

D I A L O G U E

Environmental Impacts of the Border Wall

Summary

On January 25, 2017, during his first week in office, President Donald Trump signed an Executive Order calling for the “immediate construction of a physical wall on the southern border” of the United States. Such a wall would span more than one thousand miles, across many different habitats and many different communities. Before a wall will be built, numerous questions must be answered: Which environmental laws apply? How might all this work? On February 16, ELI convened experts to discuss how environmental law and policy may interact with the Executive Order, and to spark discussion about important environmental resources and communities along the border. Below, we present a transcript of the event, which has been edited for style, clarity, and space considerations.

David Roche (moderator) is a Staff Attorney with the Environmental Law Institute.

Dan Millis is Borderlands Program Coordinator with the Sierra Club.

Andy Gordon is a Senior Litigator for Coppersmith Brockelman PLC.

Sarah Krakoff is the Raphael J. Moses Professor of Law at the University of Colorado Law School.

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David Roche: Welcome to the very first official installment of our new webinar series, the Environmental Accountability Project. For this pilot webinar, we have a fascinating and diverse group of panelists and a similarly amazing mix of attendees from law, policy, government, and the press. And we couldn't do any of this work without the Naomi and Nehemiah Cohen Foundation, which has funded our webinar series for many years.

Prior to the 2016 election cycle, when I thought of “the wall,” having never practiced in this area, I thought of Pink Floyd. Now, I think about tweets and political rallies. The wall has entered the mindset of the general public after Donald Trump made the border wall a central campaign promise. Essentially discussions of the border wall were like the old quote from *Field of Dreams*, but turned on its head: “If you build it, they will not come.” Ostensibly, it's

to prevent illegal immigration over the U.S.-Mexico border, but the wall took on a life of its own.

Today, we won't be talking in detail about the human rights issues associated with immigration. What we're focusing on instead is the environmental and tribal rights impacts and how they could play a role in the wall going from a campaign slogan to what it's turning into now, an infrastructure project.

The Nature Conservancy's Texas Director Laura Huffman said, “The fence is the very definition of habitat fragmentation, the very definition of what inhibits free movement of wildlife within its natural habitat.”¹ This quote lays out much of the environmental take, and that fragmentation is not limited to wildlife. It extends to communities, ecosystems, and even cultures. We'll delve into those issues today.

So, where are we now? On January 25, 2017, President Donald Trump signed an Executive Order for the construction of the wall.² He laid out his intentions, but ground isn't quite ready to be broken yet. Lots of hoops have to be jumped through, like how it's going to be funded, and different people have lots of different thoughts on that.

Let's briefly touch on some frequently asked questions and areas that we'll be exploring today. Is it possible to construct a wall on the border? And the answer is almost certainly yes. We have already established that, as our panelists will be talking about today, and so this isn't some abstract thing that definitely can't happen. How long could this process take? It's uncertain, but these things can move fast sometimes, if the U.S. Congress acts. So, we need to be prepared to discuss environmental impacts. And finally, there are the three big areas—human costs, environmental costs, and environmental law—that are really open to debate.

Our first presenter is Dan Millis from the Sierra Club. Dan has been one of the foremost experts on border issues for many years. We're really fortunate to have him.

Dan Millis: Thank you very much for that introduction. I've been working with the Sierra Club on border issues since 2008. I'm originally from Flagstaff, Arizona, and so for me, this is an issue that really impacts my state and the place where I grew up and the place where I still live today.

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1. Melissa Gaskill, *The Environmental Impact of the U.S.-Mexico Border Wall*, NEWSWEEK (Feb. 14, 2016), <http://www.newsweek.com/2016/02/26/environmental-impact-us-mexico-border-wall-426310.html>.
 2. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017).

I'm now based in Tucson and working for Sierra Club Grand Canyon chapter, that's the Arizona Sierra Club.

The Arizona Sierra Club started the Borderlands program on a bottom-up type of format. It was really the grassroots volunteers who saw what was happening during wall construction during the George W. Bush Administration, saw the waiver of law that I'll talk about in a moment, and were motivated to put together a film in 2008, called *Wild Versus Wall*.³ It also raised enough funds to make an experimental staff position that was supposed to last about six months. I was working as a volunteer with No More Deaths⁴ at that time, and I was the lucky activist who got hired to do this job for six months and maybe more. That was in October of 2008, and we have been moving forward ever since.

I'd like to start by asking everyone what it is you think of when you think U.S.-Mexico border? If you had your eyes closed, what are the first images that pop into your mind? When I've asked this question to audiences in the past, without fail, one of the many images that people volunteer is the image of a wall. And we can see these wall images in a Google search. Obviously, this is not a scientific survey, but it gives some idea of what people are thinking of when they think about the U.S.-Mexico border, at least in terms of posting images online.



Border wall at the Lower Rio Grande Valley National Wildlife Refuge (Dan Millis).

This is a photograph that I took in a national wildlife refuge in South Texas. I assume that most folks understand that national wildlife refuges are protected by federal law, and they're not places where you can easily build a structure like this. This is not a place where you can even drive off-road or go woodcutting without permission. It's set aside for wildlife. And yet the Bush Administration was able to show up, bulldoze these areas and build, in some cases, concrete walls right through the middle of them.

How is this possible? What a lot of folks don't realize is that there are already lots of walls, hundreds of miles of barriers already built along the U.S.-Mexico border, and people also don't realize that these walls were built under the largest waiver of law in U.S. history. Now, at this point, I should mention I am simply an activist, I'm an organizer. I'm not a legal scholar or a legal expert by any means. But the legal experts that we work with told me that this is the largest waiver of law in U.S. history, and I'll explain it here.

The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Real ID Act)⁵ included a section that didn't get a whole lot of press attention. The Real ID Act, obviously, was intended to standardize identification cards across the United States, but what folks didn't realize is that §102 gave the U.S. Department of Homeland Security (DHS) the authority to waive any law in order to build border infrastructure. That following year, the Secure Fence Act of 2006⁶ was passed, signed by President Bush, which authorized the construction of 700 miles of barriers across the U.S.-Mexico border. The Bush Administration, as we know, was very gung-ho about these types of authorities and began to waive many laws along the border in order to build walls, roads, and associated infrastructure.

Those laws protected everything from endangered species, clean air and water, birds, archeological sites, public health, rivers, farmland, coasts, wilderness, Native American graves, and even religious freedom. Approximately 37 laws were waived in part or in their entirety by the Bush Administration in order to build border walls very quickly. This waiver authority was never rescinded and doesn't have a sunset, so these laws are still on the books here in our borderlands. It is very unfortunate, even tragic, that communities and resources in our borderlands don't get to count on the same protections that the rest of the country can take for granted.

So, that was the situation in 2006 through 2008, when most of these barriers were constructed. As a result, today, we have 653 miles of border with some sort of barrier already standing, with a wide variety of different designs or architectures. Arizona, California, and New Mexico have seen most of the barriers in terms of where they've been installed already. There has been quite a bit of barrier construction in Texas, as well, although not as much because of the Rio Grande River.

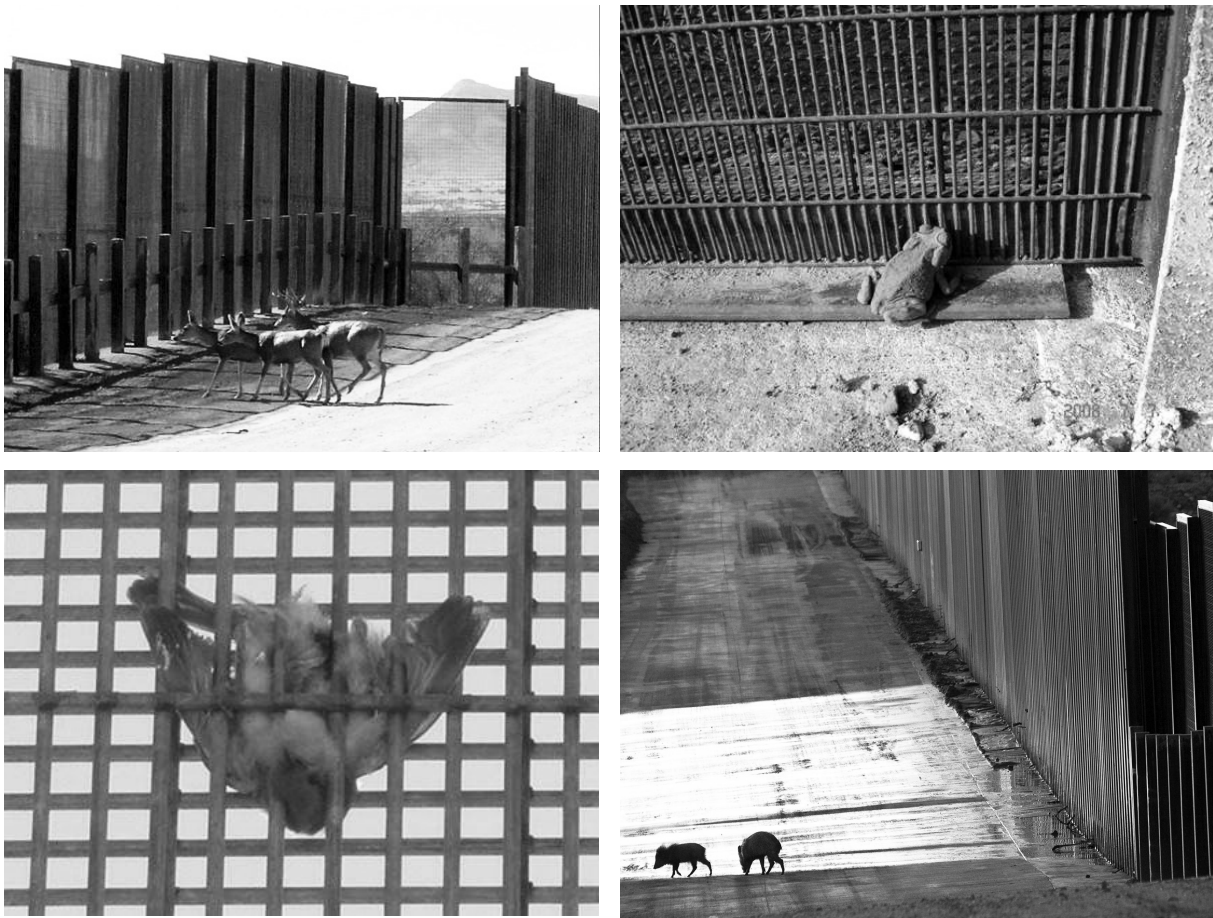
These walls block wildlife. These are deer that are blocked by the walls that go through the San Pedro Riparian National Conservation Area in Arizona, and I've seen this myself in that same spot. This is a toad being blocked by some walls that are built through Organ Pipe Cactus National Monument. You'll note that some of the types of structures that have been built are fairly solid, and so even small species like reptiles and toads can't cross. Here is a photograph of a bird that somehow got stuck in between

3. *Wild Versus Wall*, SIERRA CLUB, <http://www.sierraclub.org/borderlands/wild-versus-wall>.

4. NO MORE DEATHS, <http://forms.nomoredeaths.org/en/> (last visited Apr. 24, 2017).

5. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 302.

6. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.



Clockwise from top left: Deer at San Pedro Riparian National Conservation Area (anonymous); toad at Organ Pipe Cactus National Monument (anonymous); javelin, or peccaries, play an important role in the distribution of seeds for many plant species (Krista Schlyer); the border wall can be a dangerous obstacle for many species of birds (anonymous).

the layers of mesh of a piece of border wall and died there. This wall is not designed with wildlife in mind, and I'll talk more about that. And these little creatures are javelina, and again they're at that section of wall that goes through the San Pedro Conservation Area in Arizona. That is a photo taken by Krista Schlyer, an amazing photographer and photojournalist.⁷

In addition to photographs, which are more or less anecdotal evidence, there has also been a lot of science done that documents the impacts and potential impacts to various species. Some of the species that have been identified are species like the puma and the coati, where measurable impacts have been documented. We also have a lot of endangered species in the borderlands and some studies have identified threatened species that are being impacted now, and that would be impacted even more if the walls were to be expanded under a scenario such as the one that President Trump has proposed.

Recently, a photograph of a jaguar was taken in the Huachuca Mountains near Sierra Vista, Arizona. And you may have heard about "El Jefe" the jaguar, when a video was taken of the cat just south of Tucson in the Santa Rita

Mountains.⁸ So, we've got one or two jaguars that we know of in the United States, both of them came across the border from larger breeding populations in northern Mexico. And since both of these cats are male, we know that if we were to seal off the border, we would no longer have any jaguars in the United States.

The ocelot is a species similar to the jaguar, and just like the jaguar, it was thought to have been extinct from Arizona. It was hunted into extirpation. But camera traps and recent developments have resulted in several photographs and sightings of ocelots in Arizona. There are also breeding populations of ocelot in south Texas, where many of the border walls have been built through national wildlife refuges.

There is also the Sonoran pronghorn, which is the fastest land mammal in the Western Hemisphere. They live in the Cabeza Prieta National Wildlife Refuge and Organ Pipe Cactus National Monument areas. And they're an amazing species. They're very reclusive. They're sort of a success story right now, because their numbers in the United States

7. KRISTA SCHLYER: CONSERVATION WRITING & PHOTOGRAPHY, <https://kristaschlyer.com/about/>.

8. Ethan Shaw, *America's Celebrity Jaguar "El Jefe" Is a Bear Hunter*, EARTH TOUCH NEWS NETWORK (Oct. 19, 2016), <https://www.earthtouchnews.com/natural-world/predator-vs-prey/americas-celebrity-jaguar-el-jefe-is-a-bear-hunter/>.

were down to under 30, if I'm not mistaken, and now we're up to several hundred animals.

These are just a few of the many endangered species that live along the U.S.-Mexico border. If you have a wall that blocks wildlife, then the wildlife can't migrate. Wildlife habitat gets smaller. If they can't find mates, they can become inbred and their genetic diversity can become so poor that it threatens their survival. Down near the Rio Grande, some of those solid concrete walls either trap wildlife during flood events or isolate wildlife from the river, their primary water source.

In addition to the wildlife considerations, border walls cause flooding. The Bush Administration built a wall through a very dry area called Organ Pipe Cactus National Monument, which resulted in flood damage. Because they waived so many laws that require that things be done properly and that studies be done beforehand, they didn't bother to figure out if and where flash flood zones were located. What might look like a nice, flat sandy spot during the dry season can turn into a flood zone during the wet season. Debris piled up against the steel-and-concrete wall and caused the wall to act as a dam. And because it's not designed for that kind of pressure, the dam breached and the wall fell over.



Border wall impacts from a 2011 flood at Organ Pipe Cactus National Monument (National Park Service).

Of course, not only was the wall damaged, but the surrounding land was damaged as well. And this erosion was a problem that the park rangers had to fix. They had to come back and fill it in and revegetate. That's a big deal for the park rangers, but it's an even bigger problem when these types of floods happen in our border communities.

Nogales is a border community divided by a wall—you have Nogales, Arizona, and Nogales, Sonora. A flood in 2008, again, occurred where the wall acted as a dam and about six feet of water inundated downtown Nogales, Sonora. The flooding was not nearly as bad on the downstream side of the wall, but in Sonora, cars floated everywhere and debris strewn about the entire community. It resulted in millions of dollars in damages. Two people that

we know of drowned during this flood. Even the streets collapsed from the overloaded drainage system in Sonora. Nogales is a place that is flood-prone anyway, so when these walls are installed and flooding is not taken into account, that problem gets much worse.

We've also had the same problems when walls have fallen down and the floodwaters have rushed into Arizona all at once. There was another flood in 2014, and this time, it was Arizona neighborhoods, Arizona homes that were inundated by a wall of water that came rushing in when parts of the border wall fell in Nogales during a flood event.

So, you can imagine how you would feel if this was your home and if these problems were happening in your community. Our border communities tend to be very safe, but they also tend to be very poor, so this is an environmental justice issue that we're looking at.

It would be one thing if these walls were really solving problems on the border, but the fact is they're not. They're not addressing the root cause. They're not working. They're one of the most expensive and least effective ways to approach border security.

I wanted to tell you a little bit about President Trump's plan and what little we know about his wall. In December 2016, he asked DHS to assess all assets available for border wall and barrier construction. DHS said that barriers could be built along 413 miles of the U.S. border with Mexico, and it would cost \$11.37 billion. They also reported that 452 miles of the Canadian border could be walled at a cost of \$3.3 billion. The U.S. Government Accountability Office has released several reports on the border wall, one of which said that it would cost about \$6.5 million per mile to build a single-layer wall.⁹ This type of single-layer wall is similar to what was done in the Otay Mountain Wilderness Area in California, where the roadless and wilderness area was bulldozed and walls were built on various steep slopes, up and down, through an area that did not have a lot of cross-border traffic.

And then there are the \$10.4-million-per mile double-layer border walls, which look more like what was done in San Diego, where you have one layer of wall and then an open area and then another layer of wall. In some cases, there's even a third layer of chain-link fence, making a triple-layer barrier.

In January 2017, President Trump issued his Executive Order to build border walls as soon as possible, using the Secure Fence Act of 2006. And just this month, an internal DHS report was leaked that showed a \$21.6 billion price tag for Trump's wall, which laid out three phases, the first phase being a 26-mile-total section, several sections of wall in the San Diego, El Paso, and Rio Grande sectors. The second phase would be 151 miles in total in the Tucson, El Paso, Big Bend, Laredo, and Rio Grande sectors. And then this amazing report of phase three says

9. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SOUTHWEST BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO BETTER ASSESS FENCING'S CONTRIBUTIONS TO OPERATIONS AND PROVIDE GUIDANCE FOR IDENTIFYING CAPABILITY GAPS (2017), available at <http://www.gao.gov/assets/690/682838.pdf>.

we'll also build 1,080 additional miles somewhere. So, not a lot to go on there.

The report also basically assumed that this would be funded in April 2017 and the construction could begin in September. Obviously, we're going to do everything in our power to prevent that funding from going through. And everyone knows that President Trump has said that Mexico will pay; the Republican Congress, however, has recently said that U.S. taxpayers will pay for this.

In the Sierra Club, we say the thing we have to do when it comes to border issues is to address the root causes. The walls do not address the root causes. They don't address any of the problems, really, because they don't work. We think that supporting comprehensive immigration reform with a just path to citizenship would be a great way to start looking at the root causes and really do something about the problem. Also, sustainable development programs, such as Café Justo (Just Coffee),¹⁰ which is a really neat program if you haven't heard about it, allow people to make a decent living in their countries of origin. These programs really work, and they cost very little compared to border walls.

We do a lot of grassroots and media outreach. We talk to reporters, educate the public, go on field trips, do stuff like this webinar. And, of course, we try to take action, organize, lobby, etc. So, that's what we're up to. Our goal is that when people think about the border, when we think U.S.-Mexico border, instead of thinking just about walls, people should really think more about water and wildlife and what the borderlands are really all about.

David Roche: Thanks so much, Dan. That was a great summary of all the issues and Sierra Club's view of them, and it also makes me want to have a pet ocelot. Our next presenter is Sarah Krakoff from the University of Colorado Law School. She's going to be talking about indigenous rights issues.

Sarah Krakoff: I thought I would start out by just talking generally about what Native American nations or American Indian tribes have to do with the topic of border walls. First, some general background about the legal status of tribes in the United States. There are 567 federally recognized Native nations or American Indian tribes. They have a direct relationship with the federal government and they have the capacities of sovereigns with the ability to regulate and govern within their territorial boundaries with many important, and very complicated, exceptions under U.S. law.

Native nations are governments, and this makes them very different from other disenfranchised or minority groups within the United States. They have their own laws, and often they have their own legal systems. They have a variety of unique rights that stem from this direct government-to-government relationship. Anytime we think about the rights of Native people and Native nations, we have to think about this unique body of law, American Indian law.

Currently, of the 567 tribes in the United States, 25 tribes have land within approximately 200 miles of international borders between the United States and Canada and Mexico, many of which are up in Alaska, but a large number of which are in the lower 48 states. President Trump did not promise to build a wall between us and Canada, so we're only looking at the southern border. The only two Native nations that actually straddle the border are the Tohono O'odham on the southern border of Arizona and the Kickapoo over in Texas. So, they're not only within 200 miles, but they actually share a border with Mexico.

For these Native nations, the border is a wholly new and artificial construct. In fact, the Tohono O'odham aboriginal lands extend into Sonora. There, their aboriginal land base was divided when the United States acquired a huge chunk of what is now the southwestern United States after the Mexican-American War in 1848 and then in the Gadsden Purchase of 1853, which separated those tribes on the southern border. They just drew a line right through their aboriginal territory, and that's true for Tohono O'odham and the Kickapoo.

The region's remote location and sparse population at that time, the middle of the 19th century, led to there being no formal agreement between the United States and Mexico about the border-crossing rights for the Kickapoo, the Tohono O'odham, or any of the other tribes. This is different from the situation in Canada. There was, in fact, a treaty, which in many respects has since been superseded, but it was called the Jay Treaty, and it recognized that the Ojibwe on the northern border had a right to move back and forth, notwithstanding this line that cut through their aboriginal territory. No such formal agreement was reached with respect to the tribes on the southern border, but for a long time, this didn't really matter because there were no fences. As we know from Dan's talk, there were no big fences or boundaries until after the Secure Fence Act and the Real ID Act, after 9/11.

After 9/11, travel became more difficult, and various DHS measures did not include tribes in their provisions. For example, the Homeland Security Act of 2002¹¹ didn't provide any direct funding to tribes, and yet at the same time, it became increasingly difficult, to the point of physically difficult, after the construction of the fences for tribal members to cross the border. And this has all kinds of effects on the tribes.

I will mention that the Kickapoo tribe, unlike Tohono O'odham, did have legislation passed in 1983 that allowed Kickapoo tribal members to freely pass across the U.S.-Mexico border. But that situation changed after 9/11, with the requirements for secure IDs and passports. Mexico requires U.S. passports for travel. So, even for the Kickapoo, the recognition of their rights to freely cross the border changed after 9/11.

I'm going to shift and just talk mainly about the Tohono O'odham at this point, because they're a more populous tribe with a bigger land base, and have come out with

10. CAFÉ JUSTO, <http://www.justcoffee.org/> (last visited Apr. 24, 2017).

11. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

stronger statements in the wake of President Trump's announcement of a wall.

First, I'll just talk about some of the effects already witnessed because of the construction of the fence that Dan discussed. And, again, the negative effects sort of run in both directions. The DHS approach to date has provided insufficient support to the Tohono O'odham for them to successfully address the smuggling of humans and drugs across the border, and at the same time, it inhibits travel of the Tohono O'odham people. In terms of the effects on the tribe of illegal border crossings, drug smuggling, and so forth, there are huge environmental and social impacts.

In Tohono O'odham, the reservation is about the size of Connecticut. It's the second biggest land base, I believe, of any American Indian Tribe. The Navajo Nation is the biggest, their reservation is the size of West Virginia. So, Tohono O'odham has a big land base, it's extremely rural, and it's difficult to keep track of everything that happens on the border. As a result, there are a lot of problems such as drug smuggling and huge amounts of trash such as rusted vehicles and garbage. And then, of course most tragically, it includes dead bodies on the Tohono O'odham side of the border due to people trying to cross and dying because of the heat, lack of water, or just ill treatment. Each year, the tribe spends in excess of about \$3 million of its own funds on law enforcement addressing these border issues, and that's at the expense of what they could be doing to increase public health and safety on the rest of their nation.

At the same time—and this is true for other tribes, too—the Tohono O'odham cannot cross the southern border to access sacred sites or visit relatives and community members. Their aboriginal territory includes land that's larger than, or close to, the land on the U.S. side of the border, and now their land base is cut in half in a much more physical, and in some places literally concrete, way. So, there are negative effects running both ways for the Tohono O'odham. As a result, they're not happy with the wall situation to date, and so they certainly weren't welcoming of the idea to create an even larger border wall. The Tribe's vice chair made the statement, "Over my dead body will a wall be built."¹² We hope, of course, that's not literally true, but the tribe has officially come out opposing construction of the wall on their border, and that would result in a 62-mile gap in the border wall.

Since many of us are lawyers here, that's the factual backdrop and the legal context for understanding why the Tohono O'odham Nation and the Kickapoo and maybe other tribes, even those who don't have a border, might have different legal rights with respect to the situation. The legal effects on them are different and one thing that may make this 62-mile gap in the wall possible is the question about whether or not existing legislation, the Secure Fence

Act, already authorizes the construction of a wall across Tohono O'odham land.

This is tribal trust land. It's land held by the federal government in trust for the Tribe, and I suspect that the Tribe would argue that existing legislation doesn't authorize the construction of the wall. It's unclear whether that's the case or not, and it is currently an untested question. If Tohono O'odham is serious about their opposition to the wall (and there is every indication that they are), they would litigate if there was an attempt to build a wall without any further legislative authorization. But, of course, Congress could pass further legislation. In federal Indian law, Congress has very broad powers in Indian affairs, including the ability to pass legislation that breaches treaty terms. Again, that wouldn't go untested. If Congress passed legislation there could be a challenge to that in court. Under current Indian law doctrine, it could be an uphill battle, but for the Tohono O'odham it might be a battle worth waging.

The federal government does have a trust obligation to tribes, meaning that, because of the unique federal-tribal relationship, the federal government has an obligation, one that it took on early in the history of our republic, to safeguard the interests of tribes and tribal governments. Of course, in many situations, that ends up devolving into what is essentially a moral obligation, but it has legal aspects to it. Tribes are very much subject to the political leanings of a particular administration, and I don't think we've seen anything in this administration so far that indicates that it would take the Tribe's interests and prioritize them over the interest in constructing this wall. Nonetheless, the trust obligation is another hook, legal and moral, that the Tohono O'odham can use in their efforts to oppose a wall.

Then, moving down to the "softer" forms of law, tribes have the right to be consulted about actions taken that affect their land and their powers of self-governance and so forth. That right is embodied in Executive Order No. 13175.¹³ Whether this administration takes the consultation obligation seriously remains to be seen, although there are early signs that are not promising. The President's executive orders about the Dakota Access Pipeline, for example, do not bode well for strong protections of tribal consultation rights.

And then, of course, there is political advocacy. Tribes do have a very strong lobbying voice in Washington, D.C. and Congress, much stronger than they did several decades ago. I think that if Tohono O'odham sticks to its position of opposing this wall, they might build on the momentum that surrounded the support for Standing Rock and its opposition to the pipeline and try to build a sort of political movement to oppose the wall's construction on the Tohono O'odham section.

Moving to the international legal options, the United Nations Declaration on the Rights of Indigenous People,¹⁴

12. Samantha Schmidt, *A 75-Mile-Wide Gap in Trump's Wall? A Tribe Says It Won't Let It Divide Its Land*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/15/a-75-mile-wide-gap-in-trumps-wall-a-tribe-says-it-wont-let-the-wall-divide-its-land/?utm_term=.d77dd4b920cd.

13. Exec. Order No. 13175, 65 Fed. Reg. 67252 (Nov. 6, 2000).

14. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

which has the unfortunate acronym UNDRIP, has provisions that give indigenous peoples rights to self-determination of varying kinds. Several of the provisions of UNDRIP would certainly be implicated by the construction of a wall, including the rights of tribes to have free prior and informed consent to actions taken on their lands. Whether or not a tribe's resort to international forums (either the U.N. Forum or the Inter-American Commission, which is our regional version of the U.N. Forum) to object to U.S. actions would have any effect on the U.S. government is unclear. Our government, even in previous administrations, is not all that mindful of decisions that issue from these international forums when indigenous rights are concerned, but seeking redress there can nonetheless be part of a larger political strategy for tribes.

There are other options that the Tohono O'odham have, as do all U.S. citizens and litigants under environmental laws, but I'm just going to refer back to Dan's presentation in that the environmental laws are in a state of suspension due to the Real ID Act. Again, to compare to Standing Rock, those tribes brought litigation against construction of the Dakota Access Pipeline based on unique rights that tribes have, including consultation rights, but also powerful rights under federal environmental statutes. Without those laws being operative, tribes, too, lose powerful legal weapons and arguments in this kind of a battle.

David Roche: Thanks so much, Sarah. It's so wonderful to have a tribal legal expert here, solely because these issues are so often overlooked.

Our next presenter is Andy Gordon, who has done just about everything in his career. Basically he has worked on the fence issues, he's seen how this works in practice, and he has a really practical understanding of how the law interacts with politics.

Andy Gordon: Thanks very much. David was too polite and discreet to be more direct, but I know some of the people who are attending today know me from my prior position at DHS. I was counsel to the Secretary on fence issues in 2009 and 2010, and so I had direct on-the-ground experience from the DHS side.

There are several practical things I want to talk about in the few minutes here, and I know, and justifiably so, that there is a lot of concern about the building of a wall along the border and how rapidly it can happen, particularly in light of the environmental waivers. There is a lot, justifiably, to be concerned about. Although as I have said to several reporters in other sources, the president cannot tweet the wall into existence. There are real, huge, practical issues that the administration faces if they want to go forward.

While the fence is largely completed in Arizona, California, and most of New Mexico, it is largely not completed in Texas. Texas is overwhelmingly the largest uncompleted area, and there are a couple of reasons for that. One is obviously that the Rio Grande constitutes the bulk of that area and you cannot build a fence or a wall in the middle of the

Rio Grande for a number of reasons, including International Boundary Water Commission issues, which means it has to go on solid land, obviously, on the U.S. side. The biggest obstacle in Texas is that, unlike the property in Arizona, and largely California and New Mexico, that's privately held land. Before the government can build any wall on the privately held land, it has to acquire the land.

When I got to DHS in 2009, at that point, there were over 700 condemnation lawsuits pending in Texas alone with private property owners objecting to the government taking their land. This conflict between private-property rights and the perceived need for this construction is a huge political fight in Texas. I'm not taking a partisan side, but I've got to use partisan terms here, it's a huge political fight within the Republican Party because of their view of private-property rights. So, when the president or the new Secretary of Homeland Security says, "We'll have this done in two years," that's simply not going to happen. Putting aside the planning issues, first the property has to be acquired, and that's going to be wrapped up in litigation, at least in Texas, for a long time. That's one of the reasons why the Texas Republican delegation, particularly those members with districts along the southern part of the Texas border, have either come out in opposition to President Trump's plan or have been remarkably silent. The private-property takings issue is an enormous problem.

Second, there is simply a planning issue. The physical construction takes planning, it takes bidding, and all of that takes time, which again is not anywhere close to being done yet. The fence that's currently up, which is approximately 700 miles, were the easy places to build on or the high-traffic areas, where the illegal immigration concern was the highest. What's not built on, outside of Texas, is largely very difficult, up-and-down terrain.

The first parts of walls and fence were built back in 1996. The huge surge in building was during the Bush Administration after the passage of the Secure Fence Act. And then in the 2009-2011 time frame, some additional fencing was built during the Obama Administration, which was what I was involved with, and where I did in fact meet some of you.

The cost is generally estimated, but if they're really going to build 700 more miles of fence, it will cost somewhere between \$20 and \$25 billion. The reason that cost is so high is not only are the construction costs very high, but there is also the land acquisition cost I mentioned before.

Let me go back to the land acquisition for one moment. Sarah alluded to the fact that there's approximately 75 miles across the Tohono O'odham that has not been built on and that I think, although it's not completely clear, would take an act of Congress to do that, which is another obstacle.

Currently, the thinking is that they may have available to them in uncommitted funds maybe somewhere from \$300 to \$500 million, at the maximum. This isn't going to get them very far in this project, so they're going to need a very substantial appropriation over time. And if the Trump Administration is going to stick to the notion that they're

not going to grow the deficit or grow the budget, every dollar they spend to build a wall is not being spent on something else.

Dan talked about the various kinds of structure that are currently up, there are a lot of different kinds of fencing that's being used, depending upon the particular terrain and the assessed needs at that time. None of this is anything close to the 30-foot wall that the president has talked about. Now, whether that is just President Trump's hyperbole or not, we don't know. But there's nothing comparable to it at this point, which just magnifies the engineering difficulties of building it. Dan laid out wonderfully that there are enough environmental problems with the existing fence structures. A wall is a wall.

I want to spend a couple of moments talking about what the Executive Order itself says. It talks about securing the southern border of the United States through the construction of a physical wall, monitored to prevent immigration, drug and human trafficking, and acts of terrorism. In addition to the other things I do, I also teach national security law at the Sandra Day O'Connor School of Law at Arizona State University—they want us to use the whole name when we talk about the law school.

There is no reason to believe that this wall would have any significant impact on drug trafficking or acts of terrorism. The drug trafficking, while there may be some coming through, it's not a significant amount. Most of that comes through by air, sea, or, frankly, through the existing ports and places like Nogales, where they bring it through in trucks. More than 80% of the illegal drug traffic that comes in from Mexico is marijuana, which is large and bulky and needs to go in large containers. And we have, at least at the time I was at DHS and from what I can gather subsequent to then, no record of any terrorist coming through the southern border this way.

What I want to point out here are two things. While he calls it a wall, the Executive Order really says "physical wall or other similarly secure, impassable physical barrier." Maybe that's a wall, maybe that's a fence. Impassable by whom, I don't know.

"Operational control" means, and this is the really frightening one, the prevention of all unlawful entries into the United States. That's just a remarkably hyperbolic statement to assume that a country the size of the United States—realizing that the Mexican border is just a small percentage of the total border the United States has—ever could prevent or would be willing to spend the money or that it's worth the effort to stop all unlawful entries into the country.

What's interesting in the remaining portions of this order is it doesn't actually say where the wall is going to be built or what it's going to look like. It just says "using appropriate materials and technology to effectively achieve," but then it says "complete operational control." So, at this point in time, we really have no idea. And President Trump has been so dismissive of what's up there already, candidly, I can't tell whether he's talking about taking down fence that

currently exists and replacing it with a wall, putting a wall up where there is no fence now, or doing both.

From an environmental perspective, while the Executive Order itself doesn't talk about the waiver power, which is absolute, it does talk about permitting all officers, employees of the United States, as well as locals to have access to all federal lands as necessary and appropriate to implement this order.

When I was at the DHS working on the construction, we were not utilizing the waivers and were very heavily involved in what we referred to as the interagency process. Whether they plan to do that going forward or not, I don't know. My bottom line is that there are a lot of real-life complications to doing this. It's a frightening prospect or, at least from my perspective, it's a frightening process, but there are also a huge number of bumps in the road ahead. Whether Congress and the U.S. Senate, particularly the senators in Arizona and Texas, really want this to happen—we'll see if they have the stomach for that fight.

David Roche: Thank you so much, Andy. Getting some of the practical experience you've had is just invaluable and we really appreciate you being frank about all these issues.

Now, we're going to hand it off to our final panelist, Sarah Burt from Earthjustice. She has tons of expertise on this, just thinking about ways that Earthjustice might approach this border wall, and I'll let her talk more about that.

Sarah Burt: Thank you, David. I was asked to talk a little bit about some of the legal issues surrounding the border wall, the legal authorities, and perhaps grounds for challenging the wall. And I have to say that, following Dan, Sarah, and Andy, my job has been made very easy, as they've done a really thorough job of laying out a lot of the legal authorities and issues. I'm going to move through this somewhat quickly with an eye on the time and hope we can get to questions, and I'm happy to talk in more detail about anything I touch on if there's interest in that during the question time.

As the previous panelists have made clear, this is not the first time that the prospect of a wall along the southern border has come up. We saw a significant increase in impassable infrastructure during the Bush Administration and, at least from the perspective of the federal government, the legal authorities for President Trump's wall are generally holdovers from that era or just preceding it. This has already been explained: prior to 1996, federal immigration statutes didn't expressly authorize or require the construction of barriers along the international borders. Authority to build such barriers would have probably primarily derived from the general statutory authority of the Attorney General, now the Secretary of Homeland Security, to guard the boundaries and borders of the United States against the illegal entry of aliens. But with the passage of the Illegal Immigration Reform and the Immigrant

Responsibility Act of 1996,¹⁵ DHS' specific authority to deploy barriers along international borders was enacted.

I want to focus specifically on §102 of the Real ID Act, which has been alluded to previously, so I'll run through it quickly. It authorizes DHS to construct barriers to deter illegal crossings particularly at locations of high illegal entry. It requires construction of fencing covering at least 700 miles along the border. Subsequent amendments have made clear that those 700 miles are not required to be in any particular location. And, as I think Andy said, we are almost at 700, but a little shy of the 700 miles that are required by §102.

And then, perhaps most significantly, §102(c) provides the Secretary of Homeland Security with authority to waive any legal requirements that may impede construction of barriers and roads. I want to just pause on the waiver issue, as it's one of the most troubling aspects of the border wall. As originally enacted, §102(c) only gave the Secretary authority to waive the Endangered Species Act (ESA)¹⁶ and the National Environmental Policy Act (NEPA),¹⁷ which is bad enough. But, in 2005, Congress passed the Real ID Act, which amended §102 to allow the Secretary to waive all legal requirements deemed necessary to ensure expeditious construction of barriers, and it explicitly limited the scope of the possible challenges to the Secretary's use of the waiver authority to claims alleging violations under the U.S. Constitution.

As Dan and Sarah have shown in their presentations, the construction of border infrastructure has really significant impacts on people as well as on wildlife and ecosystems. And so, given the limitations on judicial review, what legal avenues are there, or might there be, to challenge additional construction of a border wall? As a starting point, we can look back to the challenges that were brought in 2005 to 2008 against the Bush Administration's border fence. Because of the waiver, these cases have to be brought on constitutional grounds and, unfortunately, they were uniformly unsuccessful. The first constitutional theory that was tried is the idea of non-delegation, and there were three cases brought in which plaintiffs asserted that allowing the president to waive applicable laws was an unconstitutional delegation of the legislative power to pass laws. Those cases were dismissed and that non-delegation theory was not adopted by the courts.¹⁸

A second constitutional theory that was tried was under the Presentment Clause, which is actually a couple of clauses in the Constitution that lay out how statutes are to be enacted and amended: essentially that they're drafted by Congress and then presented to the president for either a signature or veto, and that allowing the president to waive

these laws is a violation of the Presentment Clause. It was allowing the president to essentially amend or repeal laws. The courts also did not buy that legal theory, arguing that the executive's actions were waivers that were bounded by limits delineated in law and they were not actually altering the underlying laws themselves.¹⁹

The final constitutional challenge tried was a Tenth Amendment challenge brought by the county of El Paso, which argued that the waiver of all state and local laws was a violation of the preemption doctrine, and that the authorities reserved to state and local governments under the Tenth Amendment allowed them to continue to enforce their laws.²⁰ But, unfortunately, the district court in Texas in that case held that Congress had in the text of the statute explicitly preempted state and local law. Also, in their effect, because of the conflict between federal and state and local laws, they were also preempted.

Where does that leave us? Are there new legal theories that might be tried to challenge any additional construction of a border wall under President Trump? Two areas that have been touched on that I just want to note are the special rights that the Native American communities living along the borders have and the potential for perhaps the constitutional claim invoking the indigenous communities' First Amendment rights.

As Sarah described, the Tohono O'odham travel their ancestral lands across the U.S.-Mexico border, and they have ceremonies that require them to travel from Arizona down to Sonora, Mexico, and construction of a wall would prevent them from the free exercise of their religion. So, perhaps there's a First Amendment claim that can be brought there. Related claims that Sarah also touched on are international claims based on the special rights of indigenous communities under international law and human rights law, including a right to prior informed consent and rights to practice culture and religion. And as Sarah said, those claims would be part of broader political strategies that would bring pressure to bear on the government to change policies on the wall, rather than being legal actions that could result in any kind of enforceable judgment.

The last legal theory that I wanted to highlight is one that was floated by Professors Daniel Hemel, Jonathan Masure, and Eric Posner at the University of Chicago,²¹ who looked at the U.S. Supreme Court decision of *Michigan v. Environmental Protection Agency*,²² in which the Court held that the language "necessary and appropriate" in the Clean Air Act (CAA)²³ required the Agency to conduct a cost-benefit analysis before issuing regulations. The professors noticed that the language in the Real ID Act also requires the Secretary of Homeland Security to issue waivers "as nec-

15. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

16. 16 U.S.C. §§1531-1544; ELR STAT. ESA §§2-18.

17. 42 U.S.C. §§4321-4370h; ELR STAT. NEPA §§2-209.

18. See *Defenders of Wildlife v. Chertoff*, 2007 U.S. Dist. LEXIS 92648 (D.D.C. 2007); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *County of El Paso v. Chertoff*, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. Aug. 29, 2008).

19. See *Chertoff*, 2007 U.S. Dist. LEXIS 92648; *County of El Paso*, 2008 U.S. Dist. LEXIS 83045.

20. *County of El Paso*, 2008 U.S. Dist. LEXIS 83045.

21. Daniel Hemel et al., *How Antonin Scalia's Ghost Could Block Donald Trump's Wall*, NY TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/opinion/how-antonin-scalias-ghost-could-block-donald-trumps-wall.html?_r=0.

22. 576 U.S. __ (2015).

23. 42 U.S.C. §§7401-7671q; ELR STAT. CAA §§101-618.

essary and appropriate,” and so the theory would be that any consideration of a waiver to construct the border wall would have to include a cost-benefit analysis. As we know, the costs associated with a wall are extremely high and the benefits in terms of accomplishing the purposes of such a wall are questionable. So, this theory of a sort of regulatory cost-benefit analysis might be the basis for a challenge.

Any of these avenues are going to be uphill battles. There’s also the issue of getting that cost-benefit analysis into court if it has to be part of a constitutional claim. The Administrative Procedure Act (APA)²⁴ has been waived, too, and so judicial review as it would normally occur isn’t possible, and that’s where that kind of analysis would usually be conducted. Because of the breadth of the waiver and because of the discretion courts give to the executive when acting on foreign policy and national security issues, any legal challenge is going to be an uphill battle. I’m hopeful that creative legal minds can come up with some viable theories. We’ll see as the policies around the wall go from a rather broad Executive Order with many hurdles to its implementation, as Andy described, to actual concrete action. We’ll see if the possibility of legal challenge arises.

David Roche: Thanks so much, Sarah. I know that was a great presentation, because I literally found myself at the edge of my seat while you were describing legal theories.

First, we have a couple of audience questions that touch on takings. The issue of taking private lands to build this wall, is it a condemnation process, and how does it work in practice in terms of getting from filing for it to completing it? How long does it take? Is it just a matter of time before the court rules in favor of the government or are they more contentious than that? Andy, I believe you were talking about that so I’d love for you to start.

Andy Gordon: Generally speaking, the federal government has the right of condemnation against property owners and there’s a process that it takes to run through. And as Sarah Burt alluded to, the rights of the government when it comes to border issues are especially deferred to. There’s little doubt that they have the right to take, but the lawsuits themselves can take quite a while depending on what judge you draw, what court it’s in, there’s just a lot that goes into it. But when I was at DHS, there were takings lawsuits that had been pending over seven years. They may try to get something through Congress to accelerate the takings process along the border, but under the Fifth Amendment, they can’t take a property without due process, including compensation.

David Roche: The next question asks about President William Clinton’s Executive Order No. 12898 on environmental justice.²⁵ Could that be used to hold DHS accountable, or was that one of the laws waived or is that not applicable here because it’s an Executive Order? Do you have any

feel for how environmental justice in the Executive Order could play a role? Sarah Burt, do you have any thoughts on this issue?

Sarah Burt: Yes, the problem with an Executive Order is that it’s extremely easy to reverse. So, although it’s not explicitly part of the statutory waiver, it would be easy for President Trump to say that it does not apply. I wonder whether the argument could be made that it could also be waived because the text of the statutory waiver is so broad, as it says, “any laws.” I think an argument could be made that it is also waived. If it is not also waived, it could be easily made to be waived. But I like the idea of thinking about the environmental justice angle.

David Roche: The next question is more about scope. Do current waivers apply to the entire border other than the tribal lands, or would there need to be new waivers for additional construction?

Dan Millis: To summarize, about 500 of the 2,000 U.S.-Mexico miles were places where laws were waived, and it was done in a somewhat piecemeal fashion. This includes parts of Tohono O’odham Nation, as well as other tribal areas, I’m sure. Basically, what happened was on five separate occasions, former Secretary of Homeland Security Michael Chertoff issued a waiver. As far as I know, what they do is issue a statement in the *Federal Register* saying, “From this border mile to that border mile, I’m waiving X, Y, and Z.”

And correct me if I’m wrong, but they did that first in the San Diego area with a number of laws. Then they waived laws in parts of Arizona, where the Sonoran pronghorn lives, which included areas in the Tohono O’odham Nation, if I’m not mistaken. The third spot where they did this was at the San Pedro Riparian National Conservation Area, where a Defenders of Wildlife case was brought against the wall construction project and Secretary Chertoff.²⁶ And then they did something strange in Hidalgo County, Texas. It was their fourth waiver, but later that same day, they issued what we call the “mega waiver,” where they basically said, “Fine. We’re sick of doing these smaller waivers, so we’re waiving laws for basically everywhere that we might want to build walls for the next few years,” and that was the one that brought the total up to nearly 500 miles and 37 laws waived.

That’s basically how the waivers were administered, and the way that they look on the ground is that it covers about one-quarter of the overall 2,000-mile U.S.-Mexico border. The extent to which this waived territory extends into the interior of the United States is undefined, but to my knowledge, the furthest inside the United States that it’s been used is about two miles inside the line for the so-called “Zone 20 Road Project” northwest of Nogales, Arizona.

24. 5 U.S.C. §§500-559.

25. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

26. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 38 ELR 20005 (D.D.C. 2007).

David Roche: The next question is for Sarah Krakoff on tribal rights. Are those purely applied within the borders of tribal lands, or can any argument be made that those can extend outside those boundaries?

Sarah Krakoff: Good question. Many of the rights that tribes have are limited by their territorial boundaries, but some of them, like the rights to be consulted, could extend to activities that occur outside of tribal boundaries on lands that affect tribal rights. For example, religious freedom rights or treaty rights, and I'm just talking generally here, not specifically answering the question about Tohono O'odham. So, yes, there can be legal rights that tribes have, distinct from other individuals or groups, that extend beyond their territorial boundaries. I think the stronger cases are where actions are taken on tribal land, which is why for both Tohono O'odham and Kickapoo, since they share the border with Mexico, they're in a stronger position than tribes north of the border that just have other kinds of interest that extend beyond their land base.

David Roche: Final question for everyone: What is one thing you're on the lookout for coming up, or unanswered question, or something that your organizations are interested in that you're working on?

Dan Millis: I already said it, but we're looking to stop the funding for the wall. We think it's a waste of money. This is the most expensive, least effective way to approach border security issues, and we've already paid a heavy price for it down here in the borderland. So, we're looking to reach out to key lawmakers, senators especially, and convince them to vote against the billions and billions of dollars of border wall funding that we think they're going to be confronted with.

Sarah Krakoff: I would say the things to look out for are the formation of alliances between the big national

environmental groups like the Sierra Club and the tribes and the tribes' national lobbying organizations like the National Congress of American Indians. In the past, sometimes environmental groups and tribes have not had the same interests and have been divided on certain kinds of preservation issues. However, because of the acute effects on tribes, the environmental justice issues, there could be a very broad coalition—social justice groups, tribes, the big enviros, and maybe the libertarian groups—all joining together to say this is really just a bad idea. It's too expensive and won't solve the problem, echoing what Dan said. It would be interesting to see if that kind of coalition would come together.

Andy Gordon: I would watch the appropriation battle. I think that's where this is really going to play out. I would really keep my eye on the Republican senators from border states who aren't very enthusiastic about this for a variety of reasons. And I do think there's a strong libertarian pitch that can be made at the same time. My hunch is that the president is going to find it a lot harder to get money for this than he thinks. They may have given him some, but they'll nickel and dime it out. That's where I would go to fight first.

Sarah Burt: I would like to echo what the other Sarah said, and say that Earthjustice, and I hope that the public broadly, will be looking at where this border wall impacts people and the kind of coalitions that can be brought together around that. The movement around Standing Rock and the Dakota Access Pipeline has been hugely powerful. And to the extent that this is a fight that is possibly going to be primarily political and secondarily legal, I think that having the power of that kind of movement behind it will be extremely important.