

7-1-2017

## Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples

Joseph Kowalski  
*University of the Pacific McGeorge School of Law*

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/ailj>



Part of the [Indian and Aboriginal Law Commons](#)

---

### Recommended Citation

Kowalski, Joseph (2017) "Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples," *American Indian Law Journal*: Vol. 5 : Iss. 2 , Article 6.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol5/iss2/6>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in American Indian Law Journal by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

IMAGINARY LINES, REAL CONSEQUENCES: THE  
EFFECT OF THE MILITARIZATION OF THE UNITED  
STATES-MEXICO BORDER ON INDIGENOUS  
PEOPLES

*Joseph Kowalski*

CONTENTS

INTRODUCTION .....	645
I. A BRIEF HISTORICAL SUMMARY OF THE BORDER .....	647
<i>A. Pre-Columbian History and the Spanish Conquest.....</i>	<i>647</i>
<i>B. Mexican Independence to the Mexican-American War.....</i>	<i>648</i>
<i>C. United States Colonization and the Current Border is         Drawn .....</i>	<i>648</i>
II. THE BORDER IMPACTS THE CIVIL AND PROPERTY RIGHTS OF NATIVE AMERICANS ON THE LAND IT CUTS THROUGH.....	650
<i>A. “Apparent Mexican Ancestry” and the Racial Profiling of         the Indigenous Peoples of the Southwest.....</i>	<i>650</i>
<i>B. Native Americans Near the Border are Forced to Carry         Tribal IDs and Cannot Freely Travel in Their Own         Ancestral Lands .....</i>	<i>651</i>
<i>C. Construction of the Wall Has Infringed on Property         Rights .....</i>	<i>653</i>
III. MILITARIZATION OF THE BORDER INFRINGES ON THE RELIGIOUS RIGHTS OF INDIGENOUS PEOPLE .....	654
<i>A. The Tohono O’odham Have Had Sacred Items Confiscated         by Customs and Have Been Unable to Pass on Traditions         Tied to the Mexican Desert.....</i>	<i>655</i>
<i>B. Yaqui on the US Side of the Border are Cut Off From Elders         on the Mexican Side.....</i>	<i>656</i>
<i>C. The Lipan Apache are Severed from their Sacred Sites,         Endangering One of Their Most Important Ceremonies .</i>	<i>656</i>
IV. POTENTIAL SOLUTIONS.....	660

A. *An Obvious but Rarely Followed Solution: Honor the Laws* .....660

B. *Technological Advancements like the Enhanced Tribal ID Program* .....662

C. *A More Radical Approach*.....663

D. *Special VISAS*.....664

E. *Extend US Citizenship to All Members of the Border Tribes* .....665

CONCLUSION.....666

# IMAGINARY LINES, REAL CONSEQUENCES: THE EFFECT OF THE MILITARIZATION OF THE UNITED STATES-MEXICO BORDER ON INDIGENOUS PEOPLES

*Joseph Kowalski\**

## INTRODUCTION

When discussing immigration law and its effects, United States politicians and academics tend to focus solely on the two colonial Nation-states of the United States of America and Mexico. However, contrary to the popular image of a very clear delineation between the sovereign United States and the sovereign Mexico, there are in fact many nations living in the area considered by both powers to be the line between them: nations that predate both the United States and Mexico; nations that likely even predate the Aztec Empire.<sup>1</sup>

Through the warring and line-drawing of foreign countries, these nations have been colonized, and their homelands separated.<sup>2</sup> After the new maps were drawn, many maintained their ancient routes to visit sacred sites on either side of the border and to visit family members as many Indigenous nations still live in their communities now subsumed into both Mexico and the United States<sup>3</sup> In the modern era, free travel back and forth from either country is much more restricted. Indigenous Nations have found themselves cut off from their traditional sacred sites by border

---

\* Joseph Kowalski, from New Haven Connecticut, graduated from University of the Pacific McGeorge School of Law in Sacramento California in May 2017. He will be returning in the Fall to get an LLM in Water Law, and hopes to work at the intersection of environmental law and Indigenous rights. Joseph would like to thank his professor Raquel Aldana, as the initial version of this article was written for her Cimmigration class.

<sup>1</sup> *Tohono O'odham History*, TOHONO O'ODHAM NATION, [http://www.tonation-nsn.gov/ton\\_history.aspx](http://www.tonation-nsn.gov/ton_history.aspx) (last accessed April 26, 2016).

<sup>2</sup> ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES HISTORY OF THE UNITED STATES* 126 (Beacon Press, 2014).

<sup>3</sup> *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the American Southwest*, AMNESTY INTERNATIONAL USA, (2012), available at

[http://www.amnestyusa.org/sites/default/files/ai\\_inhostileterrain\\_final031412.pdf](http://www.amnestyusa.org/sites/default/files/ai_inhostileterrain_final031412.pdf).

fences and have seen the presence of armed forces of the United States patrolling their land.<sup>4</sup> Some have even seen a surge of drug cartels coming through. The militarization of immigration law has led to many of their rights being infringed upon. Border patrol and other government agents are infringing on the rights of Native Americans that are United States citizens, as they are often racially profiled as brown people and must carry a tribal ID at all times to prove they belong in their own country. On both sides of the border, their rights as Indigenous peoples are being undermined, as families are being split, and access to sacred sites and natural resources the cultures depend on are being limited. The situation will likely worsen under the presidency of Donald Trump if he continues with his plan on building a border wall. One border tribe has already made it clear it will not allow Trump's wall to be built.<sup>5</sup>

In Part I of this paper, I will provide the historical background necessary to understanding the situation in its' present context. The history begins with a brief explanation of what occurred before recorded history, then carries through Spanish colonization to American colonization. In Part II, I will discuss how the border effects the civil and property rights of Native Americans who are citizens of the United States or are Mexican members of border tribes that were granted tribal IDs and the right to reside on the United States side of tribal territory. Part III discusses the impacts on religious freedom and human rights for the tribes on the border as a whole, whether they are United States or Mexican citizens. Part IV will discuss potential solutions currently undertaken by border tribes, as well as proposed solutions.

---

<sup>4</sup> Kate Kilpatrick, *U.S.-Mexico Border Wreaks Havoc on Lives of an Indigenous Desert Tribe*, AL JAZEERA AMERICA, May 25, 2014, <http://america.aljazeera.com/articles/2014/5/25/us-mexico-borderwreakshavocwithlivesofanindigenousdesertpeople.html>.

<sup>5</sup> Tristan Ahtone, *The Arizona Tribe That Knows How to Stop a Trump Wall*, YES! MAGAZINE, Nov. 15, 2016, <http://www.yesmagazine.org/peace-justice/the-arizona-tribe-that-knows-how-to-stop-a-trump-wall-20161115>

I. A BRIEF HISTORICAL SUMMARY OF THE BORDER

A. *Pre-Columbian History and the Spanish Conquest*

For thousands of years, hundreds of different Indigenous Nations were in the North American continent, establishing trade routes, territories, villages, cities, and towns.<sup>6</sup> The origins of the Natives of the continent are from so far back in time that it is hard to tell for sure when they reached the Southwest, but the historical record establishes who was in the Southwest at the time of European contact.<sup>7</sup> In the Southwest, various Nations established their roots there from various ways. Some, like the Apache, are thought to have come down from around present day Canada.<sup>8</sup> Others, like the Tohono O'odham, are thought to have originated south, perhaps in present day Mexico.<sup>9</sup> Others still did not end up in the region until Anglo-American colonists pushed them out of their homelands in the Eastern part of the continent, such as the Kickapoo who originate in Wisconsin but fled to Mexico.<sup>10</sup> For hundreds if not thousands of years, life was fairly continuous in the region. Some civilizations came and went, but others remained in pueblos and villages, establishing trading partnerships and living an agrarian lifestyle.<sup>11</sup> Everything changed when the Spanish, having colonized the Aztec Empire, began making their way further North. Missionaries began building Spanish churches throughout the Southwest and California, and Spanish soldiers began conquering villages for converts and slave labor.<sup>12</sup>

---

<sup>6</sup> DUNBAR-ORTIZ, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> Deni J. Seymour, *Gateways for Athabascan Migration to the American Southwest*, PLAINS ANTHROPOLOGIST, 57.222, 149-61 (2012).

<sup>9</sup> *Tohono O'odham History*, *supra* note 1.

<sup>10</sup> *History of the Mexican Kickapoo*, MILWAUKEE PUBLIC MUSEUM, <https://www.mpm.edu/research-collections/anthropology/online-collections-research/mexican-kickapoo/history> (last visited Apr. 26, 2016).

<sup>11</sup> DUNBAR-ORTIZ, *supra* note 2.

<sup>12</sup> ELIAS. A CASTILLO, *CROSS OF THORNS: THE ENSLAVEMENT OF CALIFORNIA'S INDIANS BY THE SPANISH MISSIONS* 18 (Craven Street Books, 2015).

B. *Mexican Independence to the Mexican-American War*

For the sake of brevity, this article fast forwards to Mexican independence. In 1821, the Mexicans ousted the Spanish.<sup>13</sup> Many mission villages became secularized, and some Indians assimilated into the “mestizo” identity of Mexico.<sup>14</sup> Many others, though, remained in their Native homelands and maintained their Indigenous identities.<sup>15</sup> Years of war and turmoil occurred in the region, with fighting occurring between Mexico, the United States, the Apache, Comanche, and others who were all vying for control of the region.<sup>16</sup> Eventually, all the illegal excursions of the United States into Mexico and the demand back east for more land and gold culminated in the Mexican-American war.<sup>17</sup> After winning the war, the United States sought to gain the entire Southwestern part of the current United States. John C. Calhoun, a United States senator at the time voiced the sentiment that perhaps demonstrates the reason many white Americans are to this day so heavily opposed to Mexican immigration: “to incorporate Mexico would be the very first instance of incorporating an Indian race; for more than half of the Mexicans are Indians, and the other is composed chiefly of mixed tribes. I protest against such a union as that! Ours is a government of the white race!”<sup>18</sup>

C. *United States Colonization and the Current Border is  
Drawn*

Nevertheless, the territory was incorporated and is where today’s confusion and turmoil involving Indigenous peoples of the

---

<sup>13</sup> Kate A. Berry, *Water Use and Cultural Conflict in 19th Century Northwestern New Spain and Mexico* 40 *Nat. Resources J.* 759, 770 (2000).

<sup>14</sup> Randall Milliken, Laurence H. Shoup, and Bev Ortiz, *Ohlone/Costanoan Indians of the San Francisco Peninsula and Their Neighbors, Yesterday and Today*, OAKLAND: ARCHAEOLOGICAL AND HISTORICAL CONSULTANTS 155 (2009).

<sup>15</sup> DUNBAR-ORTIZ, *supra* note 2.

<sup>16</sup> S.C. GWYNNE, *EMPIRE OF THE SUMMER MOON: QUANAH PARKER AND THE RISE AND FALL OF THE COMANCHES, THE MOST POWERFUL INDIAN TRIBE IN AMERICAN HISTORY* 45 (Scribner, 2010).

<sup>17</sup> Rosemary King, *Border Crossings in the Mexican American War*, 25.1 *BILINGUAL REVIEW/ LA REVISTA BILINGUE* 63-85 (2000).

<sup>18</sup> John C. Calhoun, *A Southern Senator Opposes the "All-Mexico" Plan*, HERB: RESOURCES FOR TEACHERS, <http://herb.ashp.cuny.edu/items/show/1273> (last accessed Apr. 26, 2016).

Southwestern region and immigration law began. At the conclusion of the war, the United States and Mexico signed the Treaty of Guadalupe Hidalgo. Article V of the treaty redraws the boundaries of the two countries, which dropped the border much further down, cutting through the territory of many Indigenous Nations.<sup>19</sup> Article XI makes clear that the United States' intent was to colonize them, referring to them as "savage tribes who will hereafter be under the exclusive control of the United States" who's "incursions" (into Mexico) "shall be forcibly restrained by the Government of the United States whenever this may be necessary."<sup>20</sup> In other words, early border policing was less about keeping Mexicans out and more about keeping Indians in. The continuance of Indian raids into Mexico actually led to another treaty between the two countries, known as the Gadsen purchase, where the United States bought more of the Mexican lands in order to bring railroads through and have more military excursions into Indian territory.<sup>21</sup> At the time, this was considered less a group of people fighting to defend their homelands and more "Indian hostiles" savagely resisting civilization, which further pointed to the entitlement mentality white Americans of the era had in their Manifest Destiny outlook towards seizing the continent.

Eventually, United States policy gradually shifted from domination and extermination to accommodation, and travel occurred freely. In some cases, statutes such as the Kickapoo Border Crossing Statute were passed to ensure Indigenous people at the border could travel back and forth smoothly.<sup>22</sup> As immigration law has become stricter, however, these rights are being eroded. Efforts to stop the flow of drugs and human trafficking, as well as to more rigidly control who enters and exits the country, have led to what is often referred to as a militarization of the border. Armed guards patrol reservations, and fences are

---

<sup>19</sup> Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'odham Claim for Border Crossing Rights*, 8 ARIZ. J. INT'L & COMP. L. 97, 99 (1991).

<sup>20</sup> Treaty of Guadalupe-Hidalgo [Exchange copy], Feb. 2, 1848; Perfected Treaties, 1778-1945; Record Group 11; General Records of the United States Government, 1778-1992; National Archives.

<sup>21</sup> *Gadsden Purchase, 1853-1854 - 1830-1860 - Milestones - Office of the Historian*, U.S. DEPARTMENT OF STATE OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/gadsden-purchase> (last accessed Mar. 30, 2017).

<sup>22</sup> 25 U.S.C. §1300b-13 (1983).



being placed through Native lands.<sup>23</sup> The increasingly militarized tactics of border patrol is having a negative impact on the civil, religious, and tribal rights of Indigenous peoples who live at the border.

## II. THE BORDER IMPACTS THE CIVIL AND PROPERTY RIGHTS OF NATIVE AMERICANS ON THE LAND IT CUTS THROUGH

### A. “Apparent Mexican Ancestry” and the Racial Profiling of the Indigenous Peoples of the Southwest

Due to the Indian Citizenship Act of 1924, all Indians (in legal terms, not racial terms) born in the United States are citizens of the United States.<sup>24</sup> Due to their proximity to Mexico and the fact most Mexicans are of full or partial Indian ancestry, many Natives along the border are now being racially profiled.<sup>25</sup> Unfortunately, this is currently considered constitutional. The Supreme Court has claimed that “apparent Mexican ancestry” is an acceptable reason, in stops near the border, for the mandatory “reasonable suspicion.”<sup>26</sup> The problem is that there is no such thing as “apparent Mexican ancestry.” It is a term that has been used in several cases, but without any attempt to clarify or further define what it entails. This indicates it is a racialized definition. Mexico is a country, and “Mexican” is a nationality. This conflation of race and nationality has led to Native peoples being harassed and profiled on their own land. In Arizona in particular, SB 1070, aka the “show me your papers” law, has led to an increase of profiling and harassment of people living on the Tohono O’odham Nation.<sup>27</sup> T.SB 1070, otherwise known as the “Support Our Law Enforcement and Safe Neighborhoods Act,” requires all “aliens” over the age of 14 who remain in the United States for longer than 30 days to register with the United States government, and to have

---

<sup>23</sup> Todd Miller, *Unfinished Business in Indian Country*, NACLA, <https://nacla.org/news/2014/6/9/unfinished-business-indian-country> (last accessed Apr. 26, 2016).

<sup>24</sup> Stats. At Large, 68<sup>th</sup> Cong. Ch. 233, 43 Stat. 253 (June 2, 1924).

<sup>25</sup> Amnesty International Report, *supra* note 3.

<sup>26</sup> *U.S. v. Martinez-Fuerte* 428 U.S. 543, 563 (1976).

<sup>27</sup> Amnesty International Report, *supra* note 3.

registration documents on them at all times.<sup>28</sup> If they are found without documentation, they can be charged with a misdemeanor.

There is no “Mexican race,” so there is no such thing as “apparent Mexican appearance.” Mexico has Caucasians, American Indians, Asians, Africans, and groups that are a mix of one or more of those.<sup>29</sup> Many Mexicans are mestizo, meaning their physical features resemble those of their Indigenous ancestry. Around 60 percent of the country is mestizo, and around 30 percent Indigenous.<sup>30</sup> Due to disastrous trade policies such as the North American Free Trade Agreement, it is mainly mestizo and Indigenous farmers who make up a lot of immigration, legal or otherwise, to the United States.<sup>31</sup> Therefore it is likely that the “Mexican appearance” being referred to is that of American Indians.

*B. Native Americans Near the Border are Forced to Carry Tribal IDs and Cannot Freely Travel in Their Own Ancestral Lands*

The Tohono O’odham Nations proximity to the border, and half of its’ territory being in Mexico, has led to it being an entry point for drug cartels and human traffickers, increasing the presence of customs and border production (CBP) activity.<sup>32</sup> Members now have to carry around tribal cards or other governmental identification to demonstrate they belong where they are, in their own land.<sup>33</sup> Many elders do not have birth certificates and therefore have a difficult time obtaining official government identification.<sup>34</sup> There have been incidents of harassment, arrest,

---

<sup>28</sup> 2010 Ariz. Sess. Laws, S. 1070, Chap. 113.

<sup>29</sup> Allan Wall, *Races of Mexico and the Mexican Genome*, <http://banderasnews.com/0707/eded-racesofmexico.htm> (last accessed April 26, 2016).

<sup>30</sup> *Mexico Demographics Profile 2016*, INDEXMUNDI, [http://www.indexmundi.com/mexico/demographics\\_profile.html](http://www.indexmundi.com/mexico/demographics_profile.html) (last accessed Mar. 30, 2017).

<sup>31</sup> David Bacon, *Displaced People: NAFTA's Most Important Product*, NACLA, <https://nacla.org/news/displaced-people-nafta%E2%80%99s-most-important-product> (last accessed Apr. 26, 2016).

<sup>32</sup> Kristina Pyclik & Jennifer Leibig, *Living in No Man’s Land*, CULTURAL SURVIVAL 30.3 (2006).

<sup>33</sup> Amnesty International Report, *supra* note 3.

<sup>34</sup> *Id.*

and beatings of Tohono O'odham citizens who have been found to not have proper identification on them.<sup>35</sup>

Even though tribal identification is considered valid ID and therefore should enable members to freely move within their nation, many officials have rejected the cards and harassed people using them.<sup>36</sup> According to Amnesty International, one citizen of the Tohono O'odham, born on the Mexican side of the Nation was abused by CBP even though he had a tribal card.<sup>37</sup> He obtained a tribal ID card to work on a ranch in the United States near the border. When crossing the border in Sonora, Border Patrol agents asked where he was from. He replied the USA, as he knew he was born in the Tohono O'odham Nation and assumed that meant he was from there. The agents cuffed him and called him a *pendejo*. They removed his shoes, handcuffed him to a chair for three hours, and took photos and fingerprints. Eventually, he signed an order of deportation, and they kicked him out into Sonora at three in the morning. He eventually snuck back (into his own homelands) and married a United States citizen who is also Tohono O'odham. He is now captive in his own homelands, afraid to ever travel outside of the Nation, living in fear of the many CBP who patrol the reservation.<sup>38</sup>

Other Indigenous people like the Kickapoo of Texas had to fight for legislation to be passed to allow them free travel.<sup>39</sup> Even though there is a statute that allows for the Kickapoo to travel freely through the border in a manner that respect their semi-nomadic lifestyle, CBP have demanded they only use one specific point of entry at Eagle Pass Texas.<sup>40</sup> Prior border fences have infringed on their statutory right to free travel, and a border wall would certainly infringe on that right as well<sup>41</sup>. They had the good fortune of having that statute passed before 9/11, as now many other groups who are not federally recognized but have lived in the

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Austin, *supra* note 19.

<sup>40</sup> Michelle Guzman & Zachary Hurwitz, *Violations on the Part of the United States Government of Indigenous Rights Held by Members of the Lipan Apache, Kickapoo, and Ysleta del Sur Tigua Tribes of the Texas-Mexico Border*, THE WORKING GROUP ON HUMAN RIGHTS AND THE BORDER WALL, UNIVERSITY OF TEXAS AT AUSTIN, 2008 (revised Oct. 18, 2008).

<sup>41</sup> *Id.*

border area for centuries have had requests for similar statutes denied.<sup>42</sup>

C. *Construction of the Wall Has Infringed on Property Rights*

In addition to having their traditional homelands split by the border, Natives and others have their United States property rights infringed on as well. Due to a 1906 treaty between the United States and Mexico that does not allow construction in the flood plain of the Rio Grande, much of the wall is actually being constructed through United States soil, not at the actual border, sometimes as far as a mile inland.<sup>43</sup> The result is that hundreds of acres of United States land is on the southern end of the border, and many Indigenous people, such as the Lipan Apache in Texas, have been unable to access their land.<sup>44</sup> It's not just tribal lands, but properties held under United States property law. The United States has constructed fences, gates, and surveillance technologies throughout the southwest "border" which has kept many people from accessing the southern part of their land.<sup>45</sup> While President Trump has not declared the official location of the planned wall, sources indicate some of it may go through areas that already have border fences, meaning these areas would be infringed on yet again.<sup>46</sup>

In Texas, prior border fences and the proposed Trump Border Wall would infringe on land rights that date back to Spanish

---

<sup>42</sup> Sara Daly, *Bordering on Discrimination: Effects of Immigration Policies Legislation on Indigenous Peoples in the United States and Mexico*, 38 AM. INDIAN L. REV. 157, 181 (2014).

<sup>43</sup> *The Situation at the Texas-Mexico Border and the Racially Discriminatory Impact of the Border Wall on the Lipan Apache (Cúelcahén Ndé) Peoples in Texas: A Shadow Report to the U.N. Committee on the Elimination of Racial Discrimination in Response to the Periodic Report of the United States of America concerning the International Convention on the Elimination of All Forms of Racial Discrimination*, The Human Rights Clinic at the University of Austin Texas School of Law, The Lipan Apache Band of Texas & The Lipan Apache Women Defense, University of British Columbia, Dr. Margo Tamez. T Dr. Margo Tamez (Feb. 2014) [hereinafter Shadow Report].

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Trump Wants to Build 30-foot-high Wall at Mexican Border*, CNBC, Mar. 19, 2017, <http://www.cnn.com/2017/03/19/trump-wants-to-build-30-foot-high-wall-at-mexican-border.html>.

colonization.<sup>47</sup> The Tigua People were given Spanish land grants in the late 1600s, when they established the Ysleta del Sur Pueblo, twelve miles east of El Paso.<sup>48</sup> Spanish and Mexican authorities confirmed the validity of these land titles in several documents, in 1751, 1825, 1839 and 1841.<sup>49</sup> Ever since the territory came under United States control, the United States has violated the Treaty of Guadalupe Hidalgo, which stated that all land claims of Mexican citizens would be honored.<sup>50</sup> The Tribe is now a federally recognized tribe, but Texas illegally partitioning tribal land has never been rectified.<sup>51</sup> A border wall would cut through a great deal of land granted by Spain and sworn to be honored in United States treaty.

### III. MILITARIZATION OF THE BORDER INFRINGES ON THE RELIGIOUS RIGHTS OF INDIGENOUS PEOPLE

In addition to the individual right of free travel being impeded, the collective rights of Indigenous peoples to maintain their cultural cohesion and religions are being infringed upon. Some of the members on the United States side of the border have their sacred lands in Mexico, and some of the Mexican Nations have their sacred lands in the present day United States.<sup>52</sup> Some United States Natives who have forgotten some of their customs depend on the elders on the Mexican side of the border to come teach youth culture.<sup>53</sup> Some Natives need to gather plants and other materials important to their spiritual practices in the deserts of Mexico, and are either unable to travel into Mexico or unable to return with those items, as overzealous border guards mistake them for forbidden plants.<sup>54</sup> Construction of the fence has led to the

---

<sup>47</sup> Daly, *supra* note 42.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Amnesty International Report, *supra* note 3.

<sup>53</sup> Leah Castella, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 193 (2000).

<sup>54</sup> Austin, *supra* note 19.

desecration of burial sites, which is both a blasphemy to Native peoples and a violation of federal law.<sup>55</sup>

The American Indian Religious Freedom Act states that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions,” “including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>56</sup> The actions of the United States government at the border has infringed on each of these rights. Border agents have confiscated sacred objects, the wall has blocked access to both sacred sites, and elders who bear the responsibility of passing down the spiritual teachings.

A. *The Tohono O’odham Have Had Sacred Items Confiscated by Customs and Have Been Unable to Pass on Traditions Tied to the Mexican Desert*

In Arizona, the Tohono O’odham Nation is having its religious freedom rights undermined by the border fence. Many O’odham go into the Mexican desert to collect sweet grass, bird feathers, and pine leaves, which are “sacred objects” required for their “traditional rites.”<sup>57</sup> When the fences were first constructed, there were initially three crossings left open for them to freely access their lands on the southern side.<sup>58</sup> One of these crossings was considered a “sacred pass,” and was supposed to remain open to tribal use. However, it has since been gated.<sup>59</sup> This has prevented tribal members from accessing their homelands. In some cases, they have been able to travel to other crossings, but it is a long journey to a remote area, which lays an undue burden on the exercise of their religion.<sup>60</sup> When they are able to make it, they have their religious freedoms infringed upon when attempting to return. Border officials have been confiscating these items,

---

<sup>55</sup> Russell Morse, *Fence in the Sky: Border Wall Cuts Through Native Land*, THE NATIVE PRESS, <http://www.thenativepress.com/news/fencesky.php> (last accessed April 26, 2016).

<sup>56</sup> 42 U.S.C. § 1996 (2011).

<sup>57</sup> Austin, *supra* note 19.

<sup>58</sup> Amnesty International Report, *supra* note 3.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

assuming they are not allowed to be brought into the United States.<sup>61</sup>

Elders have also complained about how being confined to the United States side interferes with their ability to pass on their traditions to the youth.<sup>62</sup> The O'odham were traditionally nomadic. Not being allowed to traverse the desert has kept them from being able to pass down survival skills and ceremonies associated with the desert. It has also kept them from being able to pass down their language, as many of the words are tied to the desert.<sup>63</sup>

*B. Yaqui on the U.S. Side of the Border are Cut Off from Elders on the Mexican Side*

The Yaqui of the Southwest rely on their relatives on the Mexican side of the border to pass on traditions.<sup>64</sup> Due to years of warfare and assimilation attempts by the United States government, a lot of the ceremonial knowledge of the Yaqui on the United States side of the border has been lost.<sup>65</sup> Medicine men, ceremonial dancers, and other knowledge keepers who live on the Mexican side have been unable to easily access their relatives in the United States.<sup>66</sup> Some have been kept from coming outright. Some who are elderly and have been concerned with their health have stayed away due to the fear of the negative health impacts being harassed and possibly detained by armed guards could cause them.<sup>67</sup> Yaqui culture is passed down orally, and if the Yaqui on the United States side are unable to learn their traditions from the Mexican Yaqui, it can disappear entirely. This would violate the obligation to "protect and preserve" American Indian religion.

*C. The Lipan Apache are Severed from their Sacred Sites, Endangering One of Their Most Important Ceremonies*

A shadow report by the Lipan Apache, otherwise known as the Nde, given to the United Nations illustrates many of the ways their

---

<sup>61</sup> Castella, *supra* note 53.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Nation and others are effected by the border.<sup>68</sup> The Texas-Mexico wall stretches across all of the traditional lands of the Lipan Apache.<sup>69</sup> The border wall and accompanying armed border agents have prevented elders from accessing sacred sites on the south side of the border.<sup>70</sup> They have had to put their lives at risk by trespassing on other peoples' property in order to reach an area for them to access their lands.<sup>71</sup> Some of these trespassers even hold legal title to the land on the other side of the fence, but nonetheless have to break the law to access it.<sup>72</sup>

There are multiple effects on the religious freedom of the Lipan Apache resulting from the construction of the Texas-Mexico wall. One is limiting the access to plants, medicines, and wildlife on the Mexican side of the wall that are necessary for cultural continuity and many religious ceremonies.<sup>73</sup> The wall keeps them from gathering these items, and keeps them from accessing the sacred sites associated with these items. Not being able to access the sites and items also limits their ability to pass down the customs and language. In addition to making it difficult for Lipan Apache to access their sacred plants, the wall is also physically destroying many of the plants.<sup>74</sup> The construction of the wall and the constant vehicle traffic of the Border Patrol are eroding the soil and killing off Native plants, causing "ecological dead zones."<sup>75</sup> Indigenous farmers on the northern side of the wall were also dependent on access to the rivers on the southern side of the wall.<sup>76</sup> They are unable to access the irrigation canals necessary to water their fields, in which they grow traditional foods and medicines that are important to their spirituality.

Another effect is the wall preventing the Lipan Apache from performing one of their most important religious ceremonies. Known as "Isánáklésh Gotal," it is described as "the transformative ritual which structures the celebratory transformation from youth to womanhood and which is central to all" "systems and

---

<sup>68</sup> Shadow Report, *supra* note 43.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



existence.”<sup>77</sup> According to Dr. Inés Talamantez, Associate Professor, Department of Religious Studies, University of California, Santa Barbara: the ceremony:

[P]rovides the framework for the elaborate song cycle and rituals which bring about the transformations of the young girls during their initiation ceremonies. This process of transforming the young initiate into ‘Isánáklésh through song, and her corresponding movement into the role of deity and then woman’ is what structures Ndé “ritual time” and “transformation”, which are central to Ndé fundamental conception of being, becoming, and belonging in Ndé society.<sup>78</sup>

Properly conducting the ceremony requires it to be performed in the land of the mother’s side of the family, as the Lipan Apache are a matrilineal society.<sup>79</sup> Many of the mothers’ homelands are near the southern end of the wall. The ceremony must be conducted in a location free from hostile, negative, or violent conditions.<sup>80</sup> The Lipan feel that the desecration of the earth required in the construction of the fence, the violence involved in detaining people, and even deaths at the border are making their homelands an unsuitable place to conduct their rite.<sup>81</sup> The third requirement is that the ceremony be conducted by a river.<sup>82</sup> The wall is blocking access to their traditional rivers. The final requirement is that the ceremony be done in a location not held by a hostile, Non-Lipan

---

<sup>77</sup> *Id.*

<sup>78</sup> Dr. Inés Talamantez, *Gathering Our Spirits, Gathering Three Generations: Revitalizing Ndé Women’s Knowledge Transmission of Isanaklesh Gotal and Disrupting Colonization and Pervasive Racism and Gender Oppression Against Ndé Women*, July 2013.

<sup>79</sup> Shadow Report, *supra* note 43.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

group.<sup>83</sup> However, the areas they traditionally use are currently held by roving Border Patrol who have been known to harass and detain them.<sup>84</sup>

The Isánáklésh Gotal is the Apache Puberty Ceremony and is central, in their belief system, to the well-being of the women, and, due to being matrilineal, the nation as a whole. The Texas-Mexico border wall has substantially interfered with the practice of this most important ceremony. This is a major burden on the Tribe's ability to practice its religion, and maintain its spirituality.

Many Natives, both those who currently live in the border area and otherwise, have ancestral burial grounds and cemeteries in the border area. Accessing these sites is central to their religions.<sup>85</sup> The desecration of these sites, both in constructing the walls and in the Border Patrol driving over them constantly, is also a violation of federal law.<sup>86</sup> The Native American Graves Protection and Repatriation Regulations is a federal law passed to protect Native archaeological sites and human remains.<sup>87</sup> If a federal agency encounters bones or ancient religious objects, they are to return those objects to a Native tribe.<sup>88</sup> If a burial site or other site of importance is discovered, a federal agency is supposed to avoid desecration.<sup>89</sup> Many Natives believe the borderlands are home to many ancient sites and burials. As discussed further later, the government waived its requirement to follow this law along the border and has avoided transparency in whether there have been remains found.<sup>90</sup> This is a violation of both religious freedom and the Native American Graves and Repatriation Act.

---

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Rob Capriccioso, *NAGPRA Waived to Build U.S.-Mexico Fence*, INDIAN COUNTRY TODAY MEDIA NETWORK, Apr. 11, 2008, <http://indiancountrytodaymedianetwork.com/2008/04/11/nagpra-waived-build-us-mexico-fence-92581>.

## IV. POTENTIAL SOLUTIONS

A. *An Obvious but Rarely Followed Solution: Honor the Laws*

Like most problems affecting Indigenous peoples, the best solution would be for the United States government to properly apply the laws as written in treaties and statutes and Acts that define the governments' obligations to Indigenous people. One of the main reasons the federal government has been able to flagrantly ignore the religious rights of Natives along the border is legislation of Congress. The initial legislation was the Real ID Act, which enabled the government to build a fence between the United States and Mexico.<sup>91</sup> The Secure Fence Act (SFA) further eroded Native rights, as it gave the government the power to waive any laws that could possibly interfere with the construction of the wall.<sup>92</sup> The Native American Graves Protection and Repatriation Act (NAGPRA) and the American Indian Religious Freedom Act (AIRFA) were waived, as were many Federal environmental protection laws.<sup>93</sup>

If the laws were properly adhered to and followed, there would be no major problems. There are many laws in place meant to protect Indigenous peoples' religious rights. The AIRFA ensures natives rights to practice their religion.<sup>94</sup> The NAGPRA protects burial sites and other ancient sites of importance.<sup>95</sup> The United Nations International Convention on the Elimination of All Forms of Racial Discrimination states that "impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" if someone violates their rights.<sup>96</sup> The Committee on the Elimination of Racial Discrimination has found that states must "recognize and protect the rights of indigenous peoples to own, develop, control and use their

---

<sup>91</sup> Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

<sup>92</sup> Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638.

<sup>93</sup> *Laws Waived on the Border*, SIERRA CLUB, <http://www.sierraclub.org/borderlands/laws-waived-border> (last accessed Mar. 30, 2017).

<sup>94</sup> 42 U.S.C. § 1996 (2011).

<sup>95</sup> Native American Graves Protection and Repatriation Act, *supra* note 87.

<sup>96</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc A/ 6014, 660 UNTS 195 (1965).

communal lands, territories and resources.”<sup>97</sup> Were the United States government to follow the principles of these laws, the religious freedoms would no longer be infringed upon. Following these laws and repealing the aspects of the SFA that allowed them to be waived would largely solve the problem. Native people and their allies will have to pressure politicians into honoring these laws as the government is unlikely to do so of its own volition. If the legality of constructing through Native lands is brought to the courts it is possible decisions will be reached in favor of Native sovereignty. If not, negotiations can occur between tribal leaders and United States Department of Homeland Security to determine ways to honor the spirit of the laws of religious freedom while still protecting the borders.

Some Indigenous Nations have sought legal recourse for their grievances. The Lipan Apache initially filed suit against the eminent domain takings required in building the fence through their lands.<sup>98</sup> It was to no avail, as the SFA granted great power to the government.<sup>99</sup> The Lipan Apache have filed shadow reports in the United Nations detailing the myriad ways in which the government has undermined its rights, and are continuing to fight injustices on its lands.<sup>100</sup> Native peoples can and should continue to use both United States and international courts and agencies to advocate for their lands.

---

<sup>97</sup> Comm. on the Elimination of Racial Discrimination, Gen. Recommendation 23, Rights of Indigenous Peoples, U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003).

<sup>98</sup> Brenda Norrell, *Apaches Defend Homeland from Homeland Security*, COUNTERPUNCH (Jan. 7, 2008), <http://www.counterpunch.org/2008/01/08/apaches-defend-homeland-from-homeland-security/>.

<sup>99</sup> *Id.*

<sup>100</sup> Shadow Report, *supra* note 43.

*B. Technological Advancements like the Enhanced Tribal ID Program*

The Pascua-Yaqui Tribe created the country's first "Enhanced Tribal ID."<sup>101</sup> It wanted to create a method for tribal members to easily enter the country without going through a screening process every time. Working with the United States Border Security Program Managers tribal liaison, they partnered with the Department of Homeland Security and the United States and Mexican governments in creating the identification card.<sup>102</sup> The card has the tribal members name, a physical description, date of birth, a tribal enrollment number, and a photo and fingerprint impression.<sup>103</sup> The fingerprint impression allows for a quick swipe and scan at ports of entry, making it faster and easier to go through border checkpoints.<sup>104</sup> While of great use to the Pascua-Yaqui Tribe, this is not a solution for all Indigenous peoples. The Lipan Apache are not a federally recognized tribe. The United States government seldom recognizes the full rights of non-recognized tribes to affirm their sovereignty and human rights, as there is a bureaucratic system where the government decides who is "Indian." Presumably, no such tribal ID program could be recognized for such tribes. The laws of CERD and the United Nation Declaration on the Rights of Indigenous People, however, are meant to apply to all people of Indigenous ancestry, not merely those the State chooses to recognize. An Act to create tribal IDs that could be used by all people able to prove membership with border tribes, federally recognized or otherwise, would be a great way to ensure quick and easy access to both sides of the border for Indigenous peoples. Religious freedom exceptions could be written into the act to ensure people who possess the ID are allowed to bring in sacred plants and other spiritual and cultural items.

---

<sup>101</sup> Lee Allen, *Don't Leave Home Without It*, INDIAN COUNTRY TODAY (Mar. 23, 2011), <http://indiancountrytodaymedianetwork.com/2011/03/23/dont-leave-home-without-it-23898>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

C. *A More Radical Approach*

Others haven't taken more grassroots approaches, outside the realm of law. Some Tohono O'odham activists have cut down fences with wire clippers, and some often simply "trespass" to reach their lands.<sup>105</sup> The Tohono O'odham Nation has made it clear they will not comply if Trump is to carry through his promise to build a wall.<sup>106</sup> Tohono O'odham Vice Chairperson Verlon Jose has stated the wall will be built "over my dead body" and warns the President should abandon the plan "unless he wants to see another Standing Rock."<sup>107</sup> Melissa Tatum, a law professor at the University of Arizona warns it would undermine the progress law enforcement officials and the Tohono O'odham have made on forming coalitions to end drug smuggling over the border.<sup>108</sup> Respecting tribal sovereignty is extremely important, and the government would risk mass resistance if it ruined its relationship with the Tohono O'odham.

Even further into the grassroots realm are organizations such as the Mexica Movement. Their manifesto states:

[W]e are Nican Tlaca, the Indigenous People of Canada, U.S., Mexico, Central and South America. We reject all European borders and divisions of our continent. We reject the artificial border divisions of our people" "We say no to occupation! Yes to liberation! We say this is still our continent! It is our land. Europeans are the illegals, since 1492!<sup>109</sup>

---

<sup>105</sup> Ofelia Rivas, *O'odham Cut Border Fence Restricting Traditional Route*, CENSORED NEWS (Mar. 22 2016), <http://bsnorrell.blogspot.com/2016/03/oodham-cut-border-fence-restricting.html>.

<sup>106</sup> Tristan Ahtone, *The Arizona Tribe That Knows How to Stop a Trump Wall*, YES! MAGAZINE (Nov. 15, 2016), <http://www.yesmagazine.org/peace-justice/the-arizona-tribe-that-knows-how-to-stop-a-trump-wall-20161115>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Mexica Movement Home Page, <http://www.mexica-movement.org>.

Although they are likely too radical to be taken seriously by lawmakers and politicians, they embody the spirit of the deepest resistance against the criminalization of migration and the militarization of the border. Made up primarily of Mexican-Americans, the group is mostly known for fighting it out with racist organizations such as the Minute Men.<sup>110</sup> While outside the more mainstream realm of law, advocacy and agitation groups such as the Mexica Movement could certainly be used to bring more attention to the problems of Indigenous people and perhaps even lobby to make sure Indigenous people have less restricted travel in their ancestral homelands. It will be important for grassroots organizations like this to partner with border tribes and other Native groups to use protest to pressure the government into honoring its obligations to Native peoples and stop infringing on the rights of Indigenous peoples at the border.

#### D. Special VISAS

A more peaceful approach can be seen with the Kumeyaay Nation of Southern California. Located in San Diego, California, it is one of the tribes that has seen the benefit of the rise of Indian casinos.<sup>111</sup> Although they have become quite prosperous and are living a general American lifestyle, their relatives on the Mexican side are impoverished and living a traditional way of life.<sup>112</sup> Due to years of genocide in California, the Kumeyaay have had difficulty retaining much of their traditional culture, while the Mexican side still speaks the language, practices the ceremonies, and knows how to live the Indigenous lifestyle.<sup>113</sup> The Kumeyaay have been able to work out a deal with the Mexican and United States governments to allow six month VISAs to be granted to Kumeyaay in the Mexican desert, even though many of them lack the birth certificates and other identification typically required to obtain

---

<sup>110</sup> Leslie Radford, *Nican Tlaca Stand Up to Cowboys*, LOS ANGELES INDYMEDIA: ACTIVIST NEWS (Nov. 27, 2005), <http://la.indymedia.org/news/2005/11/140035.php>.

<sup>111</sup> Ken Ellingwood, *Tribes Are Caught on the Border*, L. A. TIMES (May 8, 2000), <http://articles.latimes.com/2000/may/08/news/mn-27815>.

<sup>112</sup> *Kumeyaay People: Traditions Survive in Baja California*, WILDER UTOPIA (Oct. 22, 2012), <http://www.wilderutopia.com/traditions/kumeyaay-people-traditions-survive-in-baja-california/>.

<sup>113</sup> *Id.*

such materials.<sup>114</sup> This has led to a mutual benefit. The United States Kumeyaay are able to relearn their cultural and spiritual traditions, and the Mexican Kumeyaay are able to earn some much needed income while staying in California, either being paid for teaching the culture or for working in the casinos.<sup>115</sup> If the United States and Mexican governments are willing to work out a similar arrangement with other Indigenous people at the border, a similar mutually beneficial relationship could be established between United States -based border tribes and their Mexican counterparts.

*E. Extend U.S. Citizenship to All Members of the Border Tribes*

One of the most logical solutions is one proposed by the Tohono O'odham. It has been requesting the United States government to change Nationality laws to make exceptions for Indigenous peoples.<sup>116</sup> A law titled "Tohono O'odham Citizenship Act of 2013" was proposed before Congress, but was not passed.<sup>117</sup> While the Kickapoo of Texas were allowed to grant United States citizenship to their relatives on the Mexican side, there has never been an effort to unanimously grant citizenship to all Indigenous peoples directly on the other side of the United States-Mexican border.<sup>118</sup> If the Indian tribes along the border were allowed to decide who was a member of their tribe and grant them United States citizenship, it would solve the issues of free travel. The idea is not a farfetched one. Similar rights exist on the United States-Canadian border. In the late 1700s, the United States and Britain signed a treaty known as the Jay Treaty.<sup>119</sup> It was mostly to resolve what issues still remained after the Treaty of Paris, which ended the American Revolution.<sup>120</sup> While mostly about settling land disputes and getting British soldiers out of the area, there was a provision that stated Aboriginal tribes would be allowed free travel

---

<sup>114</sup> *Kumeyaay Nation: Strengthening Cross-border Ties*. YES! MAGAZINE (May 19, 2008), <http://www.yesmagazine.org/issues/a-just-foreign-policy/kumeyaay-nation-strengthening-cross-border-ties>.

<sup>115</sup> Ellingwood, *supra* note 111.

<sup>116</sup> Kilpatrick, *supra* note 4.

<sup>117</sup> Tohono O'odham Citizenship Act of 2013, H.R. 1680, 113<sup>th</sup> Cong. (2013).

<sup>118</sup> Austin, *supra* note 19.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*



over the United States-Canadian border.<sup>121</sup> This right has been encoded in the Immigration and Nationality Act.<sup>122</sup> While there are still some complications for Natives going over the Northern border, there are far less than for those at the United States-Mexico border. If the United States and Mexico were to work out a similar treaty, it would resolve many of the Natives issues.

Perhaps the overall future of the wall, and the border itself, can be found in the words of an Indigenous poet, Pennie Opal Plant:

Nations are always temporary/ In the  
long life of mother earth/ they come  
and they go/ The hatefulness of the  
fearful/ will pass with time/ Their  
imagined laws and lines/ which cross  
the land/ will dissipate/ and we will  
remain /like our ancestors/ who still  
remain here in these lands/ their  
bones breathed in through/ the dust  
on the winds/ there was no word for  
migrant in/ the time before time/ the  
borders that crossed us/ are  
imaginary lines/ of a temporary  
nation.<sup>123</sup>

#### CONCLUSION

Through many unfortunate historical circumstances, the Natives of the Southwest have had their homelands severed in two by colonial borders. While many laws have been created meant to secure their rights to visit sacred sites and see their relatives, the militarization of the United States-Mexico border has infringed heavily upon those rights. People who have lived in the region for thousands of years are now being told they are foreigners and are not allowed to visit their own ancestor's graves. They are being kept from their sacred sites, and blocked from gathering the

---

<sup>121</sup> *Id.*

<sup>122</sup> 8 U.S.C. § 1359.

<sup>123</sup> Pennie Opal Plant, *No Word For Migrant*, GATHERING TRIBES (Mar. 2016), <http://www.gatheringtribes.com/blog/why-we-represent-indigenous-arts-of-the-americas> (last visited April 20, 2017).

materials that are vital for their culture. The United States and Mexico should work together with the Indigenous Nations to ensure that the laws meant to protect Indigenous peoples are upheld and protected. Indigenous people's rights to dignity, cultural survival, and spirituality should not have to be undermined by other nation's interests.