

JUDGE FRANK MONTALVO

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2008 JUN 2 AM 12:40
US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY

COUNTY OF EL PASO,)
CITY OF EL PASO,)
EL PASO COUNTY WATER)
IMPROVEMENT DISTRICT NO. 1,)
HUDSPETH COUNTY CONSERVATION)
AND RECLAMATION DISTRICT NO. 1,)
YSLETA DEL SUR PUEBLO,)
FRONTERA AUDUBON SOCIETY,)
FRIENDS OF THE WILDLIFE CORRIDOR,)
FRIENDS OF LAGUNA ATASCOSA)
NATIONAL WILDLIFE REFUGE, and)
MARK CLARK,)

Case No: _____

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary,
U.S. Department of Homeland Security, and
U.S. DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

EP08CA0196

INTRODUCTORY STATEMENT

1. This lawsuit challenges two waivers of federal, state, and local laws issued by the Secretary of Homeland Security on April 3, 2008, pursuant to his claimed authority under Section 102(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, 8 U.S.C. § 1103 note, as amended by the REAL ID Act of 2005, Pub. L. No. 109-367, 120 Stat. 263, to facilitate the construction of physical barriers along the U.S.-Mexico border. The April 3 waivers are unprecedented in scope, setting aside more than three dozen federal statutes, as well as all related state, local, and tribal

laws, to expedite the construction of fencing along nearly 500 miles of the border. The statutes waived apply to a diverse array of subjects, including clean air, safe drinking water, noise control, waste disposal, historic preservation, religious freedom, rights of Native American tribes, and protection of endangered species, wildlife refuges, farmland, and coastal zones, among other things. The waivers purportedly free the Department of Homeland Security to proceed with construction of border fencing throughout the States of Texas, New Mexico, Arizona, and California unconstrained by these laws. Plaintiffs contend that the Secretary's waivers represent an unconstitutional exercise of legislative power by the Secretary of Homeland Security, contravene basic constitutional lawmaking procedures, and violate fundamental constitutional principles of separation of powers and federalism. Accordingly, Plaintiffs seek a declaration that the waivers and their authorizing statute are unconstitutional and an injunction barring the Department of Homeland Security from constructing any border fencing without complying with all applicable laws.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and Section 102(c)(2)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546, 8 U.S.C. § 1103 note, as amended by the REAL ID Act of 2005, Pub. L. No. 109-367, 120 Stat. 2638.

3. Venue is proper in this Court under 28 U.S.C. § 1391(e), because a substantial part of the property that is the subject of this action is situated in this judicial district and a substantial part of the events giving rise to this claim have occurred in this judicial district.

PARTIES

4. Plaintiff County of El Paso is a political subdivision of the State of Texas, organized and existing pursuant to Article IX, section 1 and Article XI, section 1 of the Texas Constitution.

5. Plaintiff City of El Paso is a home-rule municipal corporation and a political subdivision of the State of Texas.

6. Plaintiff El Paso County Water Improvement District No. 1 is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution and subject to Chapters 11, 49, and 55 of the Texas Water Code and other provisions thereof. Among the District's statutory functions and duties are the distribution and apportionment of the water received from the Rio Grande Reclamation Project, in accordance with the Reclamation Act of June 17, 1902 (43 U.S.C. § 391) and Acts supplementary thereto and amendatory thereof (43 U.S.C. §§ 371 *et seq.*) and contracts with the United States. The District includes 69,010 irrigable acres and supplies water to thousands of farmers in the County of El Paso. In addition, the District provides approximately 50% of the water supply to the City of El Paso, a city with a population of more than 600,000 people. In order to supply its users, the District has canals and drains constructed by the United States Bureau of Reclamation and deeded to the District, which, if placed together end to end, would exceed 400 miles.

7. Plaintiff Hudspeth County Conservation and Reclamation District No. 1, like El Paso County Water Improvement District No. 1, is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution and subject to Chapters 11, 49, and 55 of the Texas Water Code and other provisions thereof. Among the District's statutory functions and duties are the distribution and apportionment of the water received from the Rio Grande Reclamation Project, in accordance with the Reclamation Act of

June 17, 1902 (43 U.S.C. § 391) and Acts supplementary thereto and amendatory thereof (43 U.S.C. §§ 371 *et seq.*) and contracts with the United States. The District includes 18,618 irrigable acres and supplies water to approximately 100 farms in Hudspeth County.

8. Plaintiff Ysleta del Sur Pueblo is a federally recognized American Indian Tribe located within El Paso County. The tribal community is known as “Tigua.” The Tigua are one of three tribes located in Texas, and Ysleta del Sur is the only Pueblo located in the state. The Pueblo was founded in 1682 and has maintained its traditional political system and ceremonial practices since that date. Tribal enrollment is over 1,600.

9. Plaintiff Frontera Audubon Society is a nonprofit organization dedicated to the protection of species and habitat in the Lower Rio Grande Valley of Texas. Frontera has approximately 200 members residing in the four counties (Hidalgo, Cameron, Starr, and Willacy) that comprise the Lower Rio Grande Valley. The Lower Rio Grande Valley is among the most ecologically and biologically diverse regions of the United States, and is visited by tens of thousands of birders, botanists, and other nature tourists each year. Frontera and its members have been actively engaged in efforts to fund, develop, and maintain the Lower Rio Grande Valley National Wildlife Refuge. The Refuge was authorized by Congress in 1979 to restore and preserve animal and plant species in an area where 95 percent of natural vegetation had been cleared for agriculture or destroyed by rapid urbanization. The Refuge is administered by the U.S. Fish and Wildlife Service, a Bureau of the U.S. Department of the Interior. The Refuge provides habitat for thousands of plant and animal species, including two federally designated endangered species—the ocelot and the jaguarundi—as well as birds and butterflies found nowhere else in the United States. Since its inception, the Refuge has been actively acquiring lands along the Lower Rio Grande River to create a wildlife corridor for wildlife populations that

require continuous North-South travel corridors. Frontera and its members have been actively involved in efforts to protect and restore these lands. In addition, Frontera's members regularly use the Refuge for educational, recreational, and scientific activities.

10. Plaintiff Friends of the Wildlife Corridor is a nonprofit organization with approximately 275 members dedicated to protecting, supporting, and enhancing the Lower Rio Grande Valley and Santa Ana National Wildlife Refuges. These Refuges, together with the Laguna Atascosa National Wildlife Refuge, form a wildlife corridor whose integrity is vital to the survival of plant and animal species, including the endangered ocelot, endemic to the Lower Rio Grande Valley. The Santa Ana National Wildlife Refuge is a 2,088-acre refuge located along the banks of the Rio Grande River in Hidalgo County, Texas. The Refuge was established by Congress in 1943 for the protection of migratory birds. It contains approximately 400 species of birds, including the six most rare nesting birds in the United States. Friends of the Wildlife Corridor and its members have been actively involved in efforts to protect and restore the Lower Rio Grande Valley and Santa Ana National Wildlife Refuges as habitat for wildlife and bird populations and for nature tourism and education. In addition, Friends of the Wildlife Corridor and its members regularly use these Refuges for educational, recreational, and scientific activities.

11. Plaintiff Friends of Laguna Atascosa National Wildlife Refuge is a nonprofit organization with approximately 130 members whose mission is to protect, support, and enhance the Laguna Atascosa National Wildlife Refuge. The Refuge harbors one of only two known breeding populations of the endangered ocelot in the United States. The Refuge is charged with implementing the U.S. Fish and Wildlife Service's Listed Cats of Texas and Arizona Recovery Plan of 1990, a plan of action intended to remove the ocelot and jaguarundi from the endangered

species list, with respect to the ocelot. The success of this mission relies on the existence of a continuous wildlife corridor connecting ocelots and other wildlife from the Refuge to other wildlife, habitats, and water along the Rio Grande River. The Friends of Laguna Atascosa and its members have been actively engaged in aiding the Refuge in this mission through educational, advocacy, fundraising and other efforts.

12. Plaintiff Mark Clark is the owner of the Webb-Miller building in Brownsville, Texas. The Webb-Miller building was originally constructed in 1852 and is one of the oldest buildings in the State of Texas. The building and the surrounding neighborhood are rich in history, culture, and architecture. Numerous buildings and sites in the vicinity are Recorded Texas Historic Landmarks and/or listed on the National Register of Historic Places, and Mr. Clark has a pending application for designation of the Webb-Miller building as an historic landmark. The Webb-Miller building currently houses Galeria 409, a fine arts gallery and studio owned by Mr. Clark. In addition, the building is regularly used to host a wide variety of community cultural events. Mr. Clark is also a member of the Brownsville Heritage Review Committee, a committee empowered by the City of Brownsville to enforce the City's historic preservation regulations.

13. Defendant United States Department of Homeland Security ("DHS") is a cabinet-level agency of the executive branch, and is responsible, *inter alia*, for the administration of laws relating to immigration, including border security.

14. Defendant Michael Chertoff ("the Secretary") is the Secretary of DHS. He is sued in his official capacity.

FACTUAL ALLEGATIONS

The Secretary's Statutory Authority

15. Section 102(a) of IIRIRA directs the Secretary of Homeland Security to “take such actions as may be necessary to install additional physical barriers and roads ... in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.”

16. Section 102(c) of IIRIRA, as amended by the REAL ID Act (hereinafter “Section 102(c)”), authorizes the Secretary “to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.” IIRIRA § 102(c)(1), as amended.

17. The Secretary’s waiver determinations under Section 102(c) are subject to judicial review only in the district courts of the United States and only for the limited purpose of resolving claims “alleging a violation of the Constitution of the United States.” IIRIRA § 102(c)(2)(A), as amended. Any suit challenging a waiver determination under Section 102(c) must be filed within 60 days after the Secretary’s decision. IIRIRA § 102(c)(2)(B), as amended. A decision of the district court is not subject to review by the courts of appeal, and may be reviewed only upon petition for a writ of certiorari to the U.S. Supreme Court. IIRIRA § 102(c)(2)(C), as amended.

18. Prior to April 3, 2008, the Secretary had exercised his waiver authority under Section 102(c) three times. The Secretary first invoked Section 102(c) on September 22, 2005, to waive eight laws to facilitate construction of a 14-mile border fence in San Diego, California. On January 19, 2007, the Secretary invoked Section 102(c) to waive nine laws to facilitate construction of barriers and roads along the border in the vicinity of the Barry M. Goldwater Range in southwestern Arizona. On October 26, 2007, the Secretary invoked Section 102(c) to

waive 19 laws to facilitate construction of a border wall in the vicinity of the San Pedro Riparian National Conservation Area in southeastern Arizona.

19. Approximately 322 miles of border fencing had been completed as of May 2, 2008, and the Secretary plans to have completed 670 miles by the end of 2008.

The April 3, 2008 Waivers

20. On April 3, 2008, the Secretary exercised his authority under Section 102(c) to issue two waivers of federal, state, and other laws to facilitate the construction of physical barriers and roads in the vicinity of the U.S.-Mexico border.

21. The first waiver applies to approximately 22 miles of land in Hidalgo County, Texas. The waiver was issued to facilitate construction of a concrete barrier wall embedded in the County's existing levees. This waiver (hereinafter "the Hidalgo County Waiver"), is published at 73 Fed. Reg. 19077 (Apr. 8, 2008) (attached hereto as Exhibit A).

22. In the Hidalgo County Waiver, the Secretary waived, with respect to the Hidalgo County levee project, "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" twenty-seven enumerated federal statutes: (1) the National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321 *et seq.*); (2) the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531 *et seq.*); (3) the Federal Water Pollution Control Act (commonly known as the Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251 *et seq.*); (4) the National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (codified at 16 U.S.C. §§ 470 *et seq.*); (5) the Migratory Bird Treaty Act, 40 Stat. 755 (codified at 16 U.S.C. §§ 703 *et seq.*); (6) the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (codified at 42 U.S.C. §§ 7401 *et seq.*); (7) the Archeological Resources Protection Act, Pub. L. No. 96-95, 93 Stat. 721 (codified

at 16 U.S.C. §§ 470aa *et seq.*); (8) the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1661 (codified at 42 U.S.C. §§ 300f *et seq.*); (9) the Noise Control Act, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 4901 *et seq.*); (10) the Solid Waste Disposal Act, Pub. L. No. 94-580, 90 Stat. 2795, as amended by the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2796 (codified at 42 U.S.C. §§ 6901 *et seq.*); (11) the Comprehensive Environmental Response, Compensation and Recovery Act, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601 *et seq.*); (12) the Archaeological and Historic Preservation Act, Pub. L. No. 86-523, 74 Stat. 220 (codified at 16 U.S.C. §§ 470 *et seq.*); (13) the Antiquities Act, 34 Stat. 225 (codified at 16 U.S.C. §§ 431 *et seq.*); (14) the Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666 (codified at 16 U.S.C. §§ 461 *et seq.*); (15) the Farmland Protection Policy Act, Pub. L. No. 97-98, 95 Stat. 1341 (codified at 7 U.S.C. §§ 4201 *et seq.*); (16) the Coastal Zone Management Act, Pub. L. No. 92-583, 86 Stat. 1280 (codified at 16 U.S.C. §§ 1451 *et seq.*); (17) the Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. §§ 1701 *et seq.*); (18) the National Wildlife Refuge System Administration Act, Pub. L. No. 89-669, 80 Stat. 927 (codified at 16 U.S.C. §§ 668dd-668ee); (19) the Fish and Wildlife Act of 1956, Pub. L. No. 84-1024, 70 Stat. 1119 (codified at 16 U.S.C. §§ 742a *et seq.*); (20) the Fish and Wildlife Coordination Act, Pub. L. No. 73-121, 48 Stat. 401 (codified at 16 U.S.C. §§ 661 *et seq.*); (21) the Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 381 (codified at 5 U.S.C. §§ 551 *et seq.*); (22) the Rivers and Harbors Act of 1899, 30 Stat. 1151 (codified at 33 U.S.C. § 403); (23) the Eagle Protection Act, 54 Stat. 250 (codified at 16 U.S.C. §§ 668 *et seq.*); (24) the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. §§ 3001 *et seq.*); (25) the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996);

(26) the Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb); and (27) the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 97-258, 96 Stat. 1004 (codified at 31 U.S.C. §§ 6303-05).

23. The second waiver applies to diverse stretches of land, totaling approximately 470 miles, along the southern borders of the States of Texas, New Mexico, Arizona, and California. The waiver was issued to facilitate construction of physical barriers and roads in those areas. This waiver (hereinafter “the Multistate Waiver”), is published at 73 Fed. Reg. 19078 (Apr. 8, 2008) (attached hereto as Exhibit B).

24. In the Multistate Waiver, the Secretary waived, with respect to construction in the 470-mile multistate area, “all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of” thirty-seven enumerated federal statutes, including the twenty-seven statutes enumerated in paragraph 22, plus: (1) the Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131 *et seq.*); (2) the Otay Mountain Wilderness Act of 1999, Pub. L. No. 106-145, 113 Stat. 1711 (codified at 16 U.S.C. § 1132); (3) Sections 102(29) and 103 of Title I of the California Desert Protection Act, Pub. L. No. 103-433, 108 Stat. 4485 (codified at 16 U.S.C. § 410aaa); (4) the National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (codified at 16 U.S.C. §§ 1, 2, 4); (5) the National Park Service General Authorities Act, Pub. L. No. 91-383, 84 Stat. 825 (codified at 16 U.S.C. §§ 1a-1 *et seq.*); (6) Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3477 (codified at 16 U.S.C. § 397); (7) Sections 301(a)-(f) of the Arizona Desert Wilderness Act, Pub. L. No. 101-628, 104 Stat. 4475 (codified at 16 U.S.C. § 460ddd); (8) the National Forest Management Act of 1976, Pub. L. No. 94-588, 20 Stat. 2949 (codified at 16 U.S.C. §§ 1600 *et seq.*); (9) the Wild and Scenic Rivers Act, Pub. L. 90-542, 16 U.S.C. § 1271 *et*

seq.; and (10) the Multiple Use and Sustained Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-31).

Impact of the Waivers

25. The Secretary's Multistate Waiver jeopardizes the ability of the County of El Paso to carry out its constitutional and statutory duties to interpret and enforce State and County laws. The Secretary's waiver of all "state[] or other laws, regulations and legal requirements ... deriving from, or related to the subject of" the 37 statutes explicitly waived leaves the County and its citizens without any certainty about the state of the law following the waiver. The waiver calls into question the continuing validity of numerous State statutes and County orders that could be construed as "deriving from or relating to the subject of" the enumerated federal statutes, including the Texas Local Government Code, Antiquities Code, Natural Resources Code, Health and Safety Code, Agriculture Code, Parks and Wildlife Code, Penal Code, and Water Code and Auxiliary Laws, as well as County orders related to health and safety, waste disposal, and the environment. Accordingly, the waiver impairs the County's ability to fulfill its essential governance function. In addition, the waiver imposes financial costs on the County associated with implementing the waiver.

26. The Secretary's Multistate Waiver jeopardizes the ability of the City of El Paso to enforce its own laws and ordinances, as well as the laws of the State of Texas, for the benefit of its citizens. The Secretary's waiver of all "state[] or other laws, regulations and legal requirements ... deriving from, or related to the subject of" the 37 statutes explicitly waived leaves the City and its citizens without any certainty about the state of the law following the waiver. The waiver casts doubt on the continuing validity of numerous City and State laws that could be construed as "deriving from or relating to the subject of" the enumerated federal

statutes, including provisions of the El Paso Municipal Code related to water and sewage, stormwater management, air pollution, and noise control. In addition, the Secretary's waiver of "other ... legal requirements" calls into question the continuing validity of certain City contracts, including its contracts with the El Paso Water Improvement District No. 1 for the delivery of water to the City and its citizens. Moreover, the waiver jeopardizes vital City grant agreements with the State, which require the City to certify that it will comply with federal laws, including several of those waived, as a condition of receiving grant money. Accordingly, the waiver impairs the City's ability to serve its citizens and fulfill its essential governance function in numerous respects. In addition, the waiver imposes financial costs on the City associated with implementing the waiver.

27. The Secretary's Multistate Waiver jeopardizes the ability of the El Paso County Water Improvement District No. 1 and the Hudspeth County Conservation and Reclamation District No. 1 to fulfill their statutory mandates to deliver water to the City of El Paso and to thousands of farmers throughout El Paso and Hudspeth Counties, respectively. The Secretary's ambiguous and open-ended waiver of "all federal, state, or other laws, regulations and legal requirements ... deriving from, or related to the subject of" 37 enumerated statutes casts doubt upon the continuing validity of sections of the Texas Water Code governing the Districts' operations and calls into question the Districts' rights under federal reclamation laws (codified at 43 U.S.C. § 371 *et seq.*), which are essential to their very existence. In addition, the Secretary's waiver of "other ... legal requirements" calls into question the continuing validity of certain judicial decrees adjudicating water rights, as well as certain contracts between the Districts and the United States authorizing the Districts to divert water from the Rio Grande River. These

laws, judgments, and contracts are at the heart of the Districts' operations and vital to their ability to supply water.

28. The Secretary's waiver further imperils the Districts' ability to fulfill their essential statutory mandates by facilitating construction of border fencing on District-owned land that will interfere with the Districts' access to and ability to maintain their canals; damage the facilities and infrastructure on which the Districts rely to deliver water; generate debris crippling to the Districts' flood control infrastructure; circumvent the Districts' permitting processes for use of District property; and interfere with the Districts' standards for bridge construction, road maintenance, and dust pollution, among other things. These effects will impose significant financial costs on the Districts and, in turn, on their customers.

29. The Multistate Waiver also facilitates construction of fencing in El Paso County that will sever the access of the Ysleta del Sur Pueblo to a stretch of the Rio Grande River, running from the Ascarate area to Fabens, that the Tigua Tribe has used for more than 300 years to perform religious and cultural ceremonies. But for the waiver, this construction would be barred by the American Indian Religious Freedom Act, which requires the federal government to protect and preserve tribes' access to religious sites and their ability to perform ceremonial and traditional rites. The Pueblo and its members have spiritual, religious, cultural, and aesthetic interests that are harmed by the Secretary's waiver of the American Indian Religious Freedom Act and other laws.

30. The Secretary's Multistate and Hidalgo County Waivers will facilitate construction of border fencing in the Lower Rio Grande Valley of Texas, including Cameron, Hidalgo, and Starr Counties, that runs through the Lower Rio Grande Valley National Wildlife

Refuge. Upon information and belief, construction will cut across 20 tracts and affect over 4,100 acres.

31. In constructing border fencing in the Lower Rio Grande Valley, DHS has not complied with numerous federal, state, and other laws that would apply but for the Secretary's waivers. For example, DHS has not obtained a determination from U.S. Fish and Wildlife Service ("FWS") that construction in and around the Lower Rio Grande Valley and Santa Ana National Wildlife Refuges is "compatible" with the refuges, as required by the National Wildlife Refuge Administration Act ("NWRAA"). To the contrary, FWS concluded on March 3, 2008 that construction of a border wall was not compatible with the purposes for which the Lower Rio Grande Valley National Wildlife Refuge was established because, among other things, it will create a physical barrier impenetrable to wildlife, dividing critical habitat within the Refuge. Accordingly, FWS informed DHS that it would have to waive the NWRAA to proceed with construction. In addition, DHS has not obtained from FWS a Biological Opinion concerning adverse impacts on the federally endangered ocelot and jaguarundi species, as required by the Endangered Species Act of 1973. Moreover, DHS has not issued a final Environmental Impact Statement, as required by the National Environmental Policy Act. Plaintiffs Frontera Audubon Society, Friends of the Wildlife Corridor, and Friends of Laguna Atascosa Refuge and their members have educational, recreational, professional, and health interests that are injured by the Secretary's waivers of these and other laws.

32. The Secretary's Multistate and Hidalgo County Waivers will facilitate construction of fencing that runs through or in very close proximity to scenic and historic areas along the Rio Grande River, including the City of Brownsville. Upon information and belief, in constructing this fencing, DHS has not complied with and does not intend to comply with

numerous federal, state, and local laws that would apply but for the waiver, including the National Historic Preservation Act, the Texas Antiquities Code, and other laws related to historic preservation. Plaintiff Mark Clark, as owner of the Webb-Miller building and Galeria 409, and as a member of the Brownsville Heritage Review Committee, has aesthetic, cultural, artistic, professional, and economic interests that are injured by the Secretary's waiver of these laws.

FIRST CLAIM

Violation of U.S. Constitution, Article I, Section 1

33. Paragraphs 1 through 32 are fully incorporated fully herein.

34. Section 102(c)(1) of IIRIRA, as amended by the REAL ID Act, authorizes the Secretary to waive all laws that he, in his "sole discretion, determines necessary to ensure expeditious construction" of barriers and roads along the border.

35. Section 102(c)(2)(A) of IIRIRA, as amended by the REAL ID Act provides that the Secretary's waiver decision is not subject to judicial review except in cases "alleging a violation of the Constitution of the United States."

36. Article I, section 1 of the U.S. Constitution directs that "[a]ll legislative Powers herein shall be vested in a Congress of the United States."

37. Section 102(c)'s grant of waiver authority to the Secretary constitutes an unconstitutional delegation of legislative power to an executive officer, in violation of Article I, section 1 of the Constitution and constitutional principles of separation of powers.

38. The Secretary's April 3, 2008 waivers pursuant to Section 102(c) are unconstitutional exercises of legislative authority by an executive officer, in violation of Article I, section 1 of the Constitution and constitutional principles of separation of powers.

SECOND CLAIM

Violation of U.S. Constitution, Article I, Section 7

39. Paragraphs 1 through 38 are fully incorporated fully herein.

40. Section 102(c)(1) of IIRIRA, as amended by the REAL ID Act, authorizes the Secretary “to waive all legal requirements” that he, in his sole discretion, determines necessary to ensure expeditious construction of barriers and roads along the border.

41. The Secretary’s April 3, 2008 waivers pursuant to Section 102(c)(1) purported to waive a total of 37 validly enacted federal statutes, plus unspecified state and other laws.

42. Section 102(c)(1) is an unconstitutional infringement upon the lawmaking procedures set forth in Article I, section 7 of the U.S. Constitution.

43. The Secretary’s April 3, 2008 waivers pursuant to Section 102(c)(1) violate the lawmaking procedures set forth in Article I, section 7 of the U.S. Constitution.

THIRD CLAIM

Violation of the Tenth Amendment

44. Paragraphs 1 through 43 are fully incorporated fully herein.

45. Section 102(c)(1) of IIRIRA, as amended by the REAL ID Act, authorizes the Secretary to waive “all legal requirements” that he, in his sole discretion, determines necessary to ensure expeditious construction of barriers and roads along the border.

46. The Secretary’s April 3, 2008 waivers pursuant to Section 102(c)(1) purport to waive “all federal, state, or other laws, regulations and legal requirements of, deriving from or related to the subject of” the enumerated federal statutes.

47. The Secretary’s waivers of state and local laws, regulations, and legal requirements violate the Tenth Amendment to the U.S. Constitution and basic constitutional principles of federalism.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Declare that the authority to waive laws conferred upon the Secretary by Section 102(c) of IIRIRA, as amended by the REAL ID Act, is unconstitutional;

(2) Declare that the Secretary's April 3, 2008 waiver of 27 laws in connection with the construction of physical barriers along the border in Hidalgo County, Texas is unconstitutional;

(3) Declare that the Secretary's April 3, 2008 waiver of 37 laws in connection of the construction of physical barriers and roads along 470 miles of border in Texas, Arizona, New Mexico, and California is unconstitutional;

(4) Enjoin the Defendants from constructing any wall, fence, road, or other barrier, or related infrastructure, in the vicinity of the U.S.-Mexico border unless and until the Government has complied with all applicable laws;

(5) Award Plaintiffs their costs and reasonable attorneys' fees in this action; and

(6) Grant such other relief as the Court deems just and proper.

Dated: June 2, 2008

Respectfully submitted,



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