

TOHONO O'ODHAM NATION OFFICE OF THE CHAIRMAN AND VICE CHAIRWOMAN

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October 29, 2026

U.S. Customs and Border Protection
Office of Facilities and Asset Management
Tucson Sector Border Barrier Project
TucsonComments@cbp.dhs.gov

Re: Tucson Sector Border Barrier System Construction; 62 Miles Primary Border Barriers on the Tohono O'odham Nation

The Tohono O'odham Nation submits these comments in response to U.S. Customs and Border Protection's and the Department of Homeland Security's ("DHS") September 25, 2026 letter seeking "coordination" on DHS's plans to construct and maintain approximately 62 miles of destructive border wall and other infrastructure on the Nation's lands along the U.S. border with Mexico. While this project is moving forward in spite of the Nation's deep-seated opposition and the pendency of the Nation's lawsuit challenging the legality of the project, the Nation provides these comments regarding the implementation of the government's latest construction planning and activities.

Despite the DHS's repeated reassurances to the Nation and the courts that the Nation would have an opportunity to provide our input, the U.S. government has consistently failed to answer the most basic questions that would give the Nation some meaningful ability to evaluate impacts to our lands, water, animals, sacred sites, and natural and cultural resources,¹ and to respond with informed and constructive feedback designed to reduce adverse impacts.

And, while the Nation appreciates the offer to coordinate, this offer falls short of the requirement for DHS to *consult* with the Nation prior to implementing a project of this scope and with such significant impacts.

The U.S. Constitution, laws, court decisions, regulations, and other authorities recognize the inherent sovereign powers of tribal governments, and the United States has repeatedly

¹ The "Nation's people, lands, water, animals, natural resources, sacred places, cultural resources and relationship to the land are interconnected through Himdag, and border wall construction activities and associated ground disturbance threaten these relationships and will adversely impact the Nation's cultural resources and O'odham way of life." Legislative Council Resolution No. 26-356, "Condemning Illegal Diminishment of the Nation's Reservation, Trespass, and Use of Bureau of Indian Affairs and Other Federal Agents Against the Nation in violation of the Duty to Support Tribal Self-Government and Protect Indian Lands and Resources," <https://tolc-nsn.org/docs/Actions26/26356.pdf>.

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recognized the government-to-government relationship between the United States and tribal nations. By long-standing executive orders, memorandums,², and additional presidential and other federal policies, all executive departments and agencies of the United States are required to engage in meaningful and timely consultation with appropriate tribal officials who are designated by the tribe in developing federal policies or taking federal actions that have substantial direct effects on one or more Indian tribes.

The duty to honor the government-to-government relationship between the United States and the Tohono O’odham Nation and to timely consult the Nation *before* taking federal action affecting the Nation applies to component agencies within DHS, including without limitation, CBP, and Border Patrol. There have been repeated instances of DHS damaging the Nation’s lands without prior notice, consultation, or consent, and the Nation has called on the DHS to negotiate a government-to-government agreement to improve overall border security coordination and conduct quarterly meetings, share Nation-specific illegal encounter, seizure, and other information, to obtain the Nation’s approval for uses of national lands as required by federal and tribal law and the 2019 Nation-CBP Integrated Fixed Tower Agreement³, clarify appropriate lines of communication, and create a meaningful, timely process for responding to member’s concerns. The DHS has affirmed that the U.S. recognizes the rights of federally recognized Indian tribes to self-governance and self-determination and that tribes exercise inherent sovereign rights and governance over their members and territories (DHS Consultation and Coordination with Tribal Nations Directive No. 071-04, V.A., issued December 15, 2022).

Announcing decisions after they have been made and unlawfully using the Nation’s lands violates the government-to-government relationship and is not consultation.

There is no Collaboration

As stated in the Nation’s October 11, 2026, letter to Commissioner Scott, the Nation cannot “collaborate” with the United States on actions that will result in the destruction of Reservation lands and natural and cultural resources (all of which instead should be *protected* by the federal government consistent with the federal trust responsibility). The Nation’s and our people’s opposition to this project is firmly established and this opposition has been conveyed repeatedly. We have, in good faith, met regarding the wall and viable alternatives with Secretary Mullin, Commissioner Scott, former Border Patrol Chief Banks, Tucson Sector, and others within DHS as longstanding partners in border security. We repeatedly have attempted to discuss significant, highly effective alternative options for enhancing border security within the Nation, including deploying a linear ground detection system and autonomous surveillance towers on our lands -- systems that DHS itself previously proposed. We remain willing to discuss these and

² Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), Presidential Memorandum of September 23, 2004 (Government-to-Government Relationship With Tribal Governments), Presidential Memorandum of November 5, 2009 (Tribal Consultation), Presidential Memorandum of January 26, 2021 (Tribal Consultation and Strengthening Nation-to-Nation Relationships).

³ Agreement Between the Tohono O’odham Nation and United States Customs and Border Protection for Conditions for Grants of Easement for Rights-of-Way for Integrated Fixed Tower Project, Access and Approach Roads, and Traditional Northern Road.

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other technological alternatives that would strengthen border security without a physical wall. Unfortunately, DHS continues to ignore our requests. We remain deeply disappointed in DHS's refusal to engage in any discussions that could result in the deployment of proven and effective border security measures on the Reservation in lieu of a physical wall.

Further, for many months and continuing to this day, DHS has steadily moved forward with wall construction-related activities even though the D.C. Court of Appeals is still considering whether the project is even legal. We note too that DHS's September 25, 2026 letter to the Nation seeking "coordination" is nearly identical to a September 29, 2026 notice to the general public seeking input on the 62-mile border barrier project. The fact that these two letters are nearly identical and are dated just four days apart makes it clear that the DHS is not taking their duties to *consult* with the Nation as a sovereign tribe seriously and are treating the Nation as if it were simply another member of the public. The Nation rejects DHS's disregard for our status as a sovereign government with lawful, federally-protected authority over our lands. Here too, we remain deeply disappointed that DHS fails to afford us the respect of government-to-government consultation that is due, especially when litigation on these very issues is ongoing.

There are Alternatives to the Physical Wall

In addition to the questions the Nation repeatedly has asked, DHS must explain why a continuous wall is appropriate on the Nation's lands and in this specific location ***and most importantly explain why less damaging approaches would not meet its actual operational need now that illegal crossings on the Nation have fallen more than 95% according to the last data DHS has disclosed.*** A broad border-security mandate does not supply a site-specific factual justification for every proposed mile (IIRIRA § 102(b)(1)(D), 8 U.S.C. § 1103 note). Notably, Section 102(b)(1)(D) preserves discretion concerning particular locations when the specified infrastructure is not the most appropriate means of maintaining operational control. DHS therefore must explain how it has determined which barrier type is most appropriate. Additionally, there is no moral justification for choosing desecration that is avoidable, as is the case with this wall.

Disturbing Information Sharing Failures

DHS repeatedly has claimed that it is attempting to coordinate or collaborate with the Nation with regard to its border wall construction and pre-construction activities. Yet, the reality is that it continues moving forward with its construction plans as expeditiously as possible. In one glaring example, Acting Tucson Sector Chief Patrol Agent Laxdal emailed Chairman Jose at 4:59 a.m. on the morning on August 25, to announce that federal contractors had already entered the Reservation with plans to commence geotechnical boring survey activities at 5:00 a.m. That notice was insufficient and in violation of the U.S. government's duties to consult, coordinate, and provide opportunities for the Nation to keep its members informed about construction activities on our Reservation *before* they take place.

DHS's repeated and ongoing failures to provide the Nation with the information necessary to enable us to effectively participate in any consultation process have become commonplace with respect to this project. The cbp.gov webpage cited in the comment notice for
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this project provides no new information or answers to the basic questions the Nation has been asking for at least eight months. What is more, the September 25 letter requested comments from the Nation by October 29—notwithstanding that trespassing contractors have already started significant preconstruction activities in preparation for removing 2000 saguaros from our land, destroying 62 miles of vegetation, mining our water, blasting our sacred mountains and irreversibly destroying our homeland. Despite the imminent threat of this destruction and DHS’s stated plan to begin installing the wall itself on December 1, the Nation has not been provided any construction designs or plans necessary to provide meaningful feedback on the proposed project.

DHS should explain how it has complied with the consultation provision in IIRIRA. Section 102(b)(1)(C) specifically requires consultation with Indian Tribes and other identified governments and landowners to minimize harm to nearby communities. DHS should identify any asserted waiver of this requirement rather than treating consultation as optional by assumption (IIRIRA § 102(b)(1)(C), 8 U.S.C. § 1103 note).

Specific Project Questions Remain Unanswered

On June 5, 2026, Commissioner Scott provided a response to the very detailed border wall project questions the Nation presented in writing to Secretary Mullin on April 27, 2026. Six months have passed since the Nation presented those questions, and four months have passed since Commissioner Scott sent the summary response – and still DHS has failed to provide fundamental information that it committed to disclose. The Nation still seeks answers to those questions before DHS and its contractors engage in any further border barrier wall-related activities on the Nation. We also ask that the Nation’s April 27 questions, and their answers, are included as part of the project record. Just a few of these outstanding issues include:

- CBP has not provided the construction schedules it committed to share.
- CBP has repeatedly acknowledged that the wall will “push north” of the disputed Roosevelt Reservation and stated there would be “lands needed north of the Roosevelt Reservation” without identifying where or how far north and while inconsistently asserting in court that all work will be conducted within 60’ of the international boundary. CBP committed in writing to “coordinate with the Nation to identify a route that avoids historically identified sacred sites and burials,” while CBP has neither disclosed the wall’s exact route nor “coordinated” on its location.
- CBP responded to the basic question, “What estimated footprint would CBP need for all construction purposes and will CBP provide maps for all land uses related to this project?” by committing, “Following contract award, the Contractor will develop designs, and these will be shared with the Nation, which will include the footprint and maps.” No footprint or detailed maps have been provided.
- CBP acknowledged during a May 2, 2026 meeting at Tucson Sector Headquarters that while CBP planned to construct wells within 60’ of the international boundary, that CBP “understands the aquifer goes beyond 60’,” meaning CBP would withdraw Nation water during and potentially after construction without authorization. In response to the Nation’s written questions asking for the amount of water CBP would need and other

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details, CBP would only disclose that it was “developing estimates” and would not compensate the Nation for water use.

Autonomous Surveillance Towers

The Nation has also been requesting basic information about DHS’s plans to construct autonomous surveillance towers directly in the Traditional Northern Road (“TNR”) and other rights-of-way or in “existing disturbed corridors” on the Reservation as part of the wall project. As previously noted, the Nation has consistently affirmed its willingness to discuss leases or rights-of-way for DHS to construct additional surveillance towers and other technological solutions to enhance border security. However, any such infrastructure installations will have to be approved by the Nation. Pursuant to the 2019 Nation-CBP Integrated Fixed Tower Agreement, the Nation has consented to a *nonexclusive* right-of-way for DHS to construct, maintain, operate, and repair the TNR. The grant does not authorize DHS or its contractors to construct anything within the TNR or disturbed corridors, or to block or impede the Nation’s expressly reserved rights to use and exercise jurisdiction within the TNR.

Access to Border Area and Contractor Trespass

DHS has failed to explain how the government’s contractors intend to access the Reservation’s disputed border area without trespassing across private Nation lands and roads for which there is no valid right-of-way. The Nation’s public north-south arterial roads each terminate well north of the Reservation’s border. *See* ¶ 8, Declaration of Beverly Matthews (Dkt. 50-4, *Tohono O’odham Nation v. Mullin* (D.D.C. 2026)). And while there are connector roads which CBP and Border Patrol officials use to reach the TNR and the border from these public highways, the only valid rights of way associated with these roads were issued under the 2019 Integrated Fixed Tower Agreement and are subject to the restrictions and limitations identified above, namely that DHS obtained only a “non-exclusive grant of easement for right-of-way for construction, installation, maintenance, operation and repair of portions of the TNR, Access and Approach Roads, including necessary and related improvements to those roads such as drainage culverts, low-water crossings, and signage.” These roads therefore do not provide the Department’s contractors with a lawful right of access to the Reservation’s border. In short, it is not possible for the Department’s contractors to even reach the Reservation’s border to conduct any border wall construction activities without trespassing over the Nation’s lands, and DHS has not provided the Nation with any valid explanation as to how it intends to complete the proposed construction activities without engaging in wholesale trespass across private Nation roads and property in the process.

DHS must identify the precise property interest it claims it has to allow for wall construction and each supporting activity. A claim relying on the disputed 60-foot strip does not address whether contractors may use the Nation’s roads, establish staging areas, extract water, place fill, widen access, or operate equipment on adjoining land. DHS should disclose surveyed boundaries and every easement, agreement, acquisition instrument, or other asserted authority. It must distinguish permission for federal law-enforcement operations from permission for private

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contractors to carry out construction. DHS should also identify the actual scope of any legal authority or ruling on which it relies for its claims of access.

The Supreme Court has reaffirmed that only Congress can diminish or disestablish an established reservation, requiring a clear expression of congressional intent. That principle precludes treating administrative convenience or executive preference as sufficient authority to extinguish reservation status. DHS must address the Nation's specific arguments rather than assuming that the agency's construction mandate resolves them.

Threats and Intimidation

While the Nation appreciates recent oral confirmation that Border Patrol and other federal agents are not authorized to threaten or intimidate the Nation's police officers, other personnel, or members for monitoring wall surveys and other contractor activities on the Nation, it is our understanding and belief that such intimidation is ongoing. As part of this project, we ask that DHS identify how it will deal with any agents who continue to behave in this manner and disclose any actions that have been taken against agents engaging in this behavior thus far.

Conclusion

The Nation urges DHS to withdraw the proposed primary wall project, immediately suspend associated construction and preconstruction activities, and engage in a robust and meaningful government-to-government consultation process with the Nation to discuss alternative border security measures.

The Tohono O'odham Nation remains one of the few places on the continent where the land and both human and animal communities that have been interwoven for centuries remain intact along the US-Mexican border. Once this connection is broken, it may never be recovered.

The Nation is dedicated to keeping our lines of communication open to seek an acceptable alternative to ensure border security that avoids the entirely unnecessary destruction (and the profligate spending of taxpayer dollars) inherent in DHS's current plan to build a double wall on the Nation's Reservation. The Nation again requests the information that has been promised for many months, and that DHS make good on the offers of genuine consultation by engaging in meaningful dialogue with us once we have received that information and *before* construction commences.

Sincerely,



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