

**Violations on the Part of the United States Government of the Right to Property and
Non-Discrimination Held by Residents of the Texas Rio Grande Valley**

The Working Group on Human Rights and the Border Wall

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Introduction

The Secure Border Fence Act of 2006 and the Consolidated Appropriations Act of 2008 direct the construction of 700 miles of reinforced fencing on the Southwest border of the United States. Approximately 70 miles of this fencing is slated to be constructed in the Texas Rio Grande Valley.

The lands being taken by the U.S. government for the purpose of building the fence include public and privately held lands¹. Several private properties that are currently being accessed by the U.S. government for the purpose of surveying and construction are owned by citizens with deep historical claims to their land. Dr. Eloisa Tamez, a life-long resident of El Calaboz, Texas is one such property owner. Dr. Tamez, self identified as Lipan Apache, is the owner of a small piece of property that has been in her family since 1774. The proposed wall will bisect her land, leaving the majority of her property on the south side of the barrier.²

The case of Idalia Benavidez and her family is another example. For five generations, the Benavidez family has lived on a seven-acre plot of farmland near the U.S.–Mexico border west of Brownsville, Texas. They have harvested cotton and squash and raised goats and pigs. They have helped build the levee that is located across the rear of the property. In April, federal officials arrived asking to purchase a rectangular slice of their property abutting the levee for \$4,100 to make way for the border fence. The Benavidez family refused. Idalia Benavidez told the Working Group that one of the government employees told her, "I don't want to scare you but whether you agree or not, the government's going to build the fence." If the 18-foot-high barrier is built on their property, it will cut off the Benavidez cows and goats from a pasture south of the fence's proposed path³. Many other private property owners are being affected in similar ways.

In the process of planning and constructing the border fence on the Texas/Mexico border, and particularly in the Rio Grande Valley, the United States government is violating residents' right to property. Additionally, the Department of Homeland Security (DHS), and Customs and Border Protection in particular, are conducting the border fence planning and construction process in ways that violate the principles of equal protection and non-discrimination as understood by international human rights law.

¹ The public lands are property of the State of Texas, different cities, counties and school districts, among others.

² The Working Group has interviewed and consulted with Dr. Eloisa Tamez.

³The Working Group interviewed Idalia Benavidez. See also Arian Campo-Flores and Andrew Murr, Brownsville's Bad Lie, Newsweek, May 05, 2008.

This briefing paper examines these violations. Its central arguments are:

- The United States government is violating residents' right to property.⁴
- The placement (location) of the border fence is discriminatory.
- The placement (location) of the border fence is arbitrary.
- The burden is on the United States government to demonstrate that the construction of a border fence is a reasonable and necessary measure to protect the State's national security objectives and that there are no other less restrictive measures available, but the government has not carried its burden.

Domestic Law on the Border Fence

Two pieces of legislation are central to U.S. policy concerning the border fence:

- **P.L. 109-367, the Secure Fence Act of 2006**
- **P.L. 110-161, the Consolidated Appropriations Act of 2008**

P.L. 109-367, the Secure Fence Act of 2006, was signed into law on October 26, 2006. The act directed DHS to construct two-layered reinforced fencing and additional physical barriers, roads, cameras, sensors, and lighting along five stretches of the southwest border.

According to the act, the Texas portion of the border fence would be located: from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas; from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry; and from 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

P.L. 110-161, the Consolidated Appropriations Act of 2008, was enacted on December 26, 2007 (fourteen months after the Secure Fence Act of 2006). Most importantly, the act significantly increased the Secretary of Homeland Security's discretion as to where to construct fencing. Whereas the Secretary was previously required to build the fence in specific areas, the new legislation includes a more general requirement to construct barriers: "along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border⁵." The act also amends the provisions concerning fence construction in priority areas, by requiring the Secretary of Homeland Security to identify either 370 miles or "other mileage" along the southwest border where fencing would be most practical and effective, and to complete construction of fencing in those identified areas by December 31, 2008. Another important change enacted by this legislation is that the Secretary is

⁴ Current U.S. immigration law authorizes the Secretary of DHS to contract for and buy any interest in land adjacent to or in the vicinity of the international border when the Secretary deems the land essential to control and guard the border against any violations of immigration law. It also authorizes the Secretary to commence condemnation proceedings if a reasonable purchase price cannot be agreed upon. See Illegal Immigration Reform and Immigrant Responsibility Act, section 102.

⁵ P.L. 110-161.

not required to install: “fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location...if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.” Despite the important modifications and new requirements for consultation and consideration of alternatives included in this legislation, DHS does not appear to have changed its plans for wall locations significantly from those designated in the Secure Fence Act of 2006.

International Law as it Applies to the Border Fence - The Right to Property and the Principle of Equal Protection and Non-Discrimination

Article II of the American Declaration on the Rights and Duties of the Man (“American Declaration”) says that: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

Article V of the American Declaration states: “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”

Article IX of the American Declaration states: “Every person has the right to the inviolability of his home.”

Article XXIII of the American Declaration states: “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

The Inter-American Court of Human Rights (“the Inter-American Court” or IACtHR) has said that the right to property must be understood in the context of a democratic society. In that context, the State, in order to guarantee other rights of vital relevance can limit or restrict or even expropriate since the right to private property is not an absolute right⁶. However, the Inter-American system has put strict limitations on a State’s ability to affect a person’s right to property.

The Inter-American Court has held, on several occasions, that, in accordance with Article 21 of the American Convention on Human Rights (“American Convention”)⁷, a State may restrict the use and enjoyment of the right to property only where the restrictions on

⁶ See IACtHR, Case of Salvador-Chiriboga v. Ecuador. Preliminary Objections and Merits. Judgment of May 6, 2008 (Only in Spanish). Series C No. 179, para. 60.

⁷ The Inter-American Commission on Human Rights (“the Commission” or IACHR) has clarified that, in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly and in the light of developments in the field of international human rights law. This includes, in particular, the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. IACHR, Garza v. United States, Case 12.275, Annual Report of the IACHR 2000, paras. 88 and 89.

the right are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.⁸

The Inter-American Court has recognized its power to review the public utility or social interests invoked to restrict the right of property or to expropriate property. According to the Court, States must use the least restrictive means when the rights and duties contained in the Convention are affected⁹.

The tribunal has explained that when restricting rights, including the right to property, States must ensure that the measures are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome one in relation to the right involved, that would be as suitable to achieve the proposed objective¹⁰. The Court requires that the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right¹¹. Particularly, if various options are available to achieve an objective, the one which least restricts the right protected must be selected¹².

The Inter-American Court has further held that the requirement of proportionality in a democratic society must be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in the application of the law. States should ensure that reasons for the application of restrictive measures are provided¹³.

In addition, in accordance with case law from the Inter-American system, “there is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination.”¹⁴ Restrictions and limitations on the right to property must also respect the principle of equality and non-discrimination.

⁸ See IACtHR, *Case of the Saramaka People. v. Suriname. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172*; para 127; *Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125*, paras. 144-145 and *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146*, para. 137.

⁹ See IACtHR, *Case of Salvador-Chiriboga*, supra note 6, para. 73.

¹⁰ See IACtHR, *Case of Chaparro Álvarez y Lapo Íñiguez. v. Ecuador. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170*, para. 93.

¹¹ See, e.g., IACtHR, *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151*, para. 91.

¹² See IACtHR, *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127*, para. 206.

¹³ See IACtHR, *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111*, para. 132, citing the U.N. Human Rights Committee, General Comment No. 27 of November 2, 1999, para. 15.

¹⁴ See IACtHR, *Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States; Juridical Condition and Rights of the Undocumented Migrants*, para. 85.

The principle of equal and effective protection of the law and of non-discrimination is enshrined in multiple international instruments.¹⁵ As stated by the Inter-American Court: “the fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle.”¹⁶ As stated by the Inter-American Commission on Human Rights, the *jus cogens* nature of non-discrimination implies that, owing to its preemptory nature, all States must observe this fundamental rule, whether or not they have ratified the conventions establishing the principle of equality and non-discrimination.

International law allows States to make reasonable distinctions between groups or individuals in order to pursue legitimate aims in the interest of the State or society—including national security objectives such as border security. However to be permissible, the distinctions must fall within narrow parameters.

With regards to the possibility of the State to make distinctions between individuals and groups, the Inter-American Court has found that “the term distinction will be used to indicate what is admissible, because it is reasonable, proportionate and objective.”¹⁷ The term “discrimination” will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.¹⁸

The principle of proportionality is thus included as a requirement to establish the validity of restrictions on the right to property as well as to decide whether a measure is discriminatory. In regards to proportionality in the discrimination context, the Inter-American human rights organs apply a standard very similar to the one applied in assessing restrictions on the right to property and other rights in general. The Inter-American Commission has established that, if various options are available to achieve an objective, the one that least restricts the right protected must be selected.¹⁹ Similarly, in order to justify permissible distinctions, the State must demonstrate that its objectives cannot be satisfied any other way than through discriminatory means.²⁰

International law provides additional guidance for considering the human rights implications of the construction of the fence and its effect on the property rights of border residents. The International Court of Justice (ICJ) considered issues relevant to the Texas/Mexico border-wall when it ruled on the construction of a wall by Israel in the occupied Palestinian territory²¹. In this case, although the Israeli government had broad

¹⁵ As noted by the Inter-American Court, some of these instruments include: OAS Charter, Article 3(1); American Declaration on the Rights and Duties of Man, Article 2; American Convention on Human Rights, Articles 1 and 24; Charter of the United Nations, Article 1(3).

¹⁶ See IACtHR, Advisory Opinion OC-18/03, *supra* note 14, para. 86.

¹⁷ *Ibid.* para 84.

¹⁸ *Ibid.*

¹⁹ As stated by the Inter-American Commission in its submission in the proceedings on Advisory Opinion OC-18/03, *supra* note 14, para. 47.

²⁰ *Ibid.*

²¹ ICJ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004.

authority to confiscate land, villages complained that they had been unfairly deprived of their land through such seizures. The ICJ ruled that the wall and the route chosen for the wall and its associated security regime "gravely infringe a number of rights of Palestinians residing in the territory" and "the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order."²² The ICJ decision is crucial in the sense that it held that grave property violation cannot stand even in the face of military justifications or national security goals and their connection to the construction of the wall. In order to reach its conclusion, the ICJ took into account the provisions of the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is a party, among other instruments²³. Crucially, the ICJ observed that, in regard to the restrictions provided for under Article 12, paragraph 3 of the ICCPR relating to the right of freedom of movement, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends, conform to the principle of proportionality and be the least intrusive instrument amongst those which might achieve the desired result. The ICJ concluded that these conditions were not met in regards to the wall constructed in the occupied Palestinian territories²⁴.

This briefing paper will demonstrate that although the U.S. government has the right to subordinate the use of private property for reasons of public utility and social interest—including national security and the control of immigration—, it has not done so in a way that comports with international human rights law. By planning for the construction of a border wall across land owned by persons living along the Texas/Mexico border, the U.S. government is violating the right to property and the right to non-discrimination. The restrictions on the right to property imposed in this case are not proportional to the State's objectives; those restrictions defy the principle of necessity because they are arbitrary, discriminatory, and disproportional given that other less restrictive measures are available. Each of these points is explored below.

Arbitrary Distinctions with Regard to the Location of the Fence

The United States has made arbitrary distinctions with regard to the location of the border fence. It has done so in two ways:

- Legislation that mandates the fence has made arbitrary distinctions with regard to fence location and length and;
- DHS has executed the planning and construction of the fence using methods that make arbitrary distinctions between properties.

The Legislation Makes Arbitrary Distinctions

Congress has determined that the border fence will consist of intermittent barriers along the Texas/Mexico border. The use of intermittent fencing raises serious questions not

²² *Ibid*, para. 137.

²³ *Ibid*, para. 136.

²⁴ *Ibid*, para. 136.

only about the effectiveness of the proposed barriers, but also about the arbitrary nature of their placement.

The differences between the Secure Fence Act of 2006 and the Consolidated Appropriations Act of 2008 suggest that the decision-making process leading to the planned locations for construction of the border fence has been arbitrary and non-objective. The Secure Fence Act of 2006 placed requirements on DHS as to the segments of the Texas/Mexico border that should be fenced, although it left many gaps along the border and did not specify the exact location of the fence along those segments²⁵. Current legislation, as passed in the Consolidated Appropriations Act of 2008, removed these requirements and gave DHS complete freedom in determining the location of the intermittent fencing barriers. While the newer legislation allowed for more flexibility in determining wall construction sites and required greater consultation and consideration of alternatives, DHS has forged forward with plans to construct physical fencing, rather than implement alternatives such as heightened Border Patrol presence or increased technology in most of the areas designated in the original Secure Fence Act.

These changes in the legislation reflect the arbitrary nature of the decision-making process that will determine the fate of hundreds of property owners in South Texas. First, the lack of specificity with regards to fence location in the Consolidated Appropriations Act of 2008 raises serious questions as to the rationale behind the locations specified in the Secure Fence Act of 2006. Second, the differences between the two laws also call into question the rationale behind the current fencing locations adopted by DHS, which appear to closely follow those dictated in the Secure Fence Act despite Congress' decision not to mandate fencing in those specific areas. Third, the changes between the first and second bills undermine the legitimacy of the border fence project by demonstrating the arbitrary nature of the Congressional decision-making process itself²⁶.

The Secure Fence Act of 2006 does not indicate why or how the locations specified in the legislation were chosen. Sufficient information and data do not exist to justify the building of the border fence in these areas or establish the logical basis for its location. Legislative records from 2006, the year in which the border fence was debated in both the U.S. House of Representatives and the Senate, demonstrate the arbitrary nature of the location of the border fence.

²⁵ For example, the Secure Fence Act of 2006, while requiring the construction of a fence “extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry”, did not specify whether that segment should be built following the river bank or in a different location or how close the fence should be to the river bank.

²⁶ Current legislation appears also to reduce the number of miles of the fence by approximately 150 miles. This calculation is based on U.S. Customs and Border Patrol's estimate that the fence mandated in the Secure Fence Act of 2006 would require 850 miles of physical barriers. The Consolidated Appropriations Act of 2008 only requires the construction of reinforced fencing along not less than 700 miles of the southwest border. Source: Congressional Research Service, Report for Congress: Barriers along the U.S. International Border.” Updated January 8, 2008, page 2. Other sources suggest that the Secure Fence Act would only have required 700 miles of fencing. It is simply impossible to tell, without expert mapping, which estimate is correct since the Secure Fence Act did not give a total mileage number or even the mileage included in each of the segments of the border it identified for placement of the wall.

Statements made by Representative Chris Van Hollen during debates in the U.S. House of Representatives demonstrate Congress' lack of: 1) knowledge about the rationale behind the location of the fence, and 2) technical expertise to make location decisions. His statement suggests that Congress does not know why certain precise locations were targeted, and not others.²⁷

I want to make my position on this issue clear. I support the construction of a fence to better secure our border...However, this bill simply doesn't provide for a fence. In a typical example of congressional overreaching and micromanagement, the bill specifies exactly how such a fence will be built and the precise location of each segment of the fence. We are neither engineers nor construction managers nor do we know the best alignment of such a fence. We should simply direct the experts to construct a fence that accomplishes the objective of preventing illegal immigration and allow it to be built in the most cost-effective manner.

Representative Bryan Conoway presented a similar argument to his colleagues in the House, demonstrating that Congress was unqualified to make decisions about the location of the border fence:²⁸

The first step is to thoroughly analyze what is needed along all of our borders to meet our goal. At a minimum, the Border Patrol should be asked to provide us with what they think in their professional judgment is needed to do their job.

The bill set the amount of fencing for the southern border at 700 miles without properly consulting the Border Patrol, who knows best where a fence is needed. A proper analysis of the problem may show that we actually need 1,000 miles or it may show us that only 500 miles is needed to secure the border.

The bill designates specifically where the fencing is to be built in Texas. The communities where the fence is mandated to be constructed should have some input into this bill before the law was passed. Also, most of the border between Texas and Mexico is private property. We should have known what impact that will have on the cost of constructing the fence as well as how much of the property might have to be taken via eminent domain proceedings.

Senator John Kerry made similar arguments to the Senate:²⁹

²⁷ Statement by Representative Chris Van Hollen, Library of Congress Congressional Record, "Personal Explanation," September 14, 2006, page H6590.

²⁸ Statement by Representative Bryan Conoway, Library of Congress Congressional Record, "Providing for Consideration of H.R. 6061, Secure Fence Act (Extension of Remarks), September 21, 2006.

²⁹ Statement by Senator John Kerry, Library of Congress Congressional Record, "Secure Fence Act of 2006 (Resumed), September 29, 2006, page S10612.

The Secretary of Homeland Security has not asked for the amount of fencing provided for in this bill. Although the bill does not authorize a specific amount of fencing, it does dictate exactly where the fencing should be put up. Some people believe the bill authorizes 730 miles of fencing, but Customs and Border Protection, however, estimates that it will require 849 miles of fencing to get the job done.

These statements by Congressmen Van Hollen, Conoway, and Kerry are representative of arguments presented by many other members of Congress and clearly indicate that Congress was fundamentally uninformed with regard to the location and even the proposed length of the border fence. It appears that Congress did not ask for or receive basic and vital information from DHS that would inform its decisions about the fence locations specified in the 2006 legislation. Furthermore, Representative Conoway's testimony reiterates the failure of Congress and DHS to consult with local communities or to incorporate resident concerns into the decision-making process.

Further indicating the arbitrary nature of the location of the southern border fence, legislators and public officials have asked why the U.S. government will secure the southern border but not the northern border between the U.S. and Canada. As Representative Phil Gingrey stated in 2006: "If we are really concerned about terrorists, we ought to be much more concerned about our northern border, where there are many more miles of unprotected border without camera sensors, without fencing."³⁰

Congressional records indicate that location decisions have also been based on budgetary concerns without proper regard either for the effectiveness of the locations or for the property rights of border residents. Many members of Congress raised concerns over the dearth of funding available for the border fence project while others pointed out that decisions regarding the location of the fence were being made based on the project's budget. These legislators' concerns point to a process that consisted of weighing generally permissible national security objectives against budgetary allocations and political concerns without due consideration and balancing of the rights of border residents.

In addition to the arbitrary determinations made by the Secure Fence Act of 2006, dramatic changes to U.S. legislation produced by the Consolidated Appropriations Act of 2008 raise important questions as to the rationale behind the locations planned for the border fence. While the rationale for the original locations designated in the Secure Fence Act of 2006 was vague or nonexistent, the later legislation's failure to mention any specific areas at all to be fenced or to provide any but the most general criteria for determining which areas should be fenced – "where fencing would be most practical and effective"—calls into question the validity of the current mandate that no less than 700 miles of fencing be constructed.

³⁰ Statement by Representative Phil Gingrey, Library of Congress Congressional Record, "Personal Explanation, U.S. House of Representatives," September 14, 2006, page H6587.

The Consolidated Appropriations Act of 2008 no longer mandates that DHS build fencing in any particular location along the Texas/Mexico border. The repeal of the previous mandate, absolutely requiring 70 miles of fencing in specific areas of the Rio Grande Valley and designating 30 miles of construction in the Rio Grande Valley as a priority to be completed by the end of 2008, indicates the arbitrary nature of the original legislation. Presumably, border security objectives for the southern border have not changed substantially in the 14 months between the Act of 2006 and the Act of 2008; nor has the security situation at the border changed fundamentally. Again, it appears clear that the original legislation was based less on valid and coherent intelligence indicating essential locations for the fence, and more on other factors such as political expedience and budgetary considerations.

Despite these legislative changes, DHS is forging forward to build the wall in essentially the same areas listed in the Secure Fence Act of 2006 regardless of the new legislation which allow for more individual and collective consultation and consideration.

The Planning and Construction Make Arbitrary Distinctions³¹

In various public statements, DHS has provided glimpses into the rationale for the specific locations of the segments of wall, including: “The approach [DHS] take[s] to managing the borders [is] driven by the landscape, the flow [of illegal pedestrian traffic], the particular challenges there are in any one of the locations.”³² While statements from DHS provide some insight into the rationale employed by DHS in determining the location of the border fence, the government’s explanations are undeniably vague and do not justify the condemnation of specific plots of land held by private property owners. One conclusion that can be drawn from the void left by these unanswered questions is that decisions regarding the location of the fence are arbitrary and do not take into account all relevant factors such as the degree of impact that the placement of the fence in certain areas will have on landowners in those areas.

For instance, DHS surveyed private property for construction planning purposes in El Calaboz, Texas, at the property of Dr. Eloisa Tamez. The Working Group visited the North and South sides of Dr. Tamez’s property, which are bisected by a levee. On the levee, the Working Group witnessed measuring poles placed there by DHS, which indicate that the border fence will be constructed on the levee. This fence will cut off Dr. Tamez’s access to the South side of her property. In essence, Dr. Tamez will lose important rights to her land, which has been in her family for centuries. Yet, DHS has not made clear what characteristics of her property make it an important location for a fence to protect national security.

³¹ An accompanying paper demonstrates that there are marked and statistically significant differences in the demographics of people affected by the proposed fence in Cameron County, Texas. See J. Wilson, et al., *An Analysis of Demographic Disparities Associated with the Proposed US-Mexico Border Fence in Cameron County, Texas*.

³² Office of the Secretary of Homeland Security. “Remarks by Homeland Security Secretary Michael Chertoff at Pen-and-Pad Briefing on the Department’s Fifth Anniversary.” March 6, 2008.

The fence will run across the entirety of Dr. Tamez's property in El Calaboz. However, just 6.7 miles southeast, the fence will stop abruptly before reaching the Western property line of the River Bend Resort and Country Club, a popular winter retreat. The fence will renew again just East of the property line. Unlike Dr. Tamez, patrons of the resort will have unfettered access to the river. If the fence had followed the levee into this property, as it will on Dr. Tamez's property, it would have completely cut off the resort from the golf course that it owns. As it is, the country club, golf course, and vacation rental properties, will be unaffected by the fence. (*See Appendix 2 for a map of the planned border fence in this area*).

Recent media reports indicate that similar distinctions are being made in other areas, and that the planning and construction of the border fence is being implemented according to arbitrary distinctions. The following examples of arbitrary distinctions with regard to the planning and construction of the fence are cited by recent media reports and verified by the Working Group:

- In Granjeno, Texas, DHS originally planned to build an 18-foot high fence or wall through the property belonging to Daniel Garza—74-year-old retiree born and raised in Granjeno³³. There were reportedly no plans to build the fence through the next-door property belonging to Dallas billionaire Ray L. Hunt and his relatives.³⁴ Instead that property has been designated for large scale profitable development and agriculture undisturbed by the construction of the fence. There was no explanation from the United States as to why security concerns disappear on Mr. Hunt's properties. Mr. Hunt is reportedly a close friend of President George W. Bush, and recently donated \$35 million to Southern Methodist University to help build President Bush's presidential library. In 2001, President Bush made him a member of the Foreign Intelligence Advisory Board, where Hunt received a security clearance and access to classified intelligence.³⁵
- Original maps for locations for the fence would have had the fence running through an important local university campus, the University of Texas at Brownsville. Yet, there has been no indication that illegal immigration through campus is common and it is, in fact, unlikely that it would be. The University of Texas Brownsville and Texas Southmost College (UTB/TSC)

³³ Fortunately, it now appears that the land of small landowners in El Granjeno will not be ceased, as the county has made a deal with the Federal Government to combine construction of the wall with repairs to an already existing levee.

³⁴ The Working Group interviewed residents of Granjeno, Texas who provided information on the Hunt properties. Residents stated that Hunt Plantation Company (of the Hunt Family, which also owns Hunt Oil Company) owns large acreage of monoculture agriculture, which borders Granjeno to the north and northeast. The Hunt Family also owns Sharyland, the large housing development recently constructed between Granjeno and McAllen, Texas. The land on which Sharyland is located was formerly a plantation area owned by Hunt Co. According to Granjeno resident, Gloria Garza, all agriculture in the area is the property of Hunt Co.

³⁵ Melissa Del Bosque, "Holes in the Wall: Homeland Security won't say why the border wall is bypassing the wealthy and politically connected," *Texas Observer*, February 22, 2008. <http://www.texasobserver.org/article.php?aid=2688>

have become vocal opponents of the border fence and have called the placement of the border fence “arbitrary and capricious.”³⁶ In fact, through negotiations with DHS, UTB has been able to change the location and reduce the extension of the fence through its campus, making clear that the original plan for the fences in this area had little rationale.

- Chad Foster, Mayor of Eagle Pass, Texas, and Chair of the Texas Border Coalition has stated: “I puzzled a while over why the fence would bypass the industrial park and go through the city park.” He was reportedly utterly unsuccessful in finding “any logical answers from Homeland Security as to why certain areas in [Eagle Pass] ha [ve] been targeted for fencing over other areas.”³⁷

These stories point to the disproportionately negative impact that the fence will have on certain individuals and communities, and the difficulty that residents have had in getting answers to the question: *What is the rationale behind the location of the fence on this land?* This unanswered question is especially problematic in those instances in which sections of the fence skip properties belonging to individuals and businesses with more political and/or economic power than most residents in the area. Furthermore, even though the locations discussed above cannot yet be verified with complete certainty, that residents cannot verify these locations is yet another indication of the utter failure on the part of DHS to sufficiently inform affected residents or explain the location of the border fence and its rationale.

Finally, in a statement to the U.S. House of Representatives Committee on the Judiciary, Secretary Chertoff stated: “Of course, it makes little sense to secure the long stretches of border between our official ports of entry if we continue to have possible gaps in border security at the ports of entry.”³⁸ Yet, in the same way, it makes little sense to construct a border fence through private property belonging to individual residents and skip neighboring properties, such as those belonging to Hudson Bend and Ray Hunt. The distinctions made between such properties constitute blatantly unequal treatment of border residents.

The Specific Location of the Border Fence is Not Clearly Justified and Less-Intrusive Measures Exist for Obtaining Operational Control of the Border

Because construction of the wall on the Texas-Mexico border, as planned, involves the taking of property and also treats property owners differently from one another and therefore unequally, the United States government must justify the decision to construct

³⁶ Christopher Sherman, “Border fence lawsuit dismissed against UTB-TSC,” *Valley Morning Star*, March 19, 2008.

http://www.valleymorningstar.com/news/fence_21831___article.html/university_government.html.

³⁷ Melissa Del Bosque, “Holes in the Wall: Homeland Security won’t say why the border wall is bypassing the wealthy and politically connected,” *Texas Observer*, February 22, 2008.

<http://www.texasobserver.org/article.php?aid=2688>.

³⁸ Michael Chertoff. “Before the United State House of Representatives Committee on the Judiciary.” March 5, 2008. http://www.dhs.gov/xnews/testimony/testimony_1204746985090.shtm.

the wall as planned and must also demonstrate that it is implementing the least restrictive means to achieve its goals in doing so. Yet, the United States has continually changed the justifications both for the construction of the fence in general and for the specific locations for fencing, thus making it impossible to establish a rational link between the deprivation or limitation of property rights and equal protection and the measures being adopted by the government. According to the Secure Fence Act of 2006, the purpose of the fence is to “achieve and maintain operational control over the entire international land and maritime borders of the United States”. “Operational control” is defined as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband”³⁹. In different statements by U.S. officials, all these purposes –prevention of entrance of terrorists and instruments of terrorism, undocumented migrants, drug trafficking and contraband—were used to justify either the construction of the fence in general or its specific or proposed location. Whenever one of those justifications has been challenged, the U.S. authorities have elected one or more of the other reasons as justification for the taking of private property. It is impossible to know if the border fence that cuts through private property has a reasonable relationship to the objective of operational control of the border.

Since 2001, the U.S. has consistently invoked national security objectives to justify a number of human rights restrictions. In contrast, international human rights law holds that restrictions of rights must be proportionate to the State’s ultimate objective, and national security objectives do not give States free reign to restrict rights in unreasonable ways. In sum, the U.S. has not made the case that the border fence accomplishes a legitimate purpose for the State.

As mentioned earlier, various human rights bodies hold that, if various options are available to achieve an objective, the one that “least restricts the right protected must be selected.”⁴⁰ Similarly, in order to justify any form of discrimination, the State must demonstrate that its objectives cannot be satisfied any other way than through discriminatory means.⁴¹

In 2007 and early 2008, DHS approached border property owners and demanded that they “voluntarily” execute a six-month right-of-way to their properties for site assessment and survey. These waivers permit DHS to move structures and vegetation, store vehicles and equipment, and bore holes in property.⁴² Property owners executed these six-month waivers but were not informed that they had the right to arrive at a fixed price for this use of their land.⁴³ In other words, these waivers were not signed knowingly. Those who

³⁹ Secure Fence Act of 2006, section 2 (a) and (b).

⁴⁰U.N. Human Rights Committee, General Comment No. 18: Non-Discrimination 10/11/1989, at section 82, citing Inter-American Court on Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.

⁴¹ *Ibid.*

⁴² Peter Schey, Civil Action No. 08-CV-0555, First Amended Complaint for Injunctive and Declaratory Relief (Class Action), page 3.

⁴³ Congress has dictated that DHS negotiate with border property owners to reach a fixed price for the property before seeking condemnation of the land. These provisions require that Secretary Chertoff clearly

refused to sign the waivers were sued for possession of their land, which has been granted. DHS has apparently now completed the site evaluation stage and moved on to the process of permanently taking private property for the construction of the fence. In the spring of 2008, DHS began to make financial offers to purchase land (in the range of \$4,000) and by May 2008, the government had begun suing private property owners to obtain land from those who do not wish to sell voluntarily at the offered price or at all.

Forced taking of land to allow the construction of a border fence that runs through private property is not the least restrictive, least onerous means of achieving the national security and immigration control goals of the government. Multiple legislation, press releases, policy briefings, and statements by DHS recognize the availability of less intrusive measures for securing the southern border of the United States. Those that are officially recognized and employed by DHS include the following: unattended ground sensors, truck-mounted mobile surveillance systems, remote video surveillance systems, unmanned aerial systems, and fixed- and rotary-wing aircraft to detect, classify, track and respond to illegal border crossings.⁴⁴

Before passing the Consolidate Appropriations Act of 2006, Congress seriously debated several alternative bills that did not include a border fence. Alternative legislation, such as the “Thompson Substitute”⁴⁵ focused on reforming immigration laws and procedures. None of these alternative measures would have required the arbitrary and discriminatory restriction of the right to property on the border. Additionally, proposed legislation mandates other measures including the development and implementation of improved satellite communications and other technologies to ensure clear and secure two-way communication capabilities among Border Patrol agents and between all border security agencies of the Department of State, local, and tribal law enforcement agencies.⁴⁶ As Senator Leahy stated in a Senate proceeding, “In a country on the cutting-edge of technology, with a history of legendary ingenuity, and driven by innovators of the highest caliber, we can do better: we can secure our borders through human innovation, technology, and vigilance.”⁴⁷ In fact, many of these alternatives might be better at meeting the government’s stated goals, because they would allow direct contact between Border Patrol officials and those attempting to cross the border, thereby allowing for better categorization of border crossers and for physical apprehension where necessary.

define the interest he seeks in real property and then, if the property owners agree upon a price, DHS must purchase the interest. If a price is not agreed upon, only then is he to proceed with the condemnation process.

⁴⁴ See the following for details on alternative options: United States Government Accountability Office, Testimony before the Subcommittees on Management, Investigations, and Oversight, and Border, Maritime and Global Counterterrorism, Committee on Homeland Security, House of Representatives, Secure Border Initiative: Observations on Selected Aspects of SBInet Implementation, Wednesday, October 24, 2007. Available: www.gao.gov/new.items/d08131t.pdf.

⁴⁵ The “Thompson Substitute” was an amendment to the Secure Border Fence Act of 2006, proposed by Mississippi Congressman Bernie Thompson in September, 2006.

⁴⁶ E.g. U.S. Senate Bill 1984: Immigration Enforcement and Border Security Act of 2007.

⁴⁷ Library of Congress Congressional Record, “Secure Fence Act of 2006 (Resumed),” Senate, September 29, 2006, page S10610.

Recent negotiations between DHS and the University of Texas at Brownsville and Texas Southmost College (UTB/TSC) are a powerful demonstration of the availability of less-intrusive measures for realizing national security objectives. In the early months of 2008, DHS surveyed the property of UTB/TSC and informed the university that a segment of fencing would be constructed through university property. University officials strongly contested this plan, insisting that DHS alter the location of the fence. After a prolonged battle with UTB/TSC, DHS sued the university. A Brownsville federal judge dismissed the suit, after ensuring that DHS would renegotiate the location of the fence.⁴⁸ Accordingly, a new agreement between DHS and UTB/TSC stipulates among other things:⁴⁹

- DHS will work with the University to jointly assess alternatives to a physical barrier.
- DHS has agreed that, should damage to University property occur, it will make repairs or offer an appropriate fair market value settlement.
- DHS has been authorized to conduct studies, including environmental assessments, and to consult with the University regarding alternatives to a physical barrier.
- DHS will consider the University's unique status as an institution of higher education and will take care to minimize impact on its environment and culture.
- DHS will conduct investigations to minimize the impact of any tactical infrastructure on commerce and the quality of life for the communities and residents located near the University.
- DHS has agreed not to clear land, mow grass or otherwise alter the physical landscape of University property without the University's consent.
- DHS will coordinate all entry to the campus and give prior notice of all activities on campus to campus police.

(See Appendix I for text of the agreement and a map showing the original and the revised proposed location of the fence).

Under pressure that it perhaps did not expect, DHS has demonstrated a willingness to seriously engage UTB/TSC in further discussions over the location of the fence, while other property owners and residents are consistently ignored by the United States government. The agreement outlined above makes significant alterations to the original approach used by DHS in dealing with the property in question, demonstrating the unnecessary expansiveness of the original approach.

⁴⁸The University of Texas at Brownsville and Texas Southmost College, "UTB/TSC Hosts Border Wall Subcommittee Hearings," April 28, 2008.

http://blue.utb.edu/newsandinfo/BorderFence%20Issue/03_19_2008UpdatedBorderFenceInfo.htm

⁴⁹ The agreement, negotiated between DHS officials and attorneys with the University of Texas System and Texas Southmost College, was presented at a scheduled hearing on March 19 in U.S. District Court in Brownsville.

State Restrictions on the Right to Property are Not Proportional

U.S. immigration law authorizes the Department of Homeland Security to contract for and buy any interest in land adjacent to or in the vicinity of the international land border when the Secretary deems the land essential to control and guard the border against any violation of immigration law. It also authorizes the Secretary to commence condemnation proceedings if a reasonable purchase price can not be agreed upon⁵⁰. This is the mechanism that the United States government is employing to obtain the land across which it will build its border wall⁵¹.

Taking segments or the entirety of a property owner's land to build a fence across it, or severing portions of an individual's land with a fence is a severe restriction on the right to property of residents on the Texas/Mexico border. It is not proportional to the government's proposed national security and immigration control goals because the U.S. government has not considered and therefore not adopted the least restrictive means. Yet, the government is choosing to take privately held land to attain its goals.

Even during its initial surveying process to consider the exact coordinates for the fence, DHS has demonstrated a serious lack of proportionality. DHS has offered residents \$100 in exchange for unlimited access to their property for a six-month time period. This compensation is entirely insufficient, and the requirements imposed by the six-month period are unreasonable, especially given the paltry compensation. In essence, by demanding unlimited access for a six-month period with nominal compensation, DHS is already attempting to establish control over these properties. The compensation available to property owners for right-of-access to their land is disproportionate to:

- The potential damages to private property
- The opportunity cost of using that land in other ways during the six-month time period
- The mental stress placed on land owners by the presence of CBP agents occupying their land and
- The quasi-possession of properties by DHS.

It is not surprising that the decisions regarding construction of the fence are contrary to property rights since DHS has failed to consult with property owners and others along the Texas/Mexico border regarding the best procedure that would still meet the government's goals. Secretary Chertoff has failed to comply with the consultation requirement of the Consolidated Appropriations Act of 2008, which mandates that DHS consult with property owners, cities, and other stakeholders in order to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents

⁵⁰ 8 U.S.C. §1103(b). Congressional Research Service, Report RL33659 Border Security: Barriers Along the U.S. International Border, Updated January 8, 2008, by Blas Nuñez-Neto and Michael John Garcia at 17.

⁵¹ Unlike prior fencing projects that were primarily located on federal land, approximately 54 percent of the planned fence in the U.S./Mexico border is scheduled to be constructed on private property See Government Accountability Office, Report GAO-08-508T, Secure Border Initiative: Observations on the Importance of Applying Lessons Learned to Future Projects, February 27, 2008, at 15.

located near the sites at which activities relating to the border fence may occur. This Act is in keeping with international law in that it allows for a method of interaction between the State and residents that would produce the least intrusive measures for obtaining the State's objectives. In this case, proper consultations might have led to a decision to use methods other than physical fencing requiring the taking of land to control part of the border. In other cases, proper consultation might have led to better locations for the fence that would cause the least degree of interruption in the property owners' use of their land. However, DHS failed to follow this process.

In addition, DHS has not made known to property owners the process by which the government will fix the price of their land.⁵² Particularly, the government has not issued rules, guidelines, instructions, directives, or policies regarding how to fixing the price of residents' properties.⁵³

In fact, even the construction of the fence does not require the seizure of land as the government is proposing. In Hidalgo County, federal and local authorities reached an agreement that would largely eliminate the need to take land for the fence. The plan will modify levees along the Rio Grande with an 18-foot sheer face on the river side. Yet, DHS has not explored similar plans elsewhere.

The Burden Rests on the United States Government to Show it has Adopted the Least Restrictive Means and the Government has not Met that Burden

The burden is not on citizens to demonstrate that the construction of a border fence is an unreasonable and unnecessary measure to protect national security; the burden is on the government to show that it has adopted the least restrictive means of meeting a legitimate governmental objective.

The U.S. government has not provided sufficient evidence to support its position that the fence is necessary and that its planned locations are the most appropriate. As demonstrated in prior sections of this briefing paper, it is extremely difficult for persons and organizations outside the government and not privy to government intelligence to determine: 1) the reasoning behind the placement of the border fence, and 2) whether the

⁵² The Working Group interviewed El Calaboz, Texas residents Hitalia and Guadalupe Benavides. The family seeks to rescind the contract they signed to give access to DHS to their property, because Mrs. Benavides argues that the agreement she was asked to sign by DHS only allowed access to DHS survey machinery, and it said nothing of negotiating a price for the sale of the right to use her property (temporary easement). She stated she does not remember what language (English or Spanish) the agreement was in, and that DHS told her orally that it was an agreement only to leave machines on her property. Mrs. Benavides stated that she does not know how to read either language ("*poquito*"), nor does her husband. She also stated that she was never offered money for the temporary easement, and that one day DHS came to offer money to purchase her property. The Working Group witnessed and photographed requests by DHS that offer \$4,100 to purchase the Benavides property. No severance damage was offered by DHS in its offer to purchase the property. The Benavides family can trace the land back to the turn of the 19th Century.

⁵³ Peter Schey, Civil Action No. 08-CV-0555, First Amended Complaint for Injunctive and Declaratory Relief (Class Action), page 4.

border fence will be the most effective means of protecting national security. The information provided by the U.S. government is both limited and vague.

Though the Consolidated Appropriations Act of 2008 requires Secretary Chertoff to consult with affected residents, DHS has repeatedly failed to do so. This lack of communication is indicative of a general pattern of behavior.⁵⁴ The State has consistently failed to produce the rationale for and justification of the location of the border fence. For this reason, the Texas Border Coalition, an organization of mayors, county commissioners and economists, filed a federal lawsuit in May arguing that the Department of Homeland Security failed to conduct required negotiations with property owners and local authorities in planning construction of the barrier in Texas⁵⁵.

The following example demonstrates the lack of proper consultation by DHS. In December of 2007, DHS held a town meeting in Brownsville allegedly to comply with the legislative requirement to conduct proper consultation with affected communities. At the town meeting, community participants were forced to assemble at the Events Center where government officials simply entered community participant's comments into a computerized system. Government officials did not provide residents a forum or time to make public comments, to exchange information between DHS and the community or the opportunity to ask questions directly. Professor Juliet Garcia, President of UTB/TSC, stated to the Working Group that "the town meeting was guarded by heavily armed guards from DHS and Border Patrol. There were also plainclothes Border Patrol officers at the meeting". Dr. Garcia felt that there was such a lack of freedom for the community to make public comments that she and other community members held a second town meeting that same night across the street in a field⁵⁶. Other participants told the Working Group that the atmosphere was intimidating, orchestrated and not conducive to meaningful community input. One student described the meeting as "not a friendly place and very uncomfortable."⁵⁷

The Working Group conducted interviews with UTB/TSC President, Dr. Juliet Garcia, and UTB/TSC professor Jude Benavidez.⁵⁸ These interviews reveal the State's failure to provide affected communities, including UTB/TSC with information regarding the border fence. Though DHS was required to inform residents about plans for the border fence in Brownsville, Dr. Garcia first learned about the location of the border wall on the university campus when a UTB/TSC official attended a public hearing held by DHS in June or July 2007. No prior notice had been given and it was not until this hearing that the university realized the fence would cut through its campus. At the hearing, it became apparent that DHS representatives were using outdated maps of the campus in planning

⁵⁴ For example, Representative Hinojosa referred to meetings between DHS and the residents of Laredo, Texas in 2006 as "sham hearings that only allowed testimony from one side of the issue and are being used to justify this bill." Library of Congress Congressional Record, "Personal Explanation, House of Representatives," September 14, 2006, page H6583.

⁵⁵ See Randal C. Archibold and Julia Preston, Homeland Security Stands by Its Fence, New York Times, May 21, 2008.

⁵⁶ Interview with Professor Juliet Garcia, President of UTB, on May 2, 2008.

⁵⁷ Interview with faculty and students at UTB on May 2, 2008.

⁵⁸ Interview May 02, 2008.

the location of the wall; DHS was not aware that UTB/TSC had expanded its campus substantially, in the direction of the river. Therefore, DHS had severely underestimated the amount of land that would be cut off from the main campus by their planned border fence. Not only did DHS fail to make the plans for the fence public in a timely manner, it failed to seek out and obtain critical information about the impact of the chosen fence location.

Not only has DHS provided little information about or proof of the effectiveness of the fence and the rationale behind its location, it appears that this information is a moving target. In a March 2008 press conference, Secretary Chertoff stated: “Well, 670 miles should be done by the end of this year. We will probably build some additional fencing beyond that. I can’t tell you what an exact number is. I suspect that the physical fencing will—if there’s going to be more than the 670 [miles], whatever that number is, it will probably be done in the following year.”⁵⁹

Essentially, the United States is abusing its power to keep national security information confidential. The State is either purposefully withholding information on the exact locations of the border fence and the rationale behind these locations, or it has not yet determined the exact location of the border fence. In the first case, the government is abusing its privileged position, presumably in order to quell opposition on the part of property owners, such as the current litigation, Civil Action No: 8-CV-0555.⁶⁰ If the second case is true, the State’s argument that border fence locations are chosen based on local intelligence and other rational criteria for effectiveness is undermined, as it would appear that this information is either imprecise or unavailable.

Conclusion

In the process of planning and constructing the border fence in the Texas/Mexico border and particularly in the Rio Grande Valley, the United States government is violating residents’ right to property. Additionally, the government is conducting the border fence

⁵⁹ Office of the Secretary of Homeland Security. “Remarks by Homeland Security Secretary Michael Chertoff at Pen-and-Pad Briefing on the Department’s Fifth Anniversary.” March 6, 2008.

⁶⁰ Civil Action No: 8-CV-0555 is an action brought by attorneys from the Center for Human Rights and Constitutional Law: Peter A. Schey, Carlos Holguin, and Dawn Schock, and attorneys from the South Texas Civil Rights Project: James Harrington, Abner Burnett, and Corinna Spencer-Scheurick. The civil action is brought on behalf of plaintiffs Eloisa Garcia Tamez, Benito J. Garcia, Idalia Benavidez, Eduardo Benavidez. The plaintiffs are private land owners in the Texas Rio Grande Valley who are affected by, and opposing the border fence. The defendants are Secretary Michael Chertoff and Acting Executive Director of Asset Management for U.S. Customs and Border Patrol, Robert F. Janson. The civil action claims that: defendant Chertoff and those working as his agents have disregarded the laws of the U.S. in pushing forward to plan to build at least 70 miles of border wall in the Rio Grande Valley; six-month right-of-access waivers signed by several of the plaintiffs are entirely unreasonable and were signed without plaintiffs being informed of their legal rights; DHS has not properly consulted with affected communities; DHS is no longer required to construct fencing in the Texas Rio Grande Valley; and DHS has failed to make known its rules and policies relating to the process of negotiating for residents’ property rights. The plaintiffs seek to certify and class and the issuance of temporary and permanent injunctive and declaratory relief to require Secretary Chertoff to act in full compliance with federal laws regarding the construction of the border fence.

planning and construction process in ways that violate the principles of equal protection and non-discrimination as understood by international human rights law.

Although the U.S. government has the right, according to international law, to subordinate the use of private property for reasons of public utility and social interest—including national security and the control of immigration—it has not done so in a way that comports with international human rights law.

By planning for the construction of a border wall across land owned by persons living along the Texas/Mexico border, the U.S. government is violating the right to property and the right to non-discrimination because the restrictions on the right to property imposed in this case:

- are not proportional to the State's objectives
- defy the principle of necessity because they are arbitrary
- are discriminatory and
- are not proportional given that other less restrictive measures are available.

Appendix 1: April 2008 Agreement Between DHS and UTB/TSC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

United States District Court
Southern District of Texas
FILED

MAR 19 2008

Michael N. Milby
Clerk of Court

THE UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Civil Action No. B-08-56

37.52 ACRES OF LAND, more or less,)
situate in CAMERON COUNTY, STATE)
OF TEXAS; and TEXAS SOUTHWEST)
COLLEGE DISTRICT, ET AL.)

ORDER OF DISMISSAL

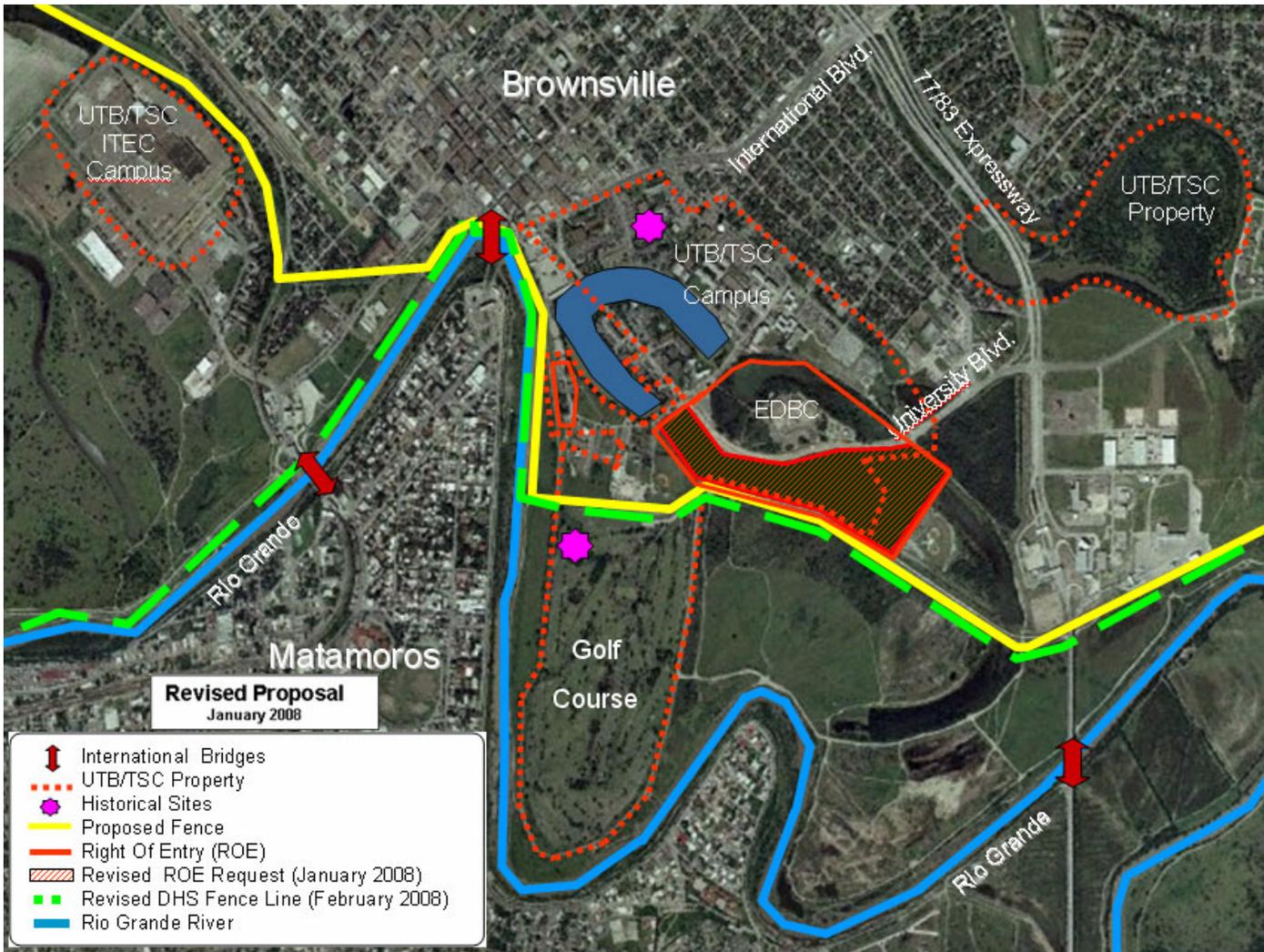
On this day, the Court considered Plaintiff's Motion for Order for Immediate Delivery of Possession (Docket No. 4) and ORDERS as follows:

1. This Order is without prejudice to Defendants' rights to later assert statutory and/or constitutional challenges to the condemnation of an interest in any property in which Defendants have an interest.
2. Plaintiff's employees and contractors shall have the right to enter upon the property described in Exhibit "C" to Plaintiff's Declaration of Taking (Docket No. 2) for the purpose of assessing methods of securing operational control of the border through the use of tactical infrastructure. Separate and apart from this eminent domain proceeding, Plaintiff, acting through the Department of Homeland Security, will jointly assess with Defendants alternatives to a physical barrier. Plaintiff's studies may include environmental assessments and property surveys, including the right to temporarily store, move and remove necessary equipment and supplies; survey, stake out, appraise, bore and take soil and/or water samples, and perform any other such work which may be necessary and incidental to Plaintiff's assessment, subject to the limitations described in this Order. This Order specifically authorizes Plaintiff to conduct such studies as are required to consult with Defendants. However this order would not require a written report.
3. In conducting its studies, Plaintiff will consider Defendants' unique status as an institution of higher education. Specifically, pursuant to 8 U.S.C. § 1103, Note, Pub. L. 110-161, Div. E., Title V § 564(a), Plaintiff will conduct such investigations as will permit it to consult

with Defendants in order to minimize the impact of any tactical infrastructure on the environment, culture, commerce, and quality of life for the communities and residents located near the property subject to this Order.

4. Recognizing that the property is part of a university campus, Plaintiff will take all reasonable action to promote safety and minimize any impact on the educational activities thereon.
5. Plaintiff is granted access to the property for six months.
6. The rights granted herein include the right of ingress and egress on other lands of the Defendants not described in this Order, provided such ingress and egress is necessary to access the property and is not otherwise conveniently available to Plaintiff. Plaintiff shall give Defendants prior notice of all activities on the property and shall coordinate entry to the property with Defendants and Defendants' police department.
7. All tools, equipment, and other property taken upon or placed upon the land by Plaintiff shall remain the property of the Plaintiff and may be removed by the Plaintiff at any time up to the expiration of Plaintiff's right of access.
8. If any action of the Plaintiff's employees or agents damage real property, Plaintiff will, at its option, either repair such damage or make an appropriate settlement with the Defendants. In no event shall such repair or settlement exceed the fair market value of the fee interest of the real property at the time immediately preceding such damage. Plaintiff's liability for damage may not exceed appropriations available for such payment. The provisions of this Order are without prejudice to any rights the Defendants may have to make a claim under applicable laws for any other damages. To the extent possible, the Government shall use contractors that have appropriate liability insurance.
9. Plaintiff will not clear land, mow grass, or otherwise alter the physical landscape of the property without Defendants' consent.
10. The Clerk is ordered to close this case on the docket. However, the Court retains jurisdiction to resolve interpretations of this Order, or any claims for damages under paragraph 8.

Signed this 15th day of March, 2008.



Appendix 2: Map of the Border Fence Skipping River Bend Resort

