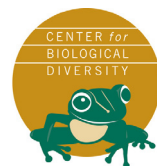


# Death, Damage, and Failure:

Past, Present, and Future Impacts of Walls on  
the U.S.-Mexico Border

2019 Update





# Executive Summary

The report *Death, Damage, and Failure: Past, Present, and Future Impacts of Walls on the U.S.-Mexico Border*, examined the border walls built since the Prevention through Deterrence strategy was implemented in 1994. Prevention through Deterrence aimed to use militarization of the southern border, including a rapid expansion of the Border Patrol's ranks and an unprecedented deployment of technology and border walls, in an effort to convince would-be border crossers that apprehension was guaranteed or that crossing was too dangerous to even try. Clear evidence demonstrates that even as the number of agents doubled, then doubled again, and barriers came to line 654 miles of the U.S. southern border, border crossers were not deterred. Border walls did, however, inflict tremendous harm upon border communities, the sovereignty of Native American nations, and borderlands ecosystems. Walls and Border Patrol deployments near border cities and towns also shifted the locations of crossings into more remote, rugged, and deadly terrain, causing a dramatic increase in the number of people who perish attempting the journey.

*“Death, Damage, and Failure”* analyzed the well-documented impacts of existing border walls in order to predict the harm we can expect from the erection of new walls. Although significant negative impacts from further wall construction are unquestionable, the lack of knowledge regarding exactly how many miles of wall would ultimately be built, and where they would go up, were major impediments to making precise predictions. In September 2018, when *“Death, Damage, and Failure”* was released, Congress had provided the Trump administration with \$1,912,000,000 to replace existing barriers in California and Arizona, convert 20 miles of vehicle barriers into border walls in New Mexico, and to build entirely new border walls in Texas. In 2019, Congress provided the president with an additional \$1.375 billion through the fiscal year 2019 appropriations bill to wall off the remainder of South Texas' Lower Rio Grande Valley. Shortly thereafter, President Trump declared an emergency on the border to enable the administration to redirect \$6.1 billion that Congress had appropriated for the Pentagon to instead build hundreds of miles of border wall. An additional

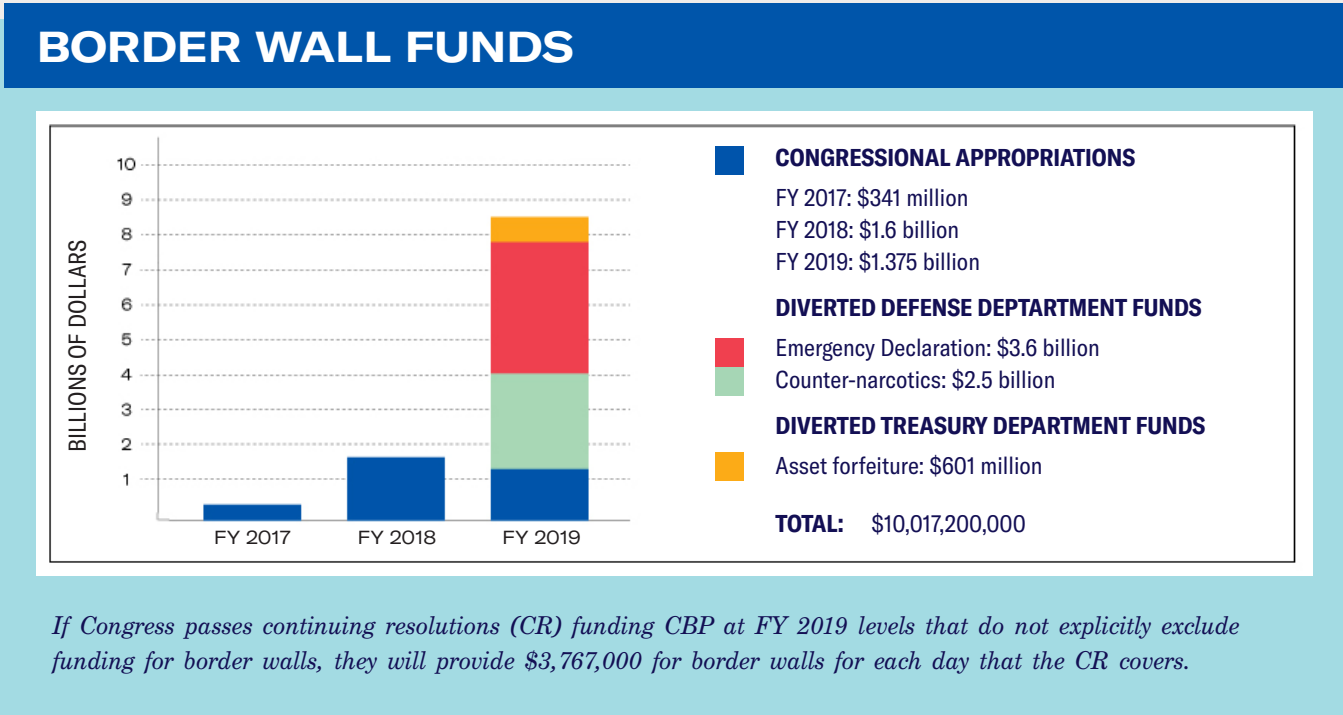
\$601 million was taken from the Treasury Department’s asset forfeiture fund. If the emergency declaration withstands legal challenge, the Trump administration will have more than \$10 billion available for border wall construction, dwarfing the \$2.3 billion spent on border barriers from 2007 through 2015. The locations of the hundreds of miles of new walls that those monies will pay for have been revealed, making it possible to better forecast their likely effects.

The following is meant to supplement “Death, Damage, and Failure,” avoiding (as much as possible) repeating the information that the first report contained and instead focusing

on the developments of the past year and their implications. The first section provides an overview of the funding sources that are being used to pay for Trump’s walls, along with a discussion of the legal challenges lodged against his emergency declaration and waivers of federal law. The next section focuses on some of the specific locations that are being targeted for construction, and the harm that those walls would inflict. The last section discusses the impacts that walling off more and more of the border will have on the asylum seeking individuals and families who currently comprise the majority of the Border Patrol’s apprehensions, and who are increasingly forced to risk their lives in the effort to find safety in the United States.

The findings of the 2019 update to “Death, Damage, and Failure” include:

The Trump administration has \$10 billion dollars available for border wall construction when the funds claimed under the national emergency declaration are added to congressional appropriations.



- Two-thirds of the recent funds for border wall construction (\$6,701,000,000) comes via the emergency that President Trump declared on the border, the shifting of military funds into accounts intended for narcotics interdiction, and the raiding of the U.S. Treasury's asset forfeiture accounts. These extraordinary funding sources represent an end run around the congressional appropriations process, cutting the American people out of the decision to build more border walls and leading to court challenges regarding the constitutionality of these moves.
- In addition to this apparent constitutional violation, the Trump administration has waived dozens of laws meant to protect people and the environment in order to hasten border wall construction. This will have the effect of making border walls even more damaging as they are erected without regard to or understanding of the impacts they will have on communities or the environment now or in the future.
- owned by 540 distinct owners, and Starr accounts for less than 1/3 of planned Texas border wall mileage. Homes, farm fields, and businesses will end up behind border walls and may be rendered inaccessible.
- Border walls are planned for the Rio Grande floodplain, imperiling communities on both sides of the river. These walls will act like dams, worsening flooding and risking property and lives.
- Tremendous damage will be inflicted upon the Lower Rio Grande Valley National Wildlife Refuge, and along with it the dream of a contiguous wildlife corridor along the Lower Rio Grande, a project began when the Refuge was founded in 1979. Because it is federally owned, the LRGV National Wildlife Refuge will likely see some of the first border wall construction. Wildlife, including endangered plant and animal species, will suffer habitat loss and fragmentation.

**The \$1.375 billion in new border wall construction funding that Congress appropriated for FY 2019 will inflict serious harm on South Texas communities and ecosystems.**

- Hundreds of municipal and private landowners in the Rio Grande Valley are set to lose their property. Families, some of whom have passed down farms for generations, will have their property condemned. In Starr County alone, CBP intends to acquire 866 parcels of land

**The \$6.7 billion taken from the Departments of Defense and Treasury will cause irreparable damage in sensitive wild places.**

- Fifty-two miles of border wall will line the Rio Grande near Laredo, Texas. This area has never seen border walls, and they will cut across a landscape rich with ecological and archaeological treasures.
- President Trump's border wall will cross the San Pedro, Arizona's last undammed

free-flowing river. The new wall will likely accumulate debris and block the river's flow, damaging fragile riparian habitat.

- At Organ Pipe Cactus National Monument, crews are drilling wells to pump millions of gallons of groundwater to make cement, imperiling nearby Quitobaquito Spring. The spring is one of the last remaining examples of desert wetlands that once punctuated the Sonoran Desert. It is home to endangered species and a sacred site of the Tohono O'odham Nation. Both the organ pipe cactus that the monument is named for and hundred-year-old saguaro cactuses have been bulldozed in the border wall construction site.

**The Trump administration policies of “metering” and the Migrant Protection Protocols will dramatically worsen the humanitarian crisis and lead to more deaths of immigrants and asylum seekers.**

- Most of the people who the Border Patrol is currently apprehending are crossing the border in order to seek asylum. They are not attempting to evade authorities and will not be deterred by border walls.
- Preventing asylum seekers from crossing the border safely at ports of entry pushes many to enter the United States between ports of entry in order to make their asylum claims. This can mean crossing the Rio Grande or trudging through remote deserts where an increasing number perish.
- The Migrant Protection Protocols, which forces asylum seekers to await immigration court dates in Mexico, rather than in the U.S., has led to the victimization of vulnerable people. This can lead some to give up on waiting for their U.S. immigration hearing while stuck in Mexico and instead attempt to cross the border clandestinely, taking potentially dangerous routes into the United States.



Border Wall washout in Organ Pipe Cactus National Monument. **2011. National Park Service.**

## Recommendations

In light of the tremendous damage that border walls and other recent Trump administration immigration policies will inflict, we recommend the following:

- Congress should refuse to appropriate any further funds for border wall construction, and should work to rescind funds that have already been appropriated.
- Customs and Border Protection should cease construction and planning of walls along the U.S. southern border.
- Congress should rescind the Department of Homeland Security’s authority to waive laws for border wall construction by passing the Rescinding DHS’s Waiver Authority for Border Wall Act (H.R. 1232) and Senator Udall and Heinrich’s equivalent legislation (S. 254).
- The administration should end its “metering” policy, which limits the number of asylum seekers who are permitted to make initial claims for asylum at ports of entry.
- The administration should end its Migrant Protection Protocols policy, which forces asylum seekers to remain in Mexico for months while their cases wind through immigration court.

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# Making Border Walls a Reality



Border wall bollards stacked in Mission, Texas. **2019. National Butterfly Center.**

## Congressional Funding for Border Walls

Prior to the 2018 midterm election, Congress passed, and the president signed into law, appropriations bills for fiscal year 2019 necessary to keep parts of the federal government, but not the Department of Homeland Security (DHS) and several other federal agencies, operating throughout fiscal year 2019 (FY 2019). Immediately following the election in which the Democrats regained the majority in the House, Republicans looked ahead and determined to enact the remaining FY 2019 spending bills that reflected the GOP's priorities

before they had to hand over control of the House to the Democrats. President Trump demanded \$5.6 billion in border wall funding, but Democrats, also looking ahead to the coming legislative session, demurred. They offered to fund the Department of Homeland Security at levels unchanged from the prior fiscal year (FY 2018), with \$1.3 billion for border walls. With portions of the government operating under continuing resolutions (stopgap spending bills that fund agencies for limited periods of time at levels unchanged from the last enacted appropriation) that would expire on December 22, legislation would need to be enacted to fund the Departments of Homeland Security, Justice, State,



Agriculture, Interior, Commerce, and others. Then House Minority Leader Nancy Pelosi and Senate Minority Leader Chuck Schumer met with President Trump, intending to hammer out a compromise to avert a partial government shutdown. But the president launched into what Senator Schumer would later characterize as a “tantrum,” proclaiming that he would be “proud to shut down the government for border security.”<sup>1</sup> Subsequent efforts to negotiate a spending measure failed, and as members of Congress left Washington, D.C. for the holiday recess, the partial federal government shutdown began.

The partial shutdown over border wall funding lasted 35 days. Approximately 300,000 federal employees were furloughed, and an additional 500,000 came to work but did not receive a paycheck. Border Patrol agents were among those deemed essential personnel who continued to carry out their duties unpaid through the holidays. As a result of so many workers going without pay, and government activities going without funding, the Congressional Budget Office estimated that the United States’ gross domestic product was \$3 billion less in the fourth quarter of 2018 than it would otherwise have been, and \$8 billion less in the first quarter of 2019.<sup>2</sup> By late January, sympathy for unpaid federal workers and upset regarding unfulfilled government services was driving down President Trump’s approval ratings. On January 25, he announced that an agreement had been reached to fund the unfunded

federal agencies for three weeks. Furloughed federal employees would get back pay, but the deal did not include more money to build border walls. A congressional working group would hammer out a new appropriations bill in the interim.



Canoeing the Rio Grande in an area slated to be behind the border wall. 2019. Scott Nicol.

The omnibus legislation crafted by the working group contained \$1,375,000,000 in fiscal year 2019 funding for pedestrian fencing – also known as border walls – in the Border Patrol’s Rio Grande Valley Sector of south Texas. This was the same amount of border wall funding that the president had rejected in December, precipitating the partial government shutdown. In 2018, Congress had given CBP \$641 million to build border walls in the Grande Valley Sector, which was supposed to add at least 33 miles to the 54 miles of levee-border wall and bollard border wall that had been in place for nearly a decade. With the addition of this FY 2019 funding, DHS had the resources to wall off almost all of the Rio Grande Valley, creating a span of near-continuous border wall 160 miles long.

1 Everett, Burgess, Sarah Ferris, and Caitlin Oprysko. “Trump Says He’s ‘Proud’ to Shut Down Government During Fight with Pelosi and Schumer.” Politico. December 11, 2018.

2 The Effects of the Partial Shutdown Ending in January 2019. Congressional Budget Office. January, 2019.

## PROTESTS IN SOUTH TEXAS

Sitting on the northern bank of the Rio Grande, the doors of the La Lomita chapel are always open and candles flicker on its modest, wooden altar. Originally built in 1865 and rebuilt in 1899, the chapel was once an outpost for Oblate priests serving the surrounding ranching communities. The nearby City of Mission, Texas was named in its honor, and it has remained a place of pilgrimage. In August 2017 people from all over the country joined hundreds of local residents in a procession and protest to draw attention to the threat that the border wall posed the mission. It stands close to the flood-control levee, within the 150-foot-wide “enforcement zone” for the planned levee-border wall that CBP intended to clear of vegetation and structures alike. The La Lomita protest was followed by protests at Santa Ana National Wildlife Refuge, which CBP planned to target for the first new border wall in the Rio Grande Valley because it was already owned by the federal government. The National Butterfly Center, a refuge owned by a private foundation where a levee-border wall

had been planned to run between the visitor’s center and 70% of the habitat, also hosted numerous anti-wall protests, teach-ins, campouts, and art events. Bentsen Rio Grande State Park and World Birding Center, which would likely close its gates and be given back to the family that had donated the land to the state of Texas in 1944 if it were walled off, also saw repeated pop-up protests. These and other community-led actions drew national and international press and had an impact on Congress, which included “carve-outs” explicitly forbidding border wall construction in each of them in 2019. Though activists were relieved to see them spared, they were not mollified. None saw the exemptions enjoyed by La Lomita or Santa Ana as making the walling off of other refuges or the condemnation of family farms acceptable. Their actions had successfully drawn attention to some specific places that walls threatened to destroy, but Congress had not heard the larger message, chanted at rallies and splashed across signs and banners: NO BORDER WALL!



From left: National Butterfly Center. **2019. Scott Nicol**; Santa Ana NWR. **2017. Scott Nicol**; Right: La Lomita Procession. **2017. John Liss**.

Congress imposed a number of restrictions upon this border wall funding. The fiscal year 2018 spending bill had decreed that only border wall designs deployed prior to 2017 could be built with the new money, thereby excluding the border wall prototypes that President Trump had erected outside of San Diego. It had also exempted the Santa Ana National Wildlife Refuge, site of two major “Save Santa Ana” protests, from wall construction. The FY 2019 bill reiterated these proscriptions, and added protections for a handful of other Rio Grande Valley locations that had seen large grassroots protests which, like the Save Santa Ana Rally in January 2018, had garnered a good deal of national press. Two other nature preserves, the National Butterfly Center and Bentsen Rio Grande Valley State Park, were to be spared from border wall construction. So would the historic La Lomita chapel, as well as the final fifteen miles of the Rio Grande before it empties into the Gulf of Mexico where SpaceX has a commercial rocket launch pad.

## Declaring a National Emergency at the Border

Just 13 hours after President Trump signed the legislation that provided \$1.375 billion for new border walls, he declared a national emergency on the U.S. southern border, invoking the National Emergencies Act and calling upon the Secretaries of Defense and Interior to bolster the efforts of

the Department of Homeland Security.<sup>3</sup> Both agencies had previously been engaged in support roles: U.S. Fish and Wildlife and National Park Service law enforcement officers from all over the United States were sent on temporary detail to the southern border, and both active-duty Army and National Guard troops were deployed to the border region in to string concertina wire and watch for border crossers. President Trump indicated that he now intended to redirect billions of dollars from Department of Defense projects to border wall construction. Using the executive authority granted by the National Emergencies Act, the administration would divert \$3.6 billion that Congress had appropriated for military construction projects and funnel towards more wall construction. On top of that, \$2.5 billion would be transferred into the Defense Department’s Support for Counterdrug Activities fund and earmarked for border wall construction. An additional \$601 million for walls would come from the Treasury Department’s law-enforcement forfeiture fund. Added to the money that Congress had allocated, this meant that the administration had \$8.1 billion with which to build border walls.<sup>4</sup> Finally, he instructed the Secretary of the Department of the Interior to support the various authorities cited within the declaration, including, “if necessary, the transfer and acceptance of jurisdiction over border lands.”<sup>5</sup>

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3 Trump, Donald J. “Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States.” February 15, 2019.

4 “President Donald J. Trump’s Border Security Victory.” White House fact sheet. February 15, 2019.

5 “Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States.” February 15, 2019.



In announcing his emergency declaration, Trump justified it by claiming that, “We have an invasion of drugs and criminals coming into our country.”<sup>6</sup> During the same press briefing he refused to engage with statistics raised by journalists that ran counter to this assertion. While the number of apprehensions of border crossers made by the Border Patrol in fiscal year 2018 was higher than the year prior, the 396,579 people that they took into custody marked the continuation of a declining trend from the peak, 18 years earlier, of 1,643,679 apprehensions on the southwest border.<sup>7</sup> And U.S. border towns are hardly hotbeds of criminal activity with residents living in fear. As has been widely reported, border communities have for many years had lower crime rates than the rest of the nation, with San Diego and El Paso vying for the top slots on lists of the 10 safest big cities in the U.S., El Paso’s crime rates had been dropping and was at historic lows, long before the passage of the Secure Fence Act in 2006 and the subsequent erection of border walls.<sup>8</sup> As the Libertarian Cato Institute concluded following an examination of the FBI’s Uniform Crime reports, “If the entire United States in 2017 had crime rates identical to those in counties along the U.S.-Mexico border, there would have been 5,720 fewer homicides, 159,036 fewer property crimes, and 99,205 fewer violent crimes

across the entire country.”<sup>9</sup> The claim of a criminal invasion terrorizing southwest border communities had no basis in fact.

The stated purpose of the emergency declaration was to access Department of Defense and other funds contrary to Congress’ appropriations judgement. Money that had been provided to build schools and housing for military service members and their families, for example, would instead go to wall construction. This, on its face, appeared to go against the notion of the “power of the purse” that the U.S. Constitution gave to Congress, whereby the executive branch is only able to spend funds appropriated by the legislative branch. In February/March, and then again in September 2019, Democrats forced a vote on a resolution to terminate President Trump’s National Emergency declaration. Under the National Emergencies Act of 1976, a vote can be forced on a resolution to terminate the national emergency declaration every six months. Both times, the resolution passed in both the House and Senate with several Republicans joining Democrats in this effort to terminate the emergency declaration. Yet, both times President Trump vetoed the resolution when it reached his desk as neither chamber mustered enough votes to override the veto. The Democrat-controlled House of Representatives sued the administration, arguing that the redirection of military funds to build the border wall violated the constitutional separation of powers and undermined constitutional congressional control over appropriations.<sup>10</sup> In June 2019, a federal judge

6 “Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border.” February 15, 2019.

7 “U.S. Border Patrol Total Illegal Alien Apprehensions by Month FY 2000 - FY 2018.” U.S. Customs and Border Protection Stats and Summaries webpage. <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf>

8 Timm, Jane C. “Fact check: Trump claims a wall made El Paso safe. Data shows otherwise.” NBC News. February 11, 2019.

9 Nowrasteh, Alex. “Crime Along the Mexican Border Is Lower Than in the Rest of the Country.” Cato Institute. <https://www.cato.org/blog/crime-along-mexican-border-lower-rest-country>

10 Harris, Andrew M., and Kartikay Mehrotra. “House Democrats Sue to Block Spending on Trump’s Border Wall.” Bloomberg News. April 5, 2019.

in the District of Columbia ruled that the House of Representatives did not, on its own, have standing to invoke the court's jurisdiction.<sup>11</sup>

Before the House suit, six plaintiff groups had separately challenged the Trump administration's diversion of military money to build the border wall. A coalition of states, led by California and including, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Virginia, and Michigan, claimed that the diversion of funds violated constitutional separation of powers, and that taking money from projects in their states as well as construction in California and New Mexico would cause them harm. Plaintiffs in the other five suits similarly claimed that the president was attempting to unconstitutionally divert money toward a border wall through their backyards. Some of these suits challenged not only the transfer of funds and construction, but the veracity of the declaration itself. El Paso County, for example, accused the president of "declaring a national emergency where none exists."<sup>12</sup> Indeed, President Trump had admitted that "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster."<sup>13</sup>

If successful, some of these suits could block or delay construction. A federal judge in El Paso recently declared the diversion of funding illegal, and will consider whether to block construction



Landing mat border wall between Tijuana and San Diego. 2018. Scott Nicol.

and, if so, where.<sup>14</sup> The American Civil Liberties Union, representing the Sierra Club, and the Southern Border Communities Coalition (SBCC), previously prevailed in a challenge to the transfer of counternarcotics funds in the District Court for the Northern District of California, securing an injunction against the transfer and use of \$2.5 billion for construction in California, Arizona, and New Mexico. The Supreme Court has stayed the lower court's injunction, allowing construction with military counternarcotics funds pending appellate and Supreme Court review of the district court's injunction. The American Civil Liberties Union has also moved to block the use of \$3.6 billion for military construction of 175 miles in California, Arizona, New Mexico, and Texas, to be decided in late November 2019.<sup>15</sup>

11 Beech, Eric. "U.S. judge denies Democrats' lawsuit to stop border wall funds." Reuters. June 3, 2019.

12 El Paso County, Texas and the Border Network for Human Rights vs. Donald J. Trump, et. al. Filed February 20, 2019. p. 5.

13 "Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border." February 15, 2019.

14 Lerman, David, and Todd Ruger. "Federal judge rules Trump border wall declaration unlawful." Roll Call. October 11, 2019.

15 "Sierra Club v Trump - Challenge to Trump's National Emergency Declaration to Construct a Border Wall." American Civil Liberties Union website. <https://www.aclu.org/cases/sierra-club-v-trump-challenge-trumps-national-emergency-declaration-construct-border-wall>

## Waiving Laws to Build Walls

The REAL ID Act in 2005 granted the Secretary of Homeland Security the authority to waive any and all laws aside from the U.S. Constitution to expedite construction of border walls. Since then all border wall construction has been preceded by a waiver. Trump's various Secretaries and Acting Secretaries of Homeland Security have issued 16 waivers, covering all of the border walls that have been built during his tenure and many (though not yet all) of those that are planned. The Trump administration issued three times as many border wall waivers as the Bush administration; the Obama administration did not issue any waivers for walls. Environmental laws such as the National Environmental Policy Act and Endangered Species Act always top the lists of suspended laws, and are accompanied by the Native American Graves Protection and Repatriation Act, the Farmland Policy Protection Act, the Religious Freedom Act, and others that Congress enacted to protect human communities. Waivers have been issued for all of the border wall replacement and new border wall construction that Congress funded in FY 2017 and FY 2018 appropriations. Some of the walls that were funded in FY 2019 have already received waivers, and it is expected that the DHS secretary will waive requirements for planned or imminent construction projects.

In March 2018 the Center for Biological Diversity, Defenders of Wildlife, and the Animal Legal Defense Fund challenged certain Department

of Homeland Security Real ID Act waivers.<sup>16</sup> Their argument was twofold. First, they said, the waiver provision in the REAL ID Act was written over a decade ago, and its powerful waiver authority was never intended to exist in perpetuity. The groups argued that the waiver was intended to cover only the "expeditious construction" of specific border wall projects described in the Secure Fence Act of 2006, the last of which was completed in 2010. At



The Eli Jackson Chapel in San Juan, Texas will be behind the levee-border wall. **2018. Scott Nicol.**

that point the waiver authority had effectively run its course, and Donald Trump's more recent border walls therefore fell outside of the REAL ID Act's reach. Their second argument was that the waiver provision itself, by granting an administration official the power to waive all federal laws, seemingly in perpetuity and with no limitations on discretion, violated the constitutional doctrine of Separation of Powers. It is the legislative branch's job to write or rescind laws, and while the president may sign or veto laws, Congress cannot abrogate

<sup>16</sup> Center for Biological Diversity, et al. v Donald J. Trump. Filed February 16, 2019. [https://www.biologicaldiversity.org/campaigns/border\\_wall/pdfs/ED-Complaint.pdf](https://www.biologicaldiversity.org/campaigns/border_wall/pdfs/ED-Complaint.pdf)



its legislative authority to the executive. Advocates had long made this argument. For example, in 2008 Defenders of Wildlife challenged the constitutionality of the Bush administration's border wall waivers. In that prior suit the Supreme Court declined to grant certiorari and hear arguments, effectively allowing the waivers to remain in place and walls to be built without regard to laws.<sup>17</sup> In September 2019 a federal court dismissed the more recent lawsuit.<sup>18</sup>

The border walls funded by the emergency declaration complicate this. Two different legal authorities were invoked to redirect military funds. When \$2.5 billion were shifted from personnel accounts to the Support for Counter-drug Activities account, it went into a program that was intended to support other agencies. This program had been used by President Bush to send the National Guard to the border to build border walls and vehicle barriers, for example. The barriers built under Bush, and the new border walls that would be built under Trump, were not viewed as Defense Department assets. This meant, according to the administration, that even though the military was erecting them, the Department of Homeland Security could issue waivers. In their suit challenging the emergency declaration, the Sierra Club and Southern Border Communities Coalition, with the American Civil Liberties Union providing legal representation, refuted this use of the REAL ID Act waiver. The REAL ID Act's waivers, they asserted, could only be applied to border walls that

were constructed under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The Secure Fence Act was actually an amendment to IIRIRA, as was Section 102 of the REAL ID Act, and it provided the president with authority that he was citing to build the border walls that Congress had funded. But the Department of Defense monies, meant to circumvent the congressional appropriations process, were outside of the authority granted by the IIRIRA. "Defendants cannot have it both ways," argued the SBCC and the Sierra Club.<sup>19</sup>

The walls that would be built with the \$3.6 billion taken from military construction projects under the National Emergencies Act fell under yet another set of rules. Those border walls were supposed to be the property of the military, not the Department of Homeland Security, so a DHS waiver would not be appropriate. Nonetheless, these border walls would be built, according to a memorandum from Secretary of Defense Mark Esper, "without regard to any other provision of law that could impede such expeditious construction." When the Secretary of Homeland Security issues a waiver the laws that are to be waived are named, with lists published in the Federal Register that typically run into the thirties. The Secretary of Defense's purported waiver, in contrast, said that "such laws include, but are not limited to, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, the Clean Water Act, and provisions in Chapter 137

17 Vicini, James. "Court rejects challenge to Arizona border fence." Reuters. June 23, 2008.

18 Zazueta-Castro, Lorenzo. "Court dismisses DHS waiver lawsuit." The Monitor. September 5, 2019.

19 Sierra Club and Southern Border Communities Coalition v. Donald J. Trump. Plaintiffs motion for partial summary judgement. Submitted June 12, 2019.

(“procurement generally”) of Title 10, U.S. code.”<sup>20</sup>

Without a list of laws making it explicit which statutes were waived and which were not, all laws were effectively swept aside. It is unknown at this time whether the military will seek to invoke the powers of the REAL ID Act or other authorities to waive applicable requirements. The American Civil Liberties Union has challenged the military’s authority to do so in its litigation on behalf of the Sierra Club and Southern Border Communities Coalition.

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<sup>20</sup> “Subject: Guidance for Undertaking Military Construction Projects Pursuant to Section 2808 of Title 10, U.S. Code. Memorandum for Secretaries of the Military Departments, Acting Undersecretary, (Comptroller)/ Chief Financial Officer.” Secretary of Defense Mark Esper. September 3, 2019.

# What Could be Lost



Eastern terminus of the border wall in Cameron County, Texas. **2014. Scott Nicol**

## New Border Walls in the Rio Grande Valley

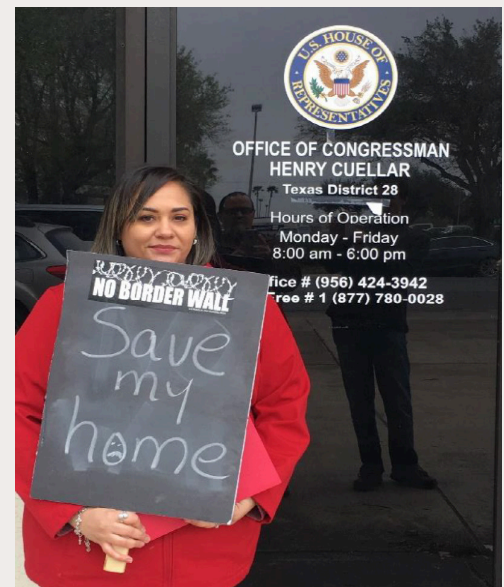
When added to the border walls that were erected a decade ago, the FY 2018 and FY 2019 appropriations provide sufficient funding to wall off the entire Lower Rio Grande Valley in South Texas. The Rio Grande Valley encompasses three Texas border counties – Starr to the west, Hidalgo in the middle, and Cameron to the east – which

front the Rio Grande along its final length before it drains into the Gulf of Mexico. Fifty-four miles of wall went up in Hidalgo and Cameron counties from 2008 through 2010, broken into 18 mostly disconnected segments. The FY 2018 and FY 2019 appropriations would, according to CBP, be used to fill in the spaces between existing border walls, with 19 miles of new wall going to Cameron County and 35 miles going to Hidalgo, and to wall off the as yet entirely unwalled Starr County with 52 miles.



## FIGHTING TO KEEP THEIR LAND AND HOMES

Nayda Alvarez and her family were contacted by the Border Patrol in 2017, requesting to survey her riverfront property outside of Rio Grande City in Starr County, Texas for a surveillance tower. Alarmed by the way the tower overlooking her home would impact her family's privacy, she decided to fight the government's plans, and had already been consulting with an attorney for months when she and her neighbor Yvette Gaytan received letters in November 2018 informing them of the plans to build a border wall through their properties. The Alvarez and Gaytan homes are perched close to the edge of a rise, and they both own the land that gradually slopes down to the river behind their houses. Although they have never been given specific information about the design or footprint of the structures that would go through their lands, if the border wall and enforcement zone are built through this neighborhood, both women are likely to have their homes condemned and to lose access to the riverfront property which has been in their families for generations. These women have been outspoken in their struggle against border walls, and have called on their congressional delegation, U.S. Representative Henry Cuellar and Texas Senators Cornyn and Cruz, to save their homes. They make the point that they feel safe, and that their stretch of river is serene. Eminent domain should not apply here, they assert, because the border wall offers no public good.



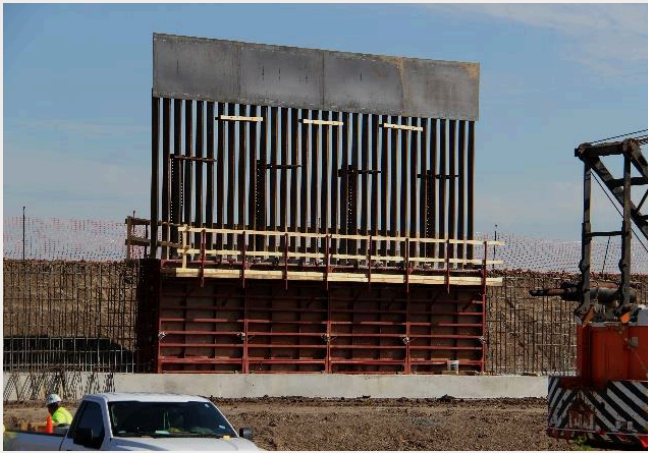
Top: Nayda Alvarez speaking to the press at La Lomita chapel. **2019. Scott Nicol**; Below: Yvette Gaytan at U.S. Representative Henry Cuellar's office. **2019. Scott Nicol**

Construction on the first new South Texas border wall, a levee-wall section a few hundred yards long, began in October of 2019.<sup>21</sup>

As was the case with earlier Texas border walls, most of the land that the new walls would be

built on is privately owned. A CBP email sent in February of 2018 stated that converting the remainder of Hidalgo County's levees into levee-border walls would require the acquisition of approximately 250 parcels of land. To build the bollard border walls planned for Starr County

<sup>21</sup> Martinez, Jolanie. "Construction for the new border wall has begun." KGBT Channel News. October 11, 2019.



Levee-border wall under construction in South Texas. 2019.  
Scott Nicol

the federal government would need to acquire all or part of 866 parcels of land, which was in the hands of 540 different landowners.<sup>22</sup> Still more families and businesses would lose land in Cameron County, though those walls were not mentioned. If landowners do not willingly sell, either because they do not agree with the federal government's offer or they oppose border walls on a more fundamental level, lawyers from the Department of Justice will be called upon to take them to court and condemn their property. When walls were built under the Bush and Obama administrations it could take up to two years for the court to award Customs and Border Protection (CBP) possession of the land, thereby allowing construction to go forward. However, federal law allows the government to seek a "quick take," which divests landowners of possession long before the end of litigation. In many cases, walls go up several years before "just compensation" for that taking is decided, and some

<sup>22</sup> "Subject: FW: Border Infrastructure SITREP 13 FEB 18 (UNCLASSIFIED)." February 14, 2018. U.S. Customs and Border Protection email obtained by the Sierra Club via Freedom of Information Act request.

of the court battles initiated during the George W. Bush administration continue to this day, though walls were built on the sites a decade ago.

## A Lost Investment in Wildlife

The Lower Rio Grande Valley National Wildlife Refuge was established in 1979 as an ambitious habitat preservation and restoration project. A central goal was to create a wildlife corridor along the Rio Grande in a region where almost all of the original landscape had been cleared for agriculture and urban development. Over the last 40 years the refuge has slowly grown to over 140 protected tracts of land along the river and in the more arid lands to the north, totaling 100,000 acres. Twenty-two of these tracts touch the river and are likened by US Fish and Wildlife staff to a "string of pearls" — exceedingly valuable from a conservation standpoint because they are all that is left of the precious riparian habitat of the lower Rio Grande.<sup>23</sup> Unfortunately, just like public lands in California, Arizona, and New Mexico, Lower Rio Grande Valley National Wildlife Refuge lands are being targeted first for new border wall construction in South Texas because the federal government already owns the land and is able to bypass the time consuming land acquisition process otherwise required for private property, and can therefore initiate construction more quickly.

This was confirmed in a series of internal U.S. Fish and Wildlife Service (USFW) emails sent in the summer of 2017. The Project Leader for the

<sup>23</sup> Moore, Richard. "Wildlife Corridor." KVEO. May 22, 2018.

Lower Rio Grande Valley National Wildlife Refuge system reported on a meeting in which then Border Patrol Sector Chief Manuel Padilla said that even though the refuge was not a strategic priority for the Border Patrol “the administration pointed here (refuge lands) as the easy place to begin and continue the border wall.”<sup>24</sup> The desire of those in Washington, D.C. for border walls to be built quickly overrode the tactical assessment of the highest ranking Border Patrol agent on the ground in the sector. In a follow up email the USFW Project Leader flatly stated the ultimate result of the push to wall off the refuge that he managed, writing, “We do know that some refuge tracts will no longer exist (though we will still have title to the property).”<sup>25</sup>

It is hard to overstate the ecological importance of the Lower Rio Grande Valley National Wildlife Refuge in a region where so little native habitat is left. These tracts represent some of the last remnants of the rich riparian forest that once grew along the river. The Vela Woods tract in Hidalgo County, which will be hit with a levee-border wall and a 150-foot cleared and gravelled enforcement zone, protects a rich diversity of densely growing native trees that serve as a rare and pristine haven for native wildlife. The Arroyo Ramirez tract in Starr County, slated for construction in 2019, is one of only a handful of protected sites where a population of the endangered Zapata bladderpod grows. This plant in

the mustard family is distinct in that it disappears below the surface in the harsh semi-arid conditions of the western Rio Grande Valley, only to reemerge during seasonal rains.<sup>26</sup>

Given the 18 endangered plant and animal species that the Lower Rio Grande Valley National



**Clearcut enforcement zone in the La Parida Banco tract of the Lower Rio Grande Valley National Wildlife Refuge. 2019. Scott Nicol.**

Wildlife Refuge harbors, building walls on these tracts would be virtually impossible without violating laws like the National Environmental Policy Act and the Endangered Species Act. However, the Real ID waiver authority has been invoked multiple times for refuge lands in the Rio Grande Valley and dozens of laws have been dismissed. Clearing on refuge lands for the 150-foot enforcement zone has already begun on the La Parida Banco tract, which is immediately adjacent to Bentsen Rio Grande State Park. The dense forest growing adjacent to the levee was made into mulch in a matter of days in February 2019. Bentsen harbors a landscape so precious that Congress

<sup>24</sup> “Subject: Contact w/ BP Sector Chief Padilla.” U.S. Fish and Wildlife Service email. July 17, 2017. Obtained by the Sierra Club via Freedom of Information Act request.

<sup>25</sup> “Subject: Border Wall update.” U.S. Fish and Wildlife Service email. July 20, 2017. Obtained by the Sierra Club via Freedom of Information Act request.

<sup>26</sup> Zapata Bladderpod *Physaria thamnophila* 5-Year Review: Summary and Evaluation. U.S. Fish and Wildlife Service Texas Coastal Ecological Services Field Office. Corpus Christi, TX. August 28, 2015.



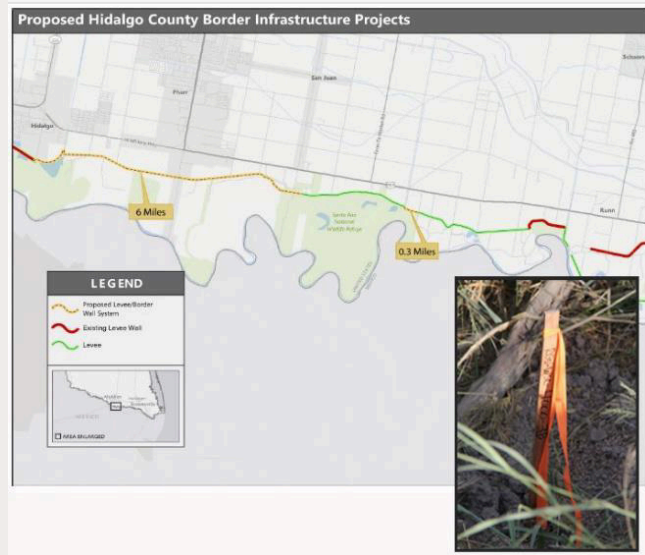
exempted it from wall construction, but identical habitat on the refuge tract was not spared. Wall construction at La Parida Banco is expected to begin in late 2019.

## The Jewel of the National Wildlife Refuge Still Threatened

In 2017, before Congress had appropriated any funds to erect border walls in Texas, CBP attempted to redirect funding from other projects to pay for a 2.93 mile long section of levee-border wall at Santa Ana.<sup>27</sup> This caused tremendous public outcry, which in turn led Congress to explicitly exempt Santa Ana from border wall construction in both 2018 and 2019 appropriations bills. The congressional intent was clear, and the legislative language was unambiguous. But a map that CBP sent to stakeholders in the summer of 2019 showed border walls intruding into Santa Ana. The map was imperfect—the levee-border wall that it depicted hitting Santa Ana’s west side would actually go through a tract of the Lower Rio Grande Valley National Wildlife Refuge that was adjacent to Santa Ana. On the east side that would not be the case, and there CBP intends to build levee-border wall adjacent to three-tenths of a mile of Santa Ana’s northern boundary.

CBP’s plan clearly runs counter to Congress’s intent in exempting Santa Ana from border walls, but it also ignores the direct impacts that its wall will have on the refuge. New levee-

<sup>27</sup> Del Bosque, Melissa. “Trump Administration Preparing Texas Wildlife Refuge for First Border Wall Segment.” *The Texas Observer*. July 14, 2017.



CBP map showing wall in Santa Ana NWR. Border wall survey stake in Santa Ana inset. **2019. Scott Nicol.**

border walls, with their 15-18 foot tall slab of vertical concrete topped with 15 foot tall bollards, will be erected at the toe of the existing levee, where the river-facing slope meets the ground. Santa Ana’s fenceline is only about 15 feet south of the levee’s toe. This is unlikely to give construction crews sufficient space to work without destroying part of the forest. Moreover, survey stakes in the area indicate that CBP plans to include the 150’ wide enforcement zone here, which would require clear-cutting dense forest in the wildlife refuge. CBP’s pretense appears to be that while Congress forbade building a border wall in Santa Ana they did not explicitly mention the construction of an enforcement zone there. This ignores the fact that CBP has consistently described the wall and its enforcement zone as a “border wall system,” and the funding to carve out and pave enforcement zones and install floodlighting, cameras, and sensors in

them comes from border wall appropriations.<sup>28</sup> If enforcement zones adjacent to border walls are an entirely separate project then CBP would need to ask Congress for the money to pay for them; if they are part of a “border wall system,” as CBP has asserted in the past, then Congress forbade their construction in Santa Ana when they exempted the refuge from border walls.

## Walls in the Rio Grande Floodplain

Starr County’s border walls will snake in and out of the Rio Grande floodplain. Bollard walls had been proposed for three of Starr County’s riverside communities — Roma, Rio Grande City, and Los Ebanos — during the first round of wall building a decade ago. The concern, expressed repeatedly by the International Boundary and Water Commission (IBWC), the binational agency responsible for administering the U.S.-Mexico border treaty, was that when the river swells and jumps its banks border walls or other barriers in the floodplain would push flood water deeper into Mexico, thereby worsening flooding in Mexican towns.<sup>29</sup> The U.S. half of the IBWC concurred with the Mexican half in rejecting walls in the floodplain, and since the REAL ID Act does not empower the Secretary of Homeland Security to waive treaties,

CBP would either need to respect their rejection or violate the treaty that established the Rio Grande as the international border. As a result, in 2008 CBP cancelled these three border wall projects, writing:

The risks associated with the potential flooding on the Mexican side of the fence could range from minor property damage to loss of life depending on the severity and location of the flooding. Mitigating the impacts of flooding from the U.S. side of the border is unattainable.<sup>30</sup>

Despite this grim assessment, CBP soon revived plans for those walls, commissioning a series of flood models intended to convince the IBWC that erecting a line of bollards in the Rio Grande floodplain would not pose significant flood hazards.

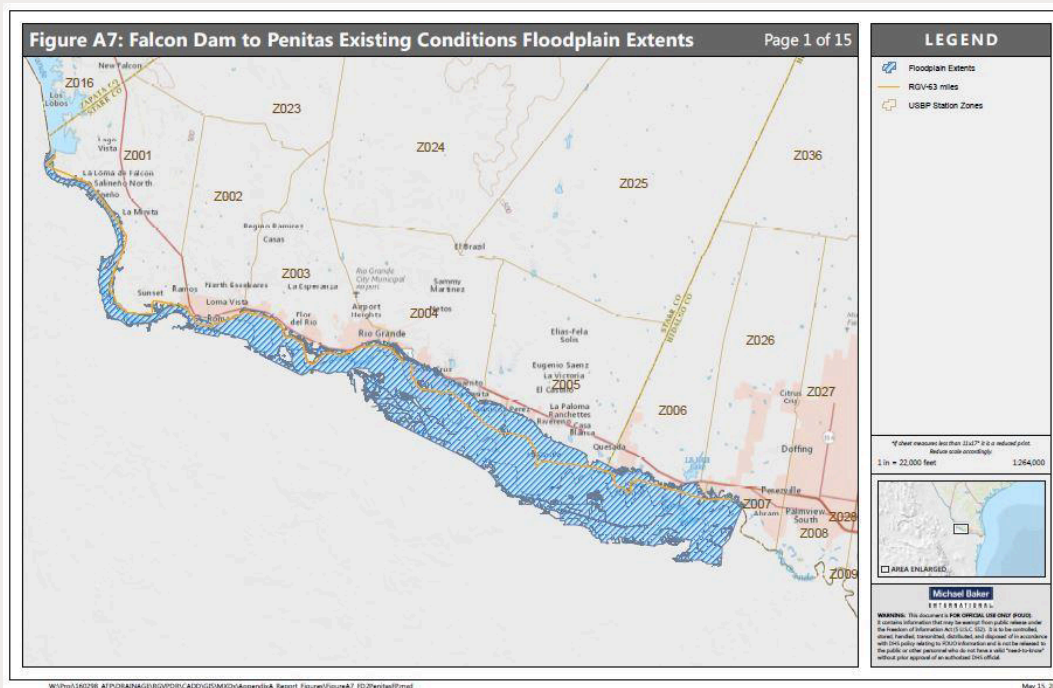
The most recent of those flood models was commissioned by CBP in May of 2018 and leaked to the press in early 2019.<sup>31</sup> It contained maps tracking a course for the border wall that lines up with the route depicted in maps that were released to the public in June of 2019. While the intentionally released maps provided minimal detail about the towns and topography that walls would intersect, those included in the leaked flood model not only showed the contours of the landscape, they also overlaid walls onto the FEMA-designated floodplain. In a few locations the walls that will cut

28 Fiscal Year 2019 Rio Grande Valley (RGV) Levee/Border Wall System Construction Projects Overview. U.S. Customs and Border Protection. June 27, 2019. <https://www.cbp.gov/sites/default/files/assets/documents/2019-Aug/Fiscal-Year-2019-Rio-Grande-Valley-Border-Barrier-Projects-Request-for-Input-508.pdf>

29 Letter from acting US IBWC Commissioner Alfredo J. Riera to U.S. Department of Homeland Security Commissioner Ralph Basham. November 24, 2008. Obtained by the Sierra Club via Freedom of Information Act request.

30 “PF 225 Change Request.” U.S. Customs and Border Protection Secure Border Initiative. September 26, 2008. Obtained by the Sierra Club via Freedom of Information Act request.

31 Lower Rio Grande Valley from Falcon Dam to Hidalgo-Cameron County Line Programmatic Floodplain Analysis and Report. The Rio Grande Valley Texas Contract Number W126G-15-D-0009. Prepared by Michael Baker International. May 15, 2018.



Map from Baker flood model showing the border wall in the Rio Grande floodplain. 2018.

off nearly all of Starr County from the Rio Grande will be outside of the floodplain, but the majority of the mileage will be in it. Baker International, the company hired to create CBP's flood models, asserted in the 2018 model that the construction of these walls in the floodplain would not significantly change the depth and location of potentially damaging water during flooding events. Whereas Baker had reported in 2009 that similar bollard border walls built across washes and other natural drainages in Arizona and California had resulted in gaps between bollards being clogged with debris, turning them into solid obstructions which dammed water,<sup>32</sup> the 2018 model for Starr County assumed that debris would only reduce the flow of water through the bollards by 35%. No explanation was given for this significant change in assumption. In

the virtual world depicted by the flood model, walls would not become completely blocked with debris and act like dams, despite numerous real-world observations in which this has happened. After bollard border walls repeatedly acted like dams in Arizona and California, CBP spent millions of dollars retrofitting stretches that crossed washes with massive flood gates that were supposed to be raised ahead of flooding. According to the most recent Baker flood model, none of the Starr County border walls will have flood gates. Instead, where walls cross arroyos and other natural drainages, the square bollards will be rotated so that instead of corners pointing towards one another the flat sides will face each other. This will decrease the amount of space that each bollard takes up and increase the space between bollards from four inches to five inches. In the presence of flood debris, this would seem to make very little difference.

32 SBI-TI PF 225 and VF 300 Border Fence Projects Technical IPT Final Report. Michael Baker Jr., Inc. May 2009. P. 11. Obtained by the Sierra Club via Freedom of Information Act request.



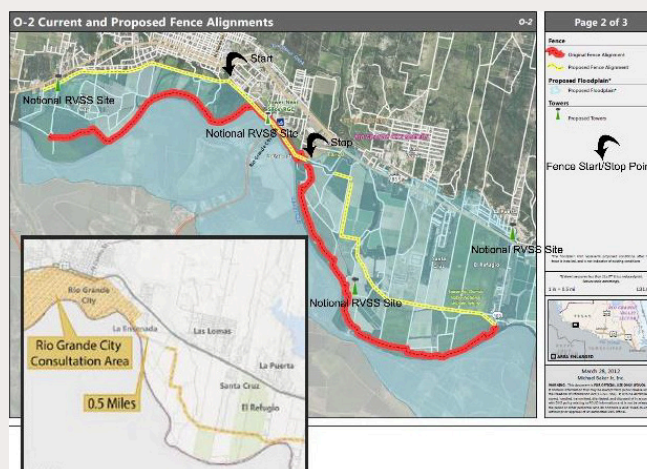
Figure 10: Steel Bollard Configuration (not to scale)



From top: Rotated bollard diagram from **2018 Baker flood model**; Debris clogging a bollard border wall in the San Pedro Riparian National Conservation Area, Arizona. **2012. Scott Nicol**

Despite making the claim that bollard border walls will not block or deflect water, two gaps in the wall are planned: one in the town of Roma that will be 250 feet wide, and another in Rio Grande City that will be 500 feet wide. First proposed in a 2009 Baker flood model, and

appearing unchanged in the 2018 flood model and the CBP maps released in 2019, these gaps are meant to divert a portion of the flow deeper into the United States than it would naturally go.<sup>33</sup> This is intended to lessen the amount of water that will



**2012 Baker map** showing the proposed border wall at Rio Grande City (yellow line); **2019 CBP map** showing the same wall section inset

be deflected into Mexican cities by the walls. A map that Baker drew up for CBP in 2012 shows this in action, with the border wall acting as the new floodplain boundary upriver from the Rio Grande City gap, and the floodplain extending deep into the United States, reaching into neighborhoods and crossing a highway, downriver from it. If the bollard border wall were actually as permeable as claimed, the effect predicted by this map would not occur. In the 2009 model it was stated that the “split” water would move through communities and agricultural lands on the north side of the wall for a few miles before rejoining the river at the end of the border wall sections, but the plans for the border wall

33 PF 225 Phase II Final Drainage Report Fence Segments 01, 02,  
03 Rio Grande Floodplain Analysis. Michael Baker Jr., Inc. December,  
2009. Obtained by the Sierra Club via Freedom of Information Act  
request.

have since changed. Instead of these gaps diverting water into the middle of a 3.75-mile long segment at Roma, and the middle of an 8.74 mile long segment at Rio Grande City, they will instead be sending water into the lands and communities behind a 63 mile long wall that will span the full length of the county before connecting with levee-border walls further downriver. The water diverted into the United States could be bottled up without an outlet.

## Trump's Emergency Declaration

President Trump's emergency declaration was utilized to raid \$3.6 billion in funding from previously approved military construction projects under the Department of Defense. This was not new money to be allocated, in the way that a congressional appropriation would be; instead, it meant defunding 127 distinct items. A middle

### FOLLOW THE MONEY

In FY 2018 Congress gave CBP \$445 million to convert 25 miles of existing flood control levee into levee-border wall in the Border Patrol's Rio Grande Valley Sector. A request for public comment sent out on September 8, 2018 showed that CBP intended to convert nearly all of the remaining non-border wall levees in Hidalgo County into levee-border walls with the exception of the levee at the Santa Ana National Wildlife Refuge, which Congress had exempted. The following year, before any of those walls had been built, Congress appropriated \$1.375 billion for border walls in fiscal year 2019 funding, again limiting wall construction to the Rio Grande Valley Sector. In publicly released documents 11 of the 25 miles of levee-border wall planned for Hidalgo County were counted by CBP against both appropriations. And on August 7, 2019 CBP issued a press statement

announcing that it had awarded a contract to build these 11 miles of levee-border wall using FY 2019 funds. With 11 miles removed from the FY 2018 project the number of miles that would be built with the \$445 million appropriation drops from 25 to 14, and there are no other levees in Hidalgo County that could replace them. That would appear to raise the cost of FY 2018 levee-border walls from just over \$18 million per mile (already an increase over the \$12 million per mile average for levee-border walls a decade ago) to just under \$32 million per mile. This is double the cost of the most expensive walls erected under past administrations, even though those climbed rugged mountainsides in California's Otay Mountain Wilderness Area and required filling a canyon near San Diego.

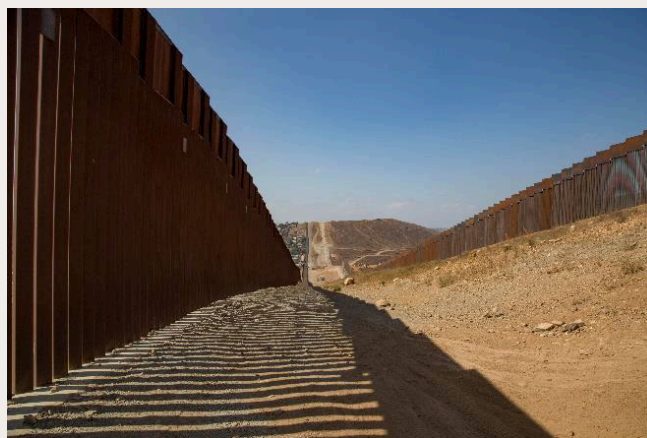
school for the children of military personnel at Fort Campbell in Kentucky and an elementary school that was to be replaced at Spangdahlem Air Base in Germany lost their funding. An aircraft maintenance unit at Yokota Air Base in Japan and a National Guard readiness center at Camp Santiago in Puerto Rico also had appropriations that were redirected.<sup>34</sup> Testifying before Congress, Assistant Secretary of Defense Robert McMahon characterized the projects that would lose funding as:

those that pose no or minimal operational or readiness risks if deferred, projects that were already scheduled to be awarded in the last six months of the fiscal year, and recapitalization projects of existing facilities that can be temporarily deferred for a period of months.<sup>35</sup>

One glaring problem with his statement was that these projects were not “deferred,” they were defunded. In order for them to be carried out at some point in the future Congress would have to provide a second appropriation, paying for them twice since the initial appropriation had been diverted to the border wall. And in some instances the projects would have potentially serious operational impacts. NBC News reported

<sup>34</sup> “Subject: Military Construction Necessary to Support the Use of the Armed Forces in Addressing the National Emergency at the Southern Border.” Memorandum for Acting Under Secretary of Defense, (Comptroller)/Chief Financial Officer. Secretary of Defense Mark Esper. September 3, 2019.

<sup>35</sup> Statement of Honorable Robert H. McMahon Assistant Secretary Of Defense Before the House Committee on Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies on the The 2019 National Emergency Declaration to Build a Border Wall & its Effect on Military Construction and Readiness. February 27, 2019.



Double walls between San Diego and Tijuana. 2019. Jill Holstin.

on an Air Force document that examined their defunded projects. In addition to schools, it pointed to Alaska’s Eielson Air Force Base, which was scheduled to replace two heating and power boilers whose failure was “imminent.” Without power and heat, in a place where temperatures can drop to 65 degrees below zero in the winter, the base would have to be evacuated. It also noted that the diversion from the Incirlik Air Base in Turkey could have a direct impact upon the safety of the base and its personnel, because “if not funded, the main gate remains vulnerable to hostile penetration in the midst of contingency operations and an increased terrorist threat.”<sup>36</sup>

With this money the Department of Defense would convert 60.5 miles of existing vehicle barrier in Arizona and New Mexico into 30-foot-tall bollard border walls. Two miles of 18-foot-tall bollard border wall in Arizona would be replaced with 30-foot-tall bollards. New bollard walls totaling 55.5 miles would go up in California, Arizona, and on the

<sup>36</sup> Kube, Courtney. “Trump’s plan to pay for border wall with Air Force funds risks national security, report says.” NBC News. September 13, 2019.



outskirts of Laredo, Texas. And California, Arizona, and New Mexico would receive a total of 57 miles of new secondary border wall, which would parallel existing border walls in those locations.<sup>37</sup>

According to a memo from Assistant Secretary of Defense Kenneth Rapuano, in order for the Department of Defense to use the National Emergency Act to build border walls the Secretary of Defense would first need to declare that they were military construction projects that served some military purpose. Military construction projects, in turn, needed to be part of a military installation situated on military land.<sup>38</sup> Thirty-one miles of wall slated for the Barry M. Goldwater range would encroach on a military installation, but the Department of Defense would need to take possession of the rest of this property. Aside from those planned for Texas, which would be built on currently privately-owned property, these border walls would for the most part go up on the federally-owned Roosevelt Easement that lines much of the border in California, Arizona, and New Mexico and adjacent lands. In September 2019 the Department of the Interior announced that it would transfer 560 acres to the Department of Defense to facilitate the construction of 70 miles of border wall. The transferred land was in New Mexico, adjacent to Cabeza Prieta National Wildlife Refuge in Arizona,

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37 "Subject: Military Construction Necessary to Support the Use of the Armed Forces in Addressing the National Emergency at the Southern Border." Memorandum for Acting Under Secretary of Defense, (Comptroller)/Chief Financial Officer. Secretary of Defense Mark Esper. September 3, 2019.

<https://www.aclu.org/legal-document/sierra-club-v-trump-dod-memo-re-guidance-undertaking-military-construction-projects>

38 "Subject: Military Construction Pursuant to 10 U.S.C. 2808." Action Memo from Kenneth P. Rapuano, Assistant Secretary of Defense, Homeland Defense and Global Security, for the Secretary of Defense. August 21, 2019.

and alongside the Colorado River near the Andrade port of entry in California. These transfers are set to expire after three years, but could be renewed.<sup>39</sup>

## The Goldwater Range and Cabeza Prieta

As a military facility where the U.S. armed forces conduct live-fire training exercises, the Barry M. Goldwater Air Force Range is the only land on which the military intends to construct border wall that was under military jurisdiction. In 2007 the Bush administration erected 37 miles of fifteen foot tall pedestrian wall in the Roosevelt Easement between Goldwater and the Mexican border. \$527 million in emergency declaration funds are to be spent to add a second layer of border wall just north of the existing border wall. A patrol road in the space in between will be lit with floodlights and monitored with cameras. The justification for border walls under both administrations has been the impact of border crossings on military training exercises at the bombing range, as planned exercises would need to be called off if people are spotted trudging through the desert. But according a memo sent from the chairman of the Joint Chiefs of Staff to the acting Secretary of Defense in the spring of 2019, this scenario rarely plays out on the ground. General Joseph Dunford wrote that the "impact to military training over the past five years has been negligible, as only 195 sorties out of a total of 255,732 sorties have been impacted

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39 "Secretary of the Interior transfers jurisdiction of five parcels of land to the Department of the Army to secure the Southwest border." Bureau of Land Management press release. September 18, 2019.

(<0.1%) with only one training event cancelled.”<sup>40</sup> In fiscal year 2018 there were just six events in which the military was aware of individuals entering the bombing range without authorization.<sup>41</sup> If the money that will be spent on this “negligible” problem were restored to some of the projects that Congress intended to fund, the main gate at the Incirlik Air Base in Turkey could be repaired, the boilers at Eielson Air Base in Alaska could be replaced, and seven schools for the children of servicemembers could be built or upgraded.

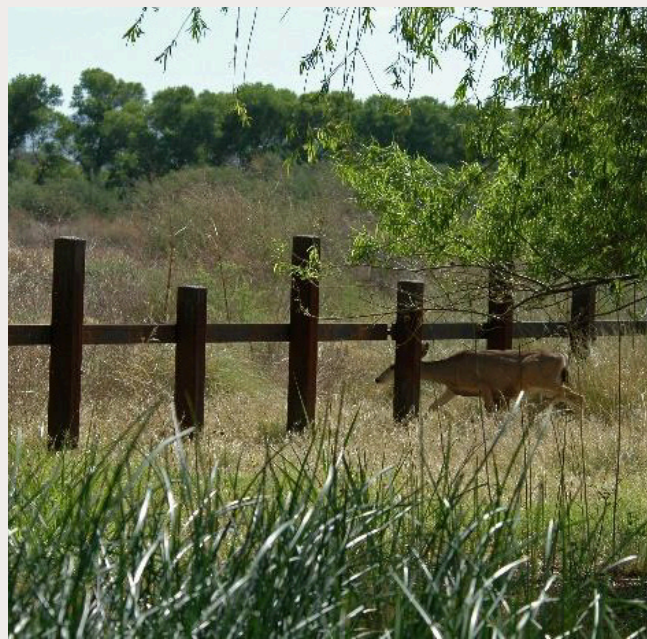
The Cabeza Prieta National Wildlife Refuge, immediately to the east of the Barry M. Goldwater Range and to the west of Organ Pipe Cactus National Monument, is scheduled to have 31 miles of vehicle barrier converted into bollard border walls. The replacement of vehicle barriers and older landing mat border walls was presented to the Trump transition team as a “quick win” shortly after the 2016 election because in these locations the land was already in federal hands.<sup>42</sup> While conversions may be expedient they are not environmentally benign. Vehicle barriers are four to six feet tall, with gaps a few feet wide between uprights and beneath crossbars. That creates far less impediment to animals than a 30-foot-tall bollard wall with spaces between posts that are

40 Appendix 2 - (U) Project Analysis by Sector. In “Subject: (U) Assessment of Whether the Construction of Barriers at the Southern Border is Necessary to Support the use of Armed Forces in Securing the Border.” Informational Memo from General Joseph F. Dunford, Jr., Chairman of the Joint Chiefs of Staff for the Acting Secretary of Defense. May 6, 2019.

<https://www.aclu.org/legal-document/sierra-club-v-trump-part-23-defendants-administrative-record-border-barrier-projects>

41 Sonne, Paul. “A remote bombing range on the border gets sized up for a piece of Trump’s wall.” The Washington Post. March 9, 2019.

42 “Overview of CBP Fence and Roads.” CBP Enterprise Services Office of Facilities and Asset Management. November 23, 2016. Powerpoint presentation obtained by the Sierra Club via Freedom of Information Act request.



Deer passing through vehicle barrier. U.S. Fish and Wildlife Service.

just four inches wide. In the summer of 2019, U.S. Fish and Wildlife raised this issue in a letter to CBP, pointing out that “many mammals, turtles, and tortoises are wider than four inches and the barrier could block their movement.”<sup>43</sup> This blockage has the potential to reduce the genetic viability of populations of animals, particularly endangered species, that would be cordoned off from one another. U.S. Fish and Wildlife also reminded CBP that during heavy rains when cross-border drainages fill, debris can clog the spaces between bollards, causing serious flooding and erosion.

## An Unknown Stretch of the Rio Grande Walled Off

The largest and most expensive segment of walls to be built with Department of Defense

43 Letter from U.S. Fish and Wildlife Ecological Services to Paul Enriquez at U.S. Customs and Border Protection. June 28, 2019.

funding will be in the Texas' Laredo Sector, extending from the Columbia Port of Entry for 52 miles to the Webb-Maverick County line. This stretch of the river contains vast tracts of ranchlands, owned by a handful of large landowners. Because of this, access has been limited and very few people have had the opportunity to experience the Rio Grande in this area, but those who have tell of a steep-banked river punctuated with islands and large boulders. Dozens of rocky arroyos adorned with prehistoric petroglyphs empty into the river, and there have been unconfirmed sightings of black bear, ocelot, and jaguarundi. Attempting to explain the need for the Laredo border wall sections, in a sector that saw roughly one fifth of the annual apprehensions as the neighboring Rio Grande Valley sector, the Department of Defense wrote that, "Based on the DHS construction projects in the Rio Grande Valley sector, DHS anticipates migrant flows and illicit drug traffic to shift to areas in [the] vicinity of Laredo."<sup>44</sup> As in the past, new border walls are the justification for yet more new border walls.

The Department of Homeland Security requested an additional 75 miles of pedestrian border wall extending from the eastern side of Laredo downriver to Falcon dam, but the Department of Defense rejected this section, stating that the cost and the difficulty of obtaining the privately owned property that the walls would cut through precluded building both sections of Laredo

wall. This stretch would have linked up with the western end of the Rio Grande Valley border wall. In October of 2019 CBP and the U.S. Army Corps of Engineers held invitation-only meetings with landowners, including the Sacred Heart Children's Home, whose property lay along the river in a stretch between the approved 52 mile span and the rejected 75 mile span.<sup>45</sup> CBP's stated goal was to get landowners to sign right of entry letters, permitting contractors to come onto their property to survey for future border wall construction. The local press was told that while they do not yet have the necessary funds to purchase or condemn property, or to initiate border wall construction, "the Laredo sector is USBP's [U.S. Border Patrol] next highest unfunded priority for new border wall system construction."<sup>46</sup> If Congress provides the administration with additional border wall funding in fiscal year 2020 Laredo will almost certainly be the first place that CBP targets.

## Defense Department Counter-Narcotics Walls

In addition to the walls that will be built under the auspices of the National Emergencies Act, the Trump administration moved \$2.5 billion into the Department of Defense's Counter-Narcotics Support account to build border walls for the Department of Homeland Security. With this money they plan to replace 15 miles of vehicle barrier in

44 Appendix 2 - (U) Project Analysis by Sector. In "Subject: (U) Assessment of Whether the Construction of Barriers at the Southern Border is Necessary to Support the use of Armed Forces in Securing the Border." Informational Memo from General Joseph F. Dunford, Jr., Chairman of the Joint Chiefs of Staff for the Acting Secretary of Defense. May 6, 2019.

45 "Children's home potential site for border wall." KGNS News. October 24, 2019.

46 "Landowners meeting held to discuss border wall." KGNS News. October 17, 2019.





30-foot-tall bollard wall replacing 18 foot tall mesh border wall at Organ Pipe Cactus National Monument. 2019. Anonymous.

the El Centro sector in California with 30-foot-tall pedestrian border walls; replace 36 miles of vehicle barrier and six miles of older pedestrian wall along the Colorado River and adjacent to the Barry M. Goldwater Air Force Range; convert a total of 86 miles of vehicle barrier to pedestrian border walls in Arizona adjacent to Cabeza Prieta National Wildlife Refuge, Organ Pipe Cactus National Monument, Coronado National Memorial, San Pedro Riparian National Conservation Area, and the San Bernardino National Wildlife Refuge; and replace 70 miles of vehicle barrier with bollard border wall in New Mexico (which the Border Patrol designates as part of its El Paso sector). These are all to be built on federally owned property, mostly the Roosevelt

Easement that runs along the southwest border from El Paso to the Pacific Ocean.<sup>47</sup>

## Damming Arizona's Last Free-Flowing River

In 1988 the San Pedro River, the last major free-flowing river in the Southwestern United States, became the nation's first Riparian National Conservation Area. This designation underscored the importance of the desert stream as a permanent waterway in an arid region and the source of a

<sup>47</sup> "Subject: Request for Assistance Pursuant to 10 U.S.C. § 284." Memorandum from Christina Bobb, Executive Secretary Department of Homeland Security, to Captain Hallock N. Mohler Jr. Executive Secretary Department of Defense. February 25, 2019.

rare remnant ecosystem that supports hundreds of species, including endangered and threatened plants and animals. Almost twenty years later the San Pedro's pivotal role in the landscape was threatened by the border walls of the Secure Fence Act, and the river became the site of a legal showdown between conservation groups and the government. In the fall of 2007 CBP prepared to begin building a 6.9-mile segment of pedestrian border wall through the Conservation Area after completing a truncated and inadequate environmental review. Defenders of Wildlife and the Sierra Club sued for an injunction to halt construction. When a federal judge found that CBP had not met the requirements of the National Environmental Policy Act and other environmental laws, Secretary of Homeland Security Michael Chertoff responded by invoking the Real ID Act waiver authority and setting aside the laws at the foundation of the successful suit. Construction in the conservation area began within days of the waiver.

The resulting bollard wall cuts across the conservation area until it reaches the river itself, which is lined instead with low-slung vehicle barriers. Although this small partial opening remains, the impact of walling off the majority of such an important wildlife corridor has certainly been immense. Studies conducted elsewhere have found that impassable walls fragment habitat and change animal migration patterns. The 2019 plans for more walls call for closing this remaining gap in the conservation area, with 30-foot-tall pedestrian bollard walls built right through the river. With only four inches between the bollards for water to pass through, debris will build up on the Mexican side



Vehicle barrier in the San Pedro riverbed clogged with debris. 2012. Scott Nicol.

of the wall during floods, damming water, eroding the river's banks, and ripping out vegetation. The Bureau of Land Management, which manages the San Pedro Riparian National Conservation Area, warned that "based upon field observations of existing border barriers (bollard and mesh designs), there could be reduced passage of sediment and debris through ephemeral paths during seasonal flood flows," and as a result the wall needed to be "capable of handling large amounts of sediment and debris."<sup>48</sup> As of July 2019 CBP had not provided the Department of the Interior with a specific design for the border wall that would cut across the San Pedro River, but if they deploy the same 30-foot-tall bollard design that has recently gone up in Organ Pipe Cactus National Monument, which is in turn simply a taller version of the bollard border walls that were built a decade ago, debris will quickly plug the spaces between bollards. The border wall will in effect be the first dam across what today is a free-flowing river, a dam which could cause massive

<sup>48</sup> Letter from Scott Feldhausen, Gila District Manager, U.S. Bureau of Land Management Gila District Office to Paul Enriquez, U.S. Customs and Border Protection. July 3, 2019.



environmental destruction during the seasonal monsoon rains.

## The Fragile Oasis of Quitobaquito Springs

Quitobaquito Springs in Organ Pipe Cactus National Monument is perhaps the single most fragile natural feature that new border wall projects threaten. Located around 150 feet north of the borderline, the spring feeds an oasis that supports an astonishing number of rare, endemic, and endangered species. The Quitobaquito pupfish, found nowhere else and adapted to the hot saline desert waterholes, swims in its shallow flow. Tiny Quitobaquito spring snails cluster on the bedrock of the spring channel, while the pond bank is lined with rare desert caper trees which, as host plants, support the only known U.S. breeding population of Howarth's white butterfly. The only major U.S. population of Sonoyta mud turtles lay their eggs nearby and graze for insects and plants in the water.



Drilling for water to mix concrete for border wall construction at Organ Pipe Cactus National Monument. 2019. Anonymous.



Organ Pipe cacti bulldozed for border wall construction in Organ Pipe Cactus National Monument. 2019. Anonymous.

This extraordinary biotic community is threatened by CBP's plans to replace the existing vehicle barriers which line the nearby border with 30-foot-tall pedestrian walls. Construction activities like bulldozing, trenching, and removing vegetation could alter drainage and lead to erosion and increased sedimentation of the pond. More frightening, contractors building the border wall in Organ Pipe National Monument have already begun drilling water wells along the border in order to mix cement for border wall foundations. The regional aquifer that underlies Quitobaquito is composed partly of stored water dating to the Pleistocene epoch which is not recharged by the meager local rainfall and is already in decline. Continuing to drill water wells, or drawing water from existing wells, will jeopardize the spring flow and could lead to the death of the oasis.

The water of Quitobaquito has drawn the people of this desert for thousands of years. Archaeological evidence of human occupation of the area goes back 16,000 years, and in historical times, a cemetery near the spring became the final resting





Quitobaquito Pond  
in Organ Pipe Cactus  
National Monument.  
**2019. Anonymous.**

place of individuals of the Sand Papago Tribe. As part of the historic homeland of both the Tohono O’odham and the H-ced O’odham, the availability of water made it an important stop on trade routes, in particular along the ancient route to collect salt from the coast of the Sea of Cortez.<sup>49</sup> For the O’odham people today the route is still sacred and the springs are used as a way marker on the salt pilgrimage, a rite of passage for young men. The pedestrian wall would block access to Mexico and

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49 Veech, Andrew S. Archaeological Survey of 18.2 Kilometers (11.3 Miles) of the U.S.-Mexico International Border, Organ Pipe Cactus National Monument, Pima County, Arizona. U.S. Department of the Interior, National Park Service, Intermountain Archaeology Program. July, 2019. p. 28.

the Sea of Cortez and end the use of the sacred pathway. In their amicus brief filed in support of *Sierra Club v. Trump*, the challenge to the emergency declaration, the Tohono O’odham Nation wrote that, “Construction impacts to Quitobaquito would impede — and threaten to eliminate — traditional O’odham use of this sacred spring, both by limiting access (through CBP restrictions) and by permanently altering this sensitive ecosystem.”<sup>50</sup>

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50 Amicus Brief of Tohono O’odham Nation in Support of Plaintiffs-Appellees. *Sierra Club, et. al. vs. Donald J. Trump, et. al.* Submitted August 22, 2019. p. 11.

## LOSING THE DARKNESS

At 500 square miles, consisting mostly of federally protected wilderness lands, Organ Pipe Cactus National Monument offers visitors desert solitude and dark skies. Indeed, the park was recently designated as a Dark Sky Place by the International Dark Sky Association. In order to qualify the park has invested in renovations and new lighting over a period of several years. The border wall's planned all-night floodlighting would counteract these efforts and ruin dark night skies in the much of the monument.

A naturally dark sky not only provides visitors a view of the Milky Way that has become rare, it is also important for nocturnal creatures. Artificial lighting can disrupt the activity of the lesser long-nosed bat, which is the primary pollinator for saguaro and organ pipe cacti. Both nocturnal predators and their prey

will also avoid brightly lit areas. In 2017 resource managers at Organ Pipe Cactus National Monument wrote that “If the existing vehicle barrier is converted into a full-on border wall, permanent security lighting could potentially be installed — a development that would be catastrophic for dark night skies in the region.” The impacts of lighting up the border wall are not restricted to Arizona. The wall and enforcement zone in South Texas’ Lower Rio Grande Valley National Wildlife Refuge will also be brightly lit. An internal U.S. Fish and Wildlife email warned that the floodlights planned for border walls in South Texas refuges “could cause habitat to be unusable by ocelot / jaguarundi for a distance into the refuge.” At the same time that border walls fragment the habitat of these endangered species, CBP’s floodlights will effectively reduce it further.



Floodlighting over border wall prototypes. 2018. Scott Nicol

# Worsening the Crisis



Protest in front of the Ursula detention facility in McAllen, Texas. 2018. Scott Nicol

## Seeking Asylum

In an amicus curiae brief submitted in *Sierra Club v. Donald J. Trump*, one of the lawsuits challenging the constitutionality of transferring funds from the Department of Defense to border wall construction without congressional approval,

the Tohono O’odham Nation discussed the impacts that new border walls would have on their traditional homeland. The Nation asserted that in addition to environmental damage that would be done to lands that they consider sacred, new walls through Cabeza Prieta National Wildlife Refuge and Organ Pipe Cactus National Monument would



lead to more people crossing through their remote territory:

In many ways Defendants' insistence on building a physical wall in these sections creates a self-fulfilling prophecy... the circumvention of existing barriers leads to the justification for additional barriers, rather than having any "force multiplier" effect. There is a very strong likelihood that history will repeat itself, this time on the [Tohono O'odham] Nation's land... as migrants attempt to circumvent 43 miles of a border wall that ends on the Nation's doorstep.<sup>51</sup>

They were describing what the Border Patrol has for decades called the "funneling effect," whereby the erection of border walls and the deployment of Border Patrol agents is directly correlated with the redirection, but not the halting, of cross-border traffic. This in turn has led to increases in the number of border crossers who die in transit, as the routes that they traverse are more dangerous than preferred crossing locations. The Tohono O'odham Nation, in the heart of the Sonoran Desert, has long experience with this. Humane Borders, a non-governmental organization that fills water stations along migrant trails in the Arizona desert and tabulates the locations where human remains are recovered, reports that the bodies of 1,253 border crossers were found within the boundaries of the Tohono O'odham Nation between 2001 and mid-

2019.<sup>52</sup> The pedestrian border wall that military funds would pay for is planned to slice through the adjacent Organ Pipe Cactus National Monument, but would stop at the boundary of their reservation. Tribal government officials have repeatedly rejected the notion of converting vehicle barriers into pedestrian border walls along the 62 miles of borderline that runs between O'odham communities in the United States and in Mexico. But even if the Nation is successful in preventing CBP from building a 30-foot-tall bollard wall there, the impacts from adjacent walls will still be felt as cross-border traffic is increasingly pushed into their lands.

Trump administration immigration policies writ large – border walls included – are animated by Prevention through Deterrence, a Clinton-era strategy based on the notion that the harsher the federal government makes the conditions that would-be border crossers confront, the more likely they will be to abandon their hopes of coming to the United States. The first border walls forced migrants to cross beyond the limits of border cities where they might enter the U.S. quickly and safely, and funneled them into places like the Tohono O'odham Nation, where they had to struggle to survive. Detaining people who made unauthorized crossings for extended periods imposed an additional hardship that, it was believed, would make others think twice before attempting to cross. But these were directed at people trying to slip into the U.S. undetected. Now, for the first time, the Trump administration has developed tactics specifically designed to level the Prevention through

<sup>51</sup> Amicus Brief of Tohono O'odham Nation in Support of Plaintiffs-Appellees. Sierra Club, et. al. vs. Donald J. Trump, et. al. Submitted August 22, 2019. p. 23.

<sup>52</sup> Arizona OpenGIS Initiative for Deceased Migrants. Humane Borders. <http://www.humaneborders.info/app/map.asp>

Deterrence strategy at asylum seekers. And just as the construction of border walls at San Diego, El Paso, Nogales, Calexico, and other cities that front the U.S. southern border led to a dramatic increase in the number of deaths in cross-border mountain ranges and deserts, measures that make the normal asylum process untenable are already pushing more and more of them into potentially deadly border crossings.

Trump's announcement of the emergency declaration cited "sharp increases in the number of family units entering and seeking entry to the United States" as a key reason to redirect funds from the military to border wall construction.<sup>53</sup> In the five years prior to his pronouncement Border Patrol apprehensions along the southwest border had actually decreased, from 414,397 in fiscal year 2013 to 396,579 in fiscal year 2018.<sup>54</sup> But "family units" and "unaccompanied minors" made up an increasingly large proportion over that span, from 12% in FY 2013 to just under 40% in FY 2018.<sup>55 56 57</sup> Historically most of the people who were apprehended along the U.S.-Mexico border came from Mexico, but over these five years there was a marked increase of people coming from three Central American nations that are wracked

by violence. In FY 2018 223,604, or 56%, of the people apprehended along the U.S.-Mexico border came from El Salvador, Guatemala, or Honduras. In the first part of fiscal year 2019 (through July) the number of unaccompanied children taken into custody, most of whom hailed from El Salvador, Guatemala, or Honduras, increased by 68%, while the number of "family units," again primarily from those three countries, increased by 406%, as compared with the same portion of the prior year. During that same period apprehensions of single adults, most of whom were Mexican nationals, increased by 28%.<sup>58</sup> In the first half of FY 2019, fully 66% of southwest border apprehensions were families and lone children; in the month of May they made up 72% of those whom the Border Patrol took into custody.<sup>59</sup> Families and children, particularly those coming from these three Central American countries, are overwhelmingly asylum seekers.

## "Metering" and Migrant Protection Protocols

According to U.S. law asylum seekers may apply for asylum when arriving to the country or no matter how they enter the United States. The Trump administration has put in place a number of new policies that are intended to destroy the

53 "Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States." February 15, 2019.

54 "U.S. Border Patrol Monthly Apprehensions (FY 2000 - FY 2018)." <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf>

55 "U.S. Border Patrol Monthly Apprehensions (FY 2000 - FY 2018)." <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf>

56 "U.S. Border Patrol Total Monthly Family Unit Apprehensions by Sector (FY 2013 - FY 2018)." <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-family-units-sector-fy13-fy18.pdf>

57 "U.S. Border Patrol Total Monthly UAC Apprehensions by Sector (FY 2010 - FY 2018)." <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-uacs-sector-fy2010-fy2018.pdf>

58 "U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019." <https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions>

59 "U.S. Customs and Border Protection Announces May 2019 Migration Statistics." June 5, 2019. <https://www.cbp.gov/newsroom/national-media-release/us-customs-and-border-protection-announces-may-2019-migration-0>

asylum system and prevent arriving asylum seekers from accessing their rights. One of these, dubbed “metering,” has involved placing CBP agents at the line that officially marks the border at ports of entry. Arriving persons who attempt to cross that line to make an asylum claim are prevented from entering the United States, told that CBP facilities for processing them are full, and then instructed to turn around and wait in Mexico or seek out Mexican officials to add their name to waiting lists.<sup>60</sup> As the lists have grown longer, the wait times have increased; in some places asylum seekers reportedly face delays up to nine months before their number is called and they are allowed to pass through the port of entry. In Tijuana, the waitlist contained 10,000 names as of August 2019, but no more than 69 people per day were allowed to enter the U.S. and begin the asylum process. Border-wide, more than 26,000 asylum seekers were on these waitlists at that time.<sup>61</sup> As more asylum seekers arrive at the border the lists get longer by the day.

Many of those who are permitted to enter the U.S. or who cross between ports of entry are subject to another new policy, the Migrant Protection Protocols (MPP), which requires that they await immigration court dates in Mexico rather than the United States. Historically, when an individual entered the United States to request asylum they were assigned a date when they could make their case for asylum before an immigration judge. That date might be months or years in

60 Smith, Hillel R. The Department of Homeland Security’s Reported “Metering” Policy: Legal Issues. Congressional Research Service. August 13, 2019.

61 Metering Update. Robert Strauss Center for International Security and Law at the University of Texas at Austin. August, 2019. [https://www.strausscenter.org/images/MSI/MeteringUpdate\\_190808.pdf](https://www.strausscenter.org/images/MSI/MeteringUpdate_190808.pdf)



Concertina wire on the Hidalgo/Reynosa international bridge. 2018. Scott Nicol

the future, and in the meantime most asylum seekers were released into the U.S. on their own recognizance, often with a location tracking monitor strapped to their ankle. In the year before MPP was rolled out 89% of those who requested asylum went through the entire process, attending all of their court dates until a final decision regarding their status was reached. The rate of compliance was even higher for those who had lawyers, with 98% coming to court.<sup>62</sup> These Department of Justice statistics stand in direct opposition to claims made by the administration that asylum seekers

62 Asylum Seekers Regularly Attend Immigration Court Hearings. Human Rights First. January 25, 2019. <https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings>



should not be released into the U.S. because “The overwhelming majority, plus 90 percent, don’t show up.”<sup>63</sup>

In January of 2019, MPP began at the San Ysidro port of entry, and over time expanded to include most major ports of entry along the U.S. southwest border. Those subjected to the policy are given a notice to appear before immigration court and forcibly returned to Mexico to await their proceedings in the United States.<sup>64</sup> They must still attend court proceedings in the U.S., so tents have been erected near some ports of entry with video feeds to more formal court facilities. In April of 2019 a federal district court in California issued a preliminary injunction barring further implementation of MPP, finding that the policy “lacks sufficient protections against aliens being returned to places where they face undue risk to their lives or freedom,”<sup>65</sup> but the Ninth Circuit Court of Appeals stayed the injunction to allow the federal government to present its appeal. By August, U.S. authorities were sending 3,300 asylum seekers per week back across the border.<sup>66</sup> As of early October 2019, over 50,000 people had been forcibly sent to Mexico.

Asylum seeking families blocked by “metering” or sent to Mexico through MPP often sleep on the bare ground or in donated tents in the vicinity

of the ports of entry, in cities that have insufficient bed space in shelters to accommodate them. Crime rates in Mexico have soared, with the reported murder rate increasing by 33% in 2018.<sup>67</sup> The number of reported kidnappings doubled in Juárez in the first half of 2019 at the same time that “metering” and MPP was swelling the population of asylum seekers in the city. Without support networks in these border cities, asylum seekers are easy targets for cartels and are often preyed upon. They have been assaulted, raped, extorted, and kidnapped for ransom. There are numerous reported examples. In Mexicali a large group of men wielding metal bars and pipes descended upon a migrant hostel, brutalizing those who were staying there.<sup>68</sup> Armed men attacked and robbed the residents of a migrant shelter in Juárez, including Cuban asylum seekers sent to Mexico as part of MPP, beating and threatening to shoot people, and taking their money, cell phones, and the documents that they needed to plead their cases.<sup>69</sup> In Matamoros and Reynosa, Doctors Without Borders reported that 45% of the migrants and asylum seekers that they helped had been violently victimized.<sup>70</sup> Aarón Méndez, director of a migrant shelter in Nuevo Laredo, was himself kidnapped when he attempted to prevent the abduction of people in his care.<sup>71</sup>

In September 2019, a tent facility was

63 Rizzo, Salvador. “How many migrants show up for immigration court hearings?” The Washington Post. June 26, 2019.

64 Harrington, Ben and Hillel R. Smith. “Migrant Protection Protocols”: Legal Issues Related to DHS’s Plan to Require Arriving Asylum Seekers to Wait in Mexico. Congressional Research Service. May 9, 2019.

65 Order Granting Motion for Preliminary Injunction. Innovation Law Lab, et. al., vs. Kirstjen Nielsen. April 8, 2019.

66 O’toole, Molly. “Trump administration appears to violate law in forcing asylum seekers back to Mexico, officials warn.” The Los Angeles Times. August 28, 2019.

67 “Murders in Mexico rise by a third in 2018 to new record.” Reuters. January 21, 2019.

68 Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process. Human Rights First. August, 2019.

69 Resendiz, Julian. “Gunmen beat and rob Cuban migrants inside Juarez shelter.” Border Report. September 4, 2019.

70 “US ‘Remain in Mexico’ policy endangers lives of asylum seekers in Tamaulipas state.” Doctors Without Borders/Médecins Sans Frontières. September 5, 2019.

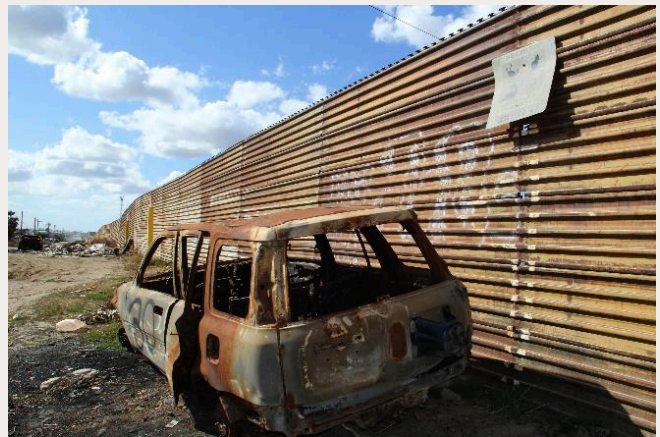
71 Bova, Gus. “Nuevo Laredo Shelter Director Reportedly Kidnapped After Protecting Cuban Migrants.” The Texas Observer. August 11, 2019.

opened in Laredo, Texas near the port of entry where asylum seekers attend a makeshift immigration court, appearing via video before a judges across the country. Persons in immigration court have a right to legal counsel, but at no expense to the government, meaning that the court will not appoint or pay for their lawyer if they are unable to find or afford counsel. The MPP policy is designed to deny access to counsel, and only around 1% of asylum seekers who have been sent to Mexico have been able to obtain a lawyer. Of the 52 persons scheduled to appear that day only 26 showed up, an appearance rate far lower than was the norm before the implementation of MPP. Of those who appeared only four had managed to obtain legal counsel. Eight of the 26 told the judge that they had been assaulted or kidnapped in Mexico during the time spent waiting for the hearing. The judge summarily ruled against the asylum claims of those who, for whatever reason, did not appear, and the rest were sent back to Mexico and told to return the following month for another hearing.<sup>72</sup>

## Pushing Asylum Seekers into Dangerous Crossings

The Trump administration takes every opportunity to decry asylum seekers crossing the border between the ports of entry even though they may do so legally. Yet withholding asylum procedures at the ports of entry has led an increasing number to cross elsewhere. In September

<sup>72</sup> Bova, Gus. "Migrants at Laredo Tent Court Tell Stories of Kidnappings and Violence While Pleading Not to Be Returned to Mexico." *The Texas Observer*. September 16, 2019.



Burned car next to the border wall in Tijuana. 2018. Scott Nicol

2018 the Department of Homeland Security's own Office of Inspector General (OIG) reported that

OIG saw evidence that limiting the volume of asylum seekers entering at ports of entry leads some aliens who would otherwise seek legal entry into the United States to cross the border illegally. According to one Border Patrol supervisor, the Border Patrol sees an increase in illegal entries when aliens are metered at ports of entry. Two aliens recently apprehended by the Border Patrol corroborated this observation, reporting to the OIG team that they crossed the border illegally after initially being turned away at ports of entry. One woman said she had been turned away three times by an officer on the bridge before deciding to take her chances on illegal entry.<sup>73</sup>

A federal lawsuit brought by asylum seekers

<sup>73</sup> Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy. Department of Homeland Security Office of Inspector General. September 27, 2018. p. 7.

challenging the metering policy similarly asserted that, fearing violence in Mexico, many “have felt compelled to enter the United States outside of POEs, often by swimming across the Rio Grande or paying smugglers exorbitant sums to transport them, to reach safety as quickly as possible.”<sup>74</sup> Inner tubes, life jackets, and cheap rubber rafts began to pile up in the brush near port of entry bridges that cross the Rio Grande, in places where a family would quickly be seen and taken into custody by the Border Patrol, while the river banks further from towns, where there was a greater possibility of evading capture, remained largely bare.

At the same time the Border Patrol began to report that large groups of Central American “family units,” some numbering in the hundreds, were crossing between ports of entry and seeking out agents. A week after the Department of Homeland Security OIG issued its report a CBP press release said, “Family units who might have previously presented themselves at ports of entry, are being shuttled by human smugglers into areas with limited infrastructure to illegally cross into Arizona.” Over the prior six weeks agents had encountered eight groups totaling 1,411 Central American families and children.<sup>75</sup> In Yuma, Arizona 108 people from Guatemala and Honduras, including 43 children and nine infants, were lowered over the border wall into the U.S.<sup>76</sup> In March, two groups totaling 430



Deflated raft in the Rio Grande. 2019. Scott Nicol

Central Americans breached border walls in El Paso and turned themselves in.<sup>77</sup> In a single night in March more than 700 people, again mostly Central American families and children crossing in large groups, were apprehended in El Paso.<sup>78</sup> In early May three groups made up of Central American family members and unaccompanied children, with more than 200 individuals in each group, crossed the border in El Paso and near the Antelope Springs port of entry in New Mexico in a 24-hour period.<sup>79</sup> Large groups also crossed the Rio Grande, including 100 asylum seekers who “congregat[ed] along the border wall” in Hidalgo, Texas to await the arrival of Border Patrol agents.<sup>80</sup>

When asylum seekers are forced to move away from ports of entry with infrastructure designed to facilitate safe, orderly crossings they

74 *Al Otro Lado, et al., vs. Kirstjen Nielsen, et al.* First Amended Complaint for Declaratory and Injunctive Relief. September 12, 2018. p. 7.

75 “Profiting Criminals Put Lives in Danger by Bringing Masses to the Border.” Customs and Border Protection press release. October 5, 2018.

76 “Yuma Sector Continues to See Record Number of Central Americans Surrendering.” Customs and Border Protection press release. October 19, 2018.

77 “U.S. Border Patrol Agents in El Paso Apprehend Over 400 in Five Minutes.” Customs and Border Protection press release. March 19, 2019.

78 “More Than 700 Taken Into Custody by El Paso Border Patrol Agents Overnight; Two Previously Removed Sex Offenders Also Nabbed During Influx.” Customs and Border Protection press release. March 6, 2019.

79 “Border Patrol Apprehends 3 Large Groups of Aliens within 24 hours.” Customs and Border Protection press release. May 3, 2019.

80 “Border Patrol Continues to Deal with Large Groups in the Rio Grande Valley.” Customs and Border Protection press release. August 9, 2019.



are put at far greater risk. In an October 2019 press release, CBP announced that 1,411 asylum seekers in eight large groups had been apprehended near Yuma or west of the Lukeville port of entry. The land to the west of Lukeville where they were apprehended comprises the Organ Pipe Cactus National Monument, where, according to Humane Borders, at least 233 border crossers have lost their lives since 2001.<sup>81</sup> CBP's press release stated that in one of the October instances 61 border crossers were threatened by rising flood water and had to be rescued by agents, and in another, "shortly after crossing the border, a mother in one of these groups passed away in front of her son."<sup>82</sup> Other locations where Central Americans were arriving en masse were similarly remote and dangerous. CBP reported that hundreds arrived at Antelope Wells in the New Mexico bootheel, where the port of entry closes before sunset and the nearest medical facility is 100 miles away. That is where seven-year-old Jakelin Caal Maquin crossed with her father and 161 others, before falling ill and dying from a bacterial infection in CBP custody.<sup>83</sup>

Desperate asylum seekers also crossed the Rio Grande, sometimes in large groups and sometimes alone. Óscar Alberto Martínez Ramírez, along with his wife and child, attempted to cross the bridge into Brownsville, Texas in April, but were turned back by CBP at the midpoint and told that they would need to add their names to the

lengthening list. After two months camped out in Matamoros they gave up on waiting, and Óscar attempted to swim across the Rio Grande with his 23-month-old daughter in his arms. They were pulled under by the river's current, and the next day their bodies were found floating near the river's southern bank.<sup>84</sup> Border Patrol Chief Karla Provost tweeted that FY 2019 water rescues by Border Patrol agents increased by 725% over the prior year. She laid the blame on smugglers, rather than CBP's refusal to allow asylum seekers to cross bridges. Any increase in the number of deaths of asylum seekers that may have occurred during the same period did not make it into her tweet.<sup>85</sup>

The president, and press officers with CBP, attempt to spin reports of asylum seekers as justification for Donald Trump's border walls. A CBP press release describing the apprehension of 220 "family units" and children from Central America in the vicinity of Yuma, Arizona, claimed that smugglers were "exploiting our need for improved border wall infrastructure." But the Yuma sector has had pedestrian border walls and vehicle barriers for more than a decade; 108 of the people who were apprehended in that instance, including 43 children, breached border walls to enter the U.S.<sup>86</sup> And border walls along the Rio Grande, including those planned for the Rio Grande Valley and Laredo sectors, will have no impact at all upon asylum seekers. Those walls will be set back up to

81 Arizona OpenGIS Initiative for Deceased Migrants. Humane Borders. <http://www.humaneborders.info/app/map.asp>

82 "Profiting Criminals Put Lives in Danger by Bringing Masses to the Border." Customs and Border Protection press release. October 5, 2018.

83 Montes, Aaron and Sara Sanchez. "Months after Jakelin Caal's death, medical examiner releases autopsy report." The El Paso Times. March 29, 2019.

84 Laird, Lorelei. "Strangers in a strange land: 'Metering' makes asylum rights meaningless, immigrant advocates say." American Bar Association Journal. July 24, 2019.

85 Provost, Karla. Twitter. October 7, 2019. <https://twitter.com/USBPCChief/status/118127588807223298>

86 "Yuma Sector Continues to See Record Number of Central Americans Surrendering." Customs and Border Protection press release. October 19, 2018.

a mile from the river's edge, meaning walls will not prevent arriving asylum seekers from reaching the United States. Óscar Alberto Martínez Ramírez attempted to swim across the Rio Grande in a location that has had a border wall for almost 10 years. Had he survived, he and his family might have leaned against it to rest while they waited for the Border Patrol. The presence of the wall would not have foreclosed them from requesting asylum under U.S. law.

Border walls and metering do not halt cross-border traffic, they simply push people into crossing in more dangerous locations, resulting in avoidable deaths. Had they been permitted to pass through one of the ports of entry at El Paso, Jakelin Caal Maquin and her father would have been just a few minutes drive from the hospital that admitted her; instead she did not reach the hospital in El Paso until 12 hours after they crossed. If Óscar Alberto Martínez Ramírez and his family had been allowed to cross the bridge into Brownsville they would never have tried to swim across the Rio Grande. New border walls will have a similar effect. In a Department of Defense memo titled *Necessity of Border Barriers*, written to explain why the military should spend billions of dollars on border walls, the conversion of vehicle barriers to border walls in New Mexico was justified with the claim that they were “expected to channel migrants to the Antelope Wells port of entry and increase what are currently fast vanishing times.”<sup>87</sup> In reality, pushing families

into the harsh desert where Jakelin Caal Maquin fell ill, or to the trek across the desert take longer (the “vanishing time” in border enforcement lingo) and thereby entail greater danger, is the purpose of building walls, not a problem to be avoided. In a similar vein the walls planned for the Organ Pipe Cactus National Monument can be expected to push more border crossers into the Tohono O’odham Nation, just as they have predicted.

From CBP’s perspective the redirection of people who cross the U.S. southern border into more difficult and dangerous terrain is not an unanticipated flaw; it is, in part, the point of erecting border walls. The legislation that gave CBP \$1.5 billion for border walls in fiscal year 2018 also required the agency to provide Congress with written justification for the tactical



[Border crosser turning himself in to a Border Patrol officer in South Texas. 2017. Scott Nicol](#)

infrastructure that they would purchase. CBP wrote that, “barriers simultaneously block illegal entry into the United States while also channeling those who would attempt illegal entry into areas where agents can apprehend, detain, and remove

<sup>87</sup> *Necessity of Border Barriers Summary of Supporting Evidence*. Included as Tab H in “Subject: Military Construction Pursuant to 10 U.S.C. 2808.” Action Memo from Kenneth P. Rapuano, Assistant Secretary of Defense, Homeland Defense and Global Security, for the Secretary of Defense. August 21, 2019.

them more easily.”<sup>88</sup> Those areas are the mountains and deserts of southern California, Arizona, and New Mexico, where agents in helicopters can spot migrants struggling on a multi-day trek, and the Rio Grande, where agents in speed boats have a tactical advantage over crossers in inner tubes or cheap rubber rafts. Left out of the justification written for a congressional audience is the fact that as more families and children attempt to cross through hostile terrain, more of them will die. The Prevention through Deterrence strategy that has guided the Border Patrol since 1994 holds that the likelihood of apprehension and risk of death will deter would-be crossers from making the trek; they will stay home rather than set out on the journey

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88 Fiscal Year 2018 Border Security Improvement Plan. Fiscal Year 2018 Report to Congress. Department of Homeland Security. December 21, 2018. p. 7. Obtained by American Oversight via Freedom of Information Act request.

north.<sup>89</sup> But for asylum seekers, who make up an ever-increasing proportion of the Border Patrol’s apprehensions, being caught by federal agents is the first step towards achieving their goal rather than the denial of it. Even hearing the reports of an increasing number of deaths of border-crossers does not represent enough of a deterrent to stop people preparing to flee violent Central American countries. So long as death is a possibility, rather than a guarantee, they will keep coming. People running from what they see as certain death will continue to take the gamble.

The administration’s proposed budget for the Department of Homeland Security (DHS) for fiscal year 2020 includes \$5 billion for the construction of another 200 miles of border wall.

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89 Border Patrol Strategic Plan: 1994 and Beyond. United States Border Patrol. July, 1994.



# Conclusion



Border wall prototypes behind landing mat wall. 2018. Scott Nicol

The Republican-controlled U.S. Senate has signaled support for this, while the Democrat-controlled House has countered that no additional money should be provided for walls. If this political impasse is not resolved it is likely that Congress will pass continuing resolutions, temporarily funding DHS at levels unchanged from fiscal year 2019 to avoid another partial government shutdown. At

the end of September 2019 Congress did just that, providing funding meant to last until November 21. Because the fiscal year 2019 appropriations bill contained \$1.375 billion for border walls this, or any future continuing resolution providing the same level of funding, would give the administration another \$3,767,000 for border wall construction for each day that is covered. In addition, the

administration's proposed Department of Defense budget would restore the money taken from military construction projects to pay for the walls that will be built under Trump's emergency declaration. Members of Congress, especially those who saw projects in their districts defunded, are loathe to be seen opposing this. The Washington Post has reported that the Trump administration intends to take advantage of this, and once again use the upcoming military appropriations to pay for border walls. According to the Post's source within the administration, "The plan is to sell it as replenishment money to the Defense Department for the \$3.6 billion they took this year. Then once they got it from Congress, they would take it again."<sup>90</sup>

The erection of border walls is not an effective, credible response to the actual situation on the United States' southern border. There is no invasion, no military emergency, and as we documented in "Death, Damage, and Failure" border walls would not be an effective tactic even if there were. In 2011, and again in 2017, the Government Accountability Office (GAO) pointed this out, stating in the more recent of the two reports that, "CBP cannot measure the contribution of fencing to border security operations along the southwest border because it has not developed metrics for this assessment."<sup>91</sup> When Congress provided \$1.5 billion for new walls in fiscal year 2018 they included a requirement that CBP develop a detailed

report which would include, among other things, descriptions of the locations of planned border walls, the methodology used to determine that walls would be the best option, metrics that would indicate whether or not walls were successful, the life cycle costs for those walls, and the impacts walls would have on the environment, border communities, and landowners. CBP submitted its Border Security Improvement Plan to Congress in December of 2018, but according to the GAO, which was tasked with reviewing it, the report fell short of Congress' demands. The most glaring omissions that GAO spotted were a lack of life cycle cost estimates, any evaluation of the impacts that walls would have on the border communities and private properties that they would run through, what environmental harm walls might inflict, and, critically, how walls might (or might not) accomplish the administration's stated goals of halting immigration and smuggling. These failings, according to the GAO, "limit the usefulness of CBP's plan as an oversight, decision-making, and accountability tool."<sup>92</sup> The Department of Defense, in explaining the use of military appropriations to build border walls, described CBP's plan very differently. They called it an "exhaustive analysis," which apparently negated the need for them to evaluate the need for or efficacy of the walls that they would pay for.<sup>93</sup>

90 Miroff, Nick and Josh Dawsey. "Trump officials plan to divert billions of dollars in additional funds for border barrier." The Washington Post. September 19, 2019.

91 Southwest Border Security: Additional Actions Needed to Better Assess Fencing's Rising Contributions to Operations and Provide Guidance for Identifying Capability Gaps. U.S. Government Accountability Office. February 2017. p. 25.

92 Border Security: Assessment of the Department of Homeland Security's Border Security Improvement Plan. U.S. Government Accountability Office. July 16, 2019. p. 6.

93 Appendix 2 - (U) Project Analysis by Sector. In "Subject: (U) Assessment of Whether the Construction of Barriers at the Southern Border is Necessary to Support the use of Armed Forces in Securing the Border." Informational Memo from General Joseph F. Dunford, Jr., Chairman of the Joint Chiefs of Staff for the Acting Secretary of Defense. May 6, 2019.



Plaque commemorating the erection of a border wall at Calexico. 2019. Laiken Jordahl / Center for Biological Diversity

Border walls are political, not tactical, so the measure of whether or not they “work” relates to whether they motivate a segment of the electorate rather than whether they deter border crossings or halt smuggling or, more importantly, whether they address the influx of families seeking refuge in the United States. Building a wall along the U.S.-Mexico border has been Donald Trump’s signature issue since he announced his candidacy, and a literal rallying cry chanted by audiences at his campaign events. According to sources within the administration who spoke with the Washington Post, President Trump is pressuring his aides and

the heads of agencies to erect 500 miles of border wall ahead of the next presidential election, even if it means seizing private property and violating federal laws.<sup>94</sup> In his Rose Garden announcement of the emergency declaration, President Trump gave what was meant to be an impromptu denial of this, but which actually sounded more like a confirmation, asserting that, “I don’t have to do it for the election. I’ve already done a lot of wall, for the election – 2020. And the only reason we’re up here talking about this is because of the election.”<sup>95</sup> As old border walls have been replaced with new ones he sought to take credit for them, having a dedicatory plaque affixed to a segment in Calexico and using a Sharpie to sign his name on a bollard near San Diego.

Family farms should not be condemned and ecosystems should not be savaged for what amounts to a multi-billion dollar taxpayer-funded campaign billboard. After a quarter century of wall-building over the course of four presidential administrations no empirical evidence of effectiveness has been produced, even when demanded by Congress. The harm inflicted, on the other hand, has been well documented. Hundreds of people have had property, often land passed down for generations, stripped from them. The sovereignty of Native American nations has been violated. Federal laws that protect communities and ecosystems have been brushed aside. Endangered species have seen their habitat

94 Miroff, Nick, and Josh Dawsey. “‘Take the land’: President Trump wants a border wall. He wants it black. And he wants it by election day.” *The Washington Post*. August 27, 2019.

95 “Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border.” February 15, 2019. <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>



fragmented, making it less likely that they will avoid extinction. Thousands of people have died horribly, as border walls have pushed their border crossings into ever more dangerous landscapes. As this report has detailed, President Trump's new border walls will magnify the brutality of existing walls upon the people and wildlife who call the borderlands their home, as well as those who are passing through seeking safe harbor.

If, as seems clear, border walls are all cost and no benefit, Congress should stop funding them and CBP should stop erecting them. Walls planned but as yet unbuilt should be abandoned, and contracts for new construction should be cancelled. Existing barriers should be removed wherever

possible, and steps to mitigate the damage already inflicted should be undertaken. The administration's "metering" policy and the so-called Migrant Protection Protocols, which lead to the brutalization of vulnerable asylum seekers, causing many to opt to cross the border in treacherous locations, should end immediately. Addressing the root causes of migration and of persons fleeing violence and persecution in their home countries, and enacting humane immigration legislation, has far greater potential benefit than the heedless militarization of the U.S. southern border. Doubling down on the failed and destructive Prevention through Deterrence tactics, including border walls, will only worsen the current situation.

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