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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

ELOISE GARCÍA TAMEZ, BENITO J. GARCIA, Plaintiffs, v. MICHAEL CHERTOFF, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY; ROBERT F. JANSON, ACTING EXECUTIVE DIRECTOR, ASSET MANAGEMENT OF U.S. CUSTOMS AND BORDER PROTECTION. Defendants.	§ § § § § § § § §	CIVIL ACTION NO: COMPLAINT FOR INJUNCTIVE AND DECLARTORY RELIEF (Class Action)

I

PRELIMINARY STATEMENT

1. This action is brought by Eloisa Garcia Tamez and Benito J. Garcia, the owners of real property along the United States-Mexico border who, pursuant to the Declaration of Taking Act, 40 U.S.C. § 3114 ff (DTA), have been served by defendants with notices of a purported "Right-of-Way for Survey and Site Assessment" and "Certificate of Acceptance," and in the case of plaintiff Tamez, sued under the DTA for immediate access to land and the ability to take down structures, bore holes, destroy plantings and crops, and take such other measures as contractors of the Department of Homeland Security may consider necessary to survey the border for construction of a fortified fence with attendant virtually complete destruction of the character and use of the lands for hundreds of years. *See United States Of America v. 1.04 Acres Of Land, More Or Less, Situated In Cameron County, State Of Texas; And Eloisa G. Tamez, et al*. Civil Action No.: 1:08-CV-0004 (United States District Court for the Southern District of Texas (Brownsville Division).

2. Defendant Secretary Chertoff and those working as his agents, have acted in disregard of the laws of the United States in pushing forward a plan to build at least 70 miles of border wall in the Rio Grande Valley area in the vicinity of Roma, Rio Grande City, McAllen, Progreso, Mercedes, Harlingen, and Brownsville, Texas.

3. Defendants have demanded and continue to demand that property owners execute waivers of their property rights for six months and defendants have sued property owners who declined to do so, including plaintiff Tamez, under the Declaration of Taking Act ("DTA"), 40 U.S.C. §3114, an expedited condemnation proceeding. However, Congress has directed that the DHS *not* use the DTA in acquiring

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land for border protection. Congress has directed that DHS acquire temporary or other interests in land "pursuant to the Act of August 1, 1888 (Chapter 728; 25 Stat. 357)," now codified at 40 U.S.C. §3113. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), §102 (b)(2) and (d). These provisions require that Secretary Chertoff clearly define the interest he seeks in real property, something he has failed to, and then attempt with the lawful owner of the interest to "fix[ ] a price for it," which he has also failed to do, and if a price is agreed upon, to then purchase the interest, which he has never done, and if a price is not agreed upon to proceed with the normal condemnation process set forth in federal law, 40 U.S.C. §3113, which he has failed to do and has instead threatened to sue and has sued plaintiffs under the DTA.

4. While misinforming property owners about their rights, *inter alia* by incorrectly threatening and using the DTA against property owners, Secretary Chertoff has also failed to first comply with the consultation requirement of the Consolidated Appropriations Act, 2008, Pub.L. 110-161, 121 Stat. 1844 (2007), §564(2)(C)(i), which requires consultation with private properties owners and cities and other stake-holders to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which border fencing may be constructed.

5. Secretary Chertoff has also ignored the new mandate in the recently enacted Consolidated Appropriations Act which repeals the Congressional mandate issued a year earlier in the Secure Fence Act of 2006 that Secretary Chertoff *must* build a segment of the border fence in the Rio Grande Valley area in the vicinity of Roma, Rio Grande City, McAllen, Progreso, Mercedes, Harlingen, and Brownsville, Texas. Instead, the new statute grants the Secretary discretion, which must be exercised reasonably, regarding the location of border fencing. In the process of consultation with stake-holders

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identified in the statute, and consideration of their legitimate concerns regarding adverse impacts on the environment, culture, economics, and their way of life, as required by the statute, the Secretary must consider that he is no longer required by Congress to build the border fence in the 70 mile area in the Rio Grande Valley identified in the now repealed provisions of the Secure Fence Act.

6. The Government policies and practices challenged in this action are common to all property owners on the planned 70-mile fence, and plaintiffs therefore seek to certify a class and the issuance of temporary and permanent injunctive and declaratory relief to require that Secretary Chertoff and his agents act in full compliance with federal laws regarding construction of a border fence.

II

JURISDICTION, VENUE, WAIVER OF IMMUNITY

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1358 (condemnation), 1361 (mandamus jurisdiction).

8. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-023. Venue is properly in this district pursuant to 28 U.S.C. § 1391(b) and (e)(2)..

III

PARTIES

9. Plaintiff Dr. Eloisa García Tamez is a private land-owner in Cameron County Texas who faces the imminent unlawful taking by defendants of an interest in her real property situated on the United States-Mexico border. Defendants have demanded that Plaintiff Tamez execute a waiver of her property rights in favor of defendants for six months, and having refused to sign such a waiver, has been sued by defendants in the action entitled *United States Of America v. 1.04 Acres Of Land, More Or Less, Situated In Cameron County, State Of Texas; And Eloisa G. Tamez, et al., supra*.

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10. Plaintiff Benito J. Garcia is the owner of property located on the path of the proposed border fence on the U.S. Highway 281, in San Benito, Texas. Defendants have demanded that Plaintiff Garcia execute a waiver of his property rights in favor of defendants for six months under threat of suit, and he has declined to do so.

11. Defendant Michael CHERTOFF is the Secretary of the United States Department of Homeland Security. Defendant CHERTOFF is charged with the implementation of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, and with the administration and oversight of the construction of the border security fence/wall. He is sued in his official capacity.

12. Defendant Robert F. Janson is the Acting Executive Director, Asset Management, U.S. Customs and Border Protection and is charged with oversight of the construction of the border security fence/wall and has authorized the filing of condemnation actions against landowners along the United States-Mexico border. He is sued in his official capacity.

IV

CLASS ALLEGATIONS

13. Plaintiffs bring this action for injunctive and declaratory relief on behalf of themselves and all other persons similarly situated pursuant to Fed.R.Civ.Proc. Rule 23(a) and 23(b)(2). Plaintiffs provisionally propose this action be certified on behalf of the following class:

> Owners of real property along the United States-Mexico border in the Rio Grande Valley and Del Rio US Border Patrol Sectors and who have been served by defendants with a "Right-of-Way for Survey and Site Assessment" and "Certificate of Acceptance" or sued under the Declaration of Taking Act, 40 U.S.C. § 3114, and have not been consulted regarding the fixing of a price for whatever interest the Department of Homeland Security wishes to acquire or to minimize the impact on the environment, culture, commerce, and quality of life pursuant to Section 564 (a)(2)(C)(i) of the Department of Homeland Security Appropriations Act of 2008.

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14. Members of the proposed class likely exceed one hundred and are so numerous that joinder of all members is impracticable. The claims of the proposed class representatives and those of the proposed class members raise common questions of law and fact concerning, *inter alia*, (i) whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 precludes defendants from using the Declaration Act to obtain an interest in class members' property through demand notices or ex parte applications filed in the courts, (ii) whether the IIRIRA §102 (b)(2) and (d) require that Secretary Chertoff clearly define the interest he seeks in real property and then attempt with the lawful owner of the interest to fix a price for it, and (iii) whether the Consolidated Appropriations Act, 2008, § 564(2)(C)(i), requires consultation with properties owners to minimize the impact border fencing on the environment, culture, commerce, and quality of life for the communities and residents before the Secretary seizes property owners' lands. located near the sites at which border fencing may be constructed

15. These questions are common to the named plaintiffs and to the members of the proposed class because defendants have acted and will continue to act on grounds generally applicable to both the named plaintiffs and proposed class members. The claims of the proposed class members and those of the individual named plaintiffs are typical of the class claims.

16. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for defendants. Prosecution of separate actions would create the risk that individual class members will secure court orders that would as a practical matter be dispositive of the claims of other class members not named parties to this

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litigation, thereby substantially impeding the ability of unrepresented class members to protect their interests.

17. Defendants, their agents, employees, and predecessors and successors in office have acted or refused to act, and will continue to act or refuse to act, on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole. Plaintiffs will vigorously represent the interests of unnamed class members. All members of the proposed class will benefit by the action brought by the plaintiffs. The interests of the plaintiffs and those of the proposed class members are identical. Plaintiffs are represented *inter alia* by counsel associated with a non-profit public interest law firm that includes attorneys highly experienced in federal class action litigation involving the U.S. Constitution and the Immigration and Nationality Act.

V

FACTUAL ALLEGATIONS

18. In 1996 Congress passed the IIRIRA, which amended portions of the Immigrant and Nationality Act, codified and amended at 8 U.S.C. §1103 & note. The IIRIRA mandated in pertinent part the construction of secondary border fencing in defined areas of the U.S.-Mexico border. IIRIRA, §102 (b)(1). Congress empowered the United States to acquire land for purposes of building the border fence as follows:

> (b)(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection . . .

IIRIRA, §102(b)(2).

19. The "inserted" Subsection (d)(1)(b) for land acquisition authority provides:

> (1) The Attorney General may contract for or buy any interest in land, including temporary use rights, adjacent to or in the vicinity of an

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> international land border when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States against any violation of this Act.
>
> (2) The Attorney General may contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be reasonable.
>
> (3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings pursuant to the Act of August 1, 1888 (Chapter 728; 25 Stat. 357).

20. Congress amended the IIRIRA with the passage of the Secure Fence Act of 2006 (the "Secure Fence Act"). Pub. L. 109-367, 120 Stat. 2638 (2006). The Secure Fence Act, section 3(2), provided Homeland Security Secretary Chertoff with additional specifications about the type and precise locations of segments of the planned border wall:

> (A) . . . [T]he Secretary of Homeland Security shall provide for [at] least 2 layers of reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors . . .
>
> (iv) extending 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
> (v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

21. The Congressional mandates with respect to the border fence were most recently amended by the 2008 Appropriations Act, signed into law by President Bush on December 26, 2007. Pub. L. 110-161, 121 Stat. 2090 (2007).

22. The new law repeals the Secure Fence Act's direction to Secretary Chertoff about the precise locations where to build a border fence and designates to the Secretary the task of determining where border fencing would be most effective and practical taking into account the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing may

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be constructed following consultation on these subjects with property owners and local governments on the border. 2008 Appropriations Act, §564(1)(A)-(D).

23. Additionally, the 2008 Appropriations Act clearly provides: "Nothing in this subparagraph may be construed to… affect the eminent domain laws of the United States or of any State." 2008 Appropriations Act, §564(1)(C)(ii)(II).

24. The 2008 Appropriations Act does *not* amend the earlier provision authorizing the Attorney General to obtain property as set forth in the IIRIRA §102(b)(2) and (d).

25. Plaintiffs and their proposed class members have not been consulted by Secretary Chertoff or his designees regarding (i) the precise interest that defendants seek regarding access to plaintiffs' lands, including how much time defendants wish to access plaintiffs' land, the expected property damage that may follow, the amount of equipment to be stored on plaintiffs' land, the extent to which the land will be patrolled, etc., (ii) fixing an agreed upon price for the interest that defendants seek, or (iii) the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing may be constructed.

26. Defendants have not informed plaintiffs or their proposed class members that pursuant to the IIRIRA defendants may not rely upon the DTA to seize plaintiffs' and class members' property, but rather have erroneously informed plaintiffs and their proposed class members that their land is subject to immediate seizure under the DTA and that they have no defenses to such action. Defendants have entirely failed to explain with precision the interests in or use of plaintiffs' property they seek or engage plaintiffs or putative class members in discussion to arrive at a fixed price for the interest sought, as required by the IIRIRA. Nor have defendants re-assessed their

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planned Del Rio border fence or consulted with plaintiffs or putative class members as required by the 2008 Appropriations Act, §564(1)(A)-(D).

27. The government's so-called "town hall meetings" do not constitute consultation as mandated by the 2008 Appropriations Act and in any event for the most part were conducted before the Appropriations Act was enacted and addressed the now repealed Secure Fence Act of 2006 requirements rather than the requirements of the 2007 Appropriations Act. DHS has publicly claimed that it has held 18 town hall meetings about the border fence and has listed those in a document titled "Border Fence Construction Outreach," which it claims evidences its commitment to ongoing dialogue with members of the community that might be affected by construction of the fencing. But none of those meetings were held in the Rio Grande Valley, where 70 miles of fencing is proposed and at issue in this lawsuit. On information and belief, members of the Texas Border Coalition (TBC), a group of mayors and judges in communities ranging from El Paso to Brownsville have publicly called DHS's claim to have held town hall meetings "totally false" and its claimed public outreach a "joke." Rio Grande Guardian.

28. Plaintiff Tamez inherited legal title to her property pursuant to the San Pedro de Carricitos Land Grant, of the Nuevo Santander region of South Texas, established by Spain in 1743. Her family has held title to it for at least 265 years. Prior to the Spanish empire, these lands were shared among numerous indigenous peoples, and Tamez is also a descendent of the Chiricahua and Lipan Nde' (Apache) and Basque peoples. This area was referred to by indigenous people as 'Ta ma ho lipam' – the place where the Lipan pray.

29. Plaintiff Garcia's family has been in possession of his land for well over one hundred years. His great grandfather, Frutoso Garcia, received this property as part of

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the Concepcion de Carricitos Spanish Land Grant, later recorded as part of the Garcia Brother's Tract. Prior and subsequent to that land grant, his great grandfather's family farmed this property. The property eventually passed to plaintiff Garcia.

30. Defendants actions of accessing plaintiffs' and putative class members' lands is highly likely to have significant adverse impacts on plaintiffs' and putative class members' economic interests, environment, culture, and way of life, all matters the secretary is required to consult about prior to taking an interest in property owners' lands and in effect commencing the process of building a wall in a segment of the border identified by Congress in a now repealed law.

31. Defendants seek not just a minimal right of access to plaintiffs' and class members' property, as they assert publicly, but rather a 180-day temporary, assignable easement consisting of the right of the United States, its agents, contractors, and assigns to enter in, on, over and across the land to make borings and to access adjacent lands; including the right to remove any vegetative or structural obstacles that interfere with said work in order to plan the construction of roads, fencing, vehicle barriers, security lighting, and related structures along the United States-Mexico border.

VI

IRREPARABLE INJURY

32. The plaintiffs and those similarly situated are threatened with or are suffering and will continue to suffer irreparable injury unless this Court orders the relief prayed for. Such injury includes, *inter alia*, violation of their right to consultation prior to the taking of any interest in their property, clouding of their title to their properties, interference with their right to privacy, and interference with their normal and exclusive use of their private property. Damages cannot adequately address the threatened injuries and injuries suffered by plaintiffs.

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VII

FIRST CAUSE OF ACTION

Unlawful Taking Pursuant to the DTA
Violation of The 2008 Appropriation Act, 121 Stat. 2090 and
IIRIRA, 110 Stat. 2009-554

33. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-32 above as though fully re-alleged here.

34. In threatening to condemn and in actually condemning plaintiffs' property pursuant to the DTA, 40 U.S.C. §3114, rather than the condemnation procedures at 40 U.S.C. §3113, defendants have violated and continue to violate the IIRIRA, 110 Stat. 2009-554, §102(d) which limits the government's taking authority to the "1888 Act" now codified at 40 U.S.C. § 3113, and the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution.

VIII

SECOND CAUSE OF ACTION

Unlawful Taking, Failure to Consult
Violation of the 2008 Appropriations Act, 121 Stat. 2090

35. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-32 above as though fully re-alleged here.

36. In threatening to condemn and in actually condemning plaintiffs' property without meeting the consultation mandate set forth in § 564 of the 2008 Appropriations Act, defendants are violating and unless enjoined by this Court will continue to violate plaintiffs' and their proposed class members' right to consultation as required by § 564, and to due process and equal protection guaranteed by the Fifth Amendment to the United States Constitution.

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IX

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court —

1. Assume jurisdiction over this action;

2. Declare that defendants' actions as alleged throughout this Complaint violate the IIRIRA as amended by the 2008 Appropriations Act and the due process and equal protection guarantees of the Fifth Amendment;

4. Issue injunctive relief requiring that defendants, their agents, employees, and successors in office comply with the IIRIRA as amended by the 2008 Act and the taking clause of the Fifth Amendment to the United States Constitution;

5. Award plaintiffs costs of suit and attorney's fees reasonably incurred as a result of this lawsuit; and

6. Grant such further relief as the Court may deem just and proper.

Dated: February 6, 2008

Respectfully submitted,

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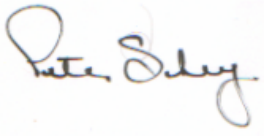

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