint around the Nation built by the United States. However, these proposed solutions must avoid the already extant problem of otherizing Tohono O'odham Nation residents. Already, the CBP sees tribal members as possible Mexican citizens. This strong presumption is dangerous and results in an intense distrust between the CBP and local residents.

The Tohono O'odham Nation remains a surveilled community beyond that of other communities in the United States. To ease the intense surveillance regime, the federal government should avoid using the IFTs; the towers are seen as further intrusions into the Tohono O'odham and symbolic of the federal government surveilling a Native American people in often-invasive ways.³⁰⁸ These towers reach into homes and could chill interactions between tribal members. This chilling effect runs afoul of the UNDRIP because it reduces the ability of the Tohono O'odham's self-determination and makes interactions difficult and strained. A proposed virtual wall that can see into the homes of Tohono O'odham residents within a ten to twenty-five-mile radius between each tower would make seventy-five miles of the Tohono O'odham under the constant eye of the CBP.³⁰⁹ To retain the trust of the Tohono O'odham Nation, the federal government should cancel this program even though it persists throughout much of Arizona.

307. See generally DUNN, *supra* note 274; Carrie F. Cordero, Heidi Li Feldman & Chimène Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 2, 432, 446–50 (2020).

308. Vanderpool, *supra* note 255.

309. Luger, *supra* note 257.

If the federal government did not invest in these towers, it could invest in partnerships with the Tohono O'odham Nation. The Nation consistently shows that it is willing to partner with the federal government as both are concerned with the safety of their citizens. The Tohono O'odham Nation does not have an interest in allowing the unmitigated migration flow. Its interest is only to allow its own people to cross and interact freely with its People. Here, the Tohono O'odham and the United States have non-conflicting priorities. This fact means that the Tohono O'odham could police its own borders. Moreover, the federal government could recalibrate its perception of the border and its more permeable areas like the Tohono O'odham Nation as something other than a relief valve.

Finally, it is important to restrain the rhetoric that has defined the federal government's own constant focus on the border.³¹⁰ The pressure relief valve metaphor underemphasizes other values that immigrants who cross at ports other than official ports of entry may have. The Tohono O'odham Nation sits in the desert—a hostile environment for human foot travel. It is a dangerous environment where migrants could die from dehydration on a regular basis. These dangerous conditions mean that migrants cannot reliably cross these areas on foot, and this constant use of the idea of a “pressure valve” distorts immigration enforcement priorities and misunderstands that people have values with motives more complex than a stream of water.

The area will only become more dangerous and will become a site of conflict as the climate changes, if immigration, the militarization of the environment, and the Nation's sovereignty are continually under assault. However, should the federal government and the Nation develop more partnerships aligning with the values of the UNDRIP, it is possible to preserve the Nation's sovereignty and help bring a people together again as the federal government concerns itself with the national security issues.

Conclusion

The Tohono O'odham Nation is one that sits on and between two nations. Here, old and new tensions arise in a dynamic environment where people, the environment, and international political pressures meet. Like any border, this is a zone of constant formal and informal renegotiations. It is in this constant tension that the Tohono O'odham exist between two sovereigns, weighing the concerns of both and trying to keep a people

310. Valencia-Weber & Lopez, *supra* note 26, at 297.

together. When the United States signed the UNDRIP, it committed itself to helping all Native American peoples in that pursuit.

The federal government and the Tohono O’odham Nation must develop more partnerships aligning with the values of the United Nations Declaration on the Rights of Indigenous Peoples. It is possible to preserve the Nation’s sovereignty and help bring a people together again as the federal government concerns itself with the national security issues in the era of climate change and constant political pressures to toughen border enforcement.