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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

_____	§	
ELOISE GARCÍA TAMEZ,	§	
BENITO J. GARCIA	§	
IDALIA BENAVIDEZ,	§	CIVIL ACTION NO: 08-CV-0555
JOSE BENAVIDEZ,	§	
EDUARDO BENAVIDEZ,	§	
	§	
Plaintiffs,	§	FIRST AMENDED COMPLAINT FOR
v.	§	INJUNCTIVE AND DECLARTORY
	§	RELIEF
	§	(Class Action)
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.		

I

PRELIMINARY STATEMENT

1. This action is brought by Eloisa Garcia Tamez (“Tamez”), Benito J. Garcia (“Garcia”), and Idalia, Jose and Eduardo Benavidez (“plaintiffs Benavidez”), 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 and Garcia, 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- 0004 (United States District Court for the Southern District of Texas (Brownsville Division) (“U.S. v. Tamez”); *United States Of America v. 5.30 Acres Of Land, More Or Less, Situated In Cameron County, State Of Texas; Benito J. Garcia; and Garco Construction, et al.* Civil Action No.: B:08-057 (United States District Court for the Southern District of Texas (Brownsville Division) (“U.S. v. Garcia”).

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, including the plaintiffs in this case, execute waivers of their property rights for six

months and defendants have threatened to sue and have sued property owners who declined to do so, including plaintiffs Tamez and Gomez, under the Declaration of Taking Act ("DTA"), 40 U.S.C. §3114, an expedited condemnation proceeding. However, Congress has directed that the DHS negotiate with border property owners in an effort to reach a fixed price for the property interest sought by defendants before seeking condemnation of land, and not use the DTA in acquiring 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 condemnation process set forth in 40 U.S.C. §3113, which he has failed to do.

4. While purporting to act pursuant to the land acquisition provisions in § 102 of the IIRIRA, Defendants have approached border property owners like plaintiffs Benavidez and demanded that they "voluntarily" execute a six-month right-of-way for survey and site assessment and certificate of acceptance, in essence permitting access to property owners' land for six months and the right to move structures and vegetation, store vehicles and equipment, and bore holes, without informing plaintiffs Benavidez and putative class members that the statute being relied upon to seek the right of entry also requires that the parties seek to arrive at a fixed price for the property interest wanted by the government. Border property owners such as plaintiffs Benavidez and many putative class members have executed six-month right-of-way agreements for survey and site assessment and certificate of acceptance without being informed of their

rights under § 102 of the IIRIRA, and the waivers they have signed were not knowingly and intelligently executed, are invalid, and should be rescinded.

5. Secretary Chertoff has also failed to 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 property 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 activities relating to border fencing may occur.

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 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. Defendants have failed to issue or make known to border property owners any rules, guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA or how the government will arrive at its position on a fixed price for the property interest sought. As a matter of Fifth Amendment due process and fundamental fairness, and to avoid arbitrary decision-making, plaintiffs and their putative class members are entitled to know the rules,

guidelines, instructions, directives or policies relating to the process of negotiation required by § 102 of the IIRIRA and how the government will arrive at its position on a fixed price for the property interest sought from plaintiffs and putative class members.

7. Media reports indicate that while defendants plan to build a border wall through plaintiffs' and proposed class members' property, it will stop at places like the edge of the River Bend Resort and golf course, a popular Winter Texan retreat two miles from plaintiff Tamez's land. The wall starts up again on the other side of the resort. *See, e.g., Texas Observer, Holes in the Wall: Homeland Security won't say why the border wall is bypassing the wealthy and politically connected.*¹ About 69 miles north, putative class member Daniel Garza, 76, faces a similar situation with a neighbor who has political connections that reach the White House. Defendants plan to build an 18 foot high fence or wall through class member Garza's property, but reportedly there are no plans to build the border fence through the property next door, owned by Dallas billionaire Ray L. Hunt and his relatives. *Id.* Hunt, who is reported to be a close friend of President George W. Bush, recently donated \$35 million to Southern Methodist University to help build Bush's presidential library. *Id.* According to the Texas Observer, Chad Foster, the mayor of Eagle Pass and chairman of the Texas Border Coalition (TBC), says he has never received any logical answers from defendants as to why certain areas in his city have been targeted for fencing over other areas: "I puzzled a while over why the fence would bypass the industrial park and go through the city park." *Id.* On information and belief, the border security measures at issue here are being coordinated and managed by the Secure Border Initiative Office ("SBI") within the U.S. Customs and Border Protection of the Department of Homeland Security. In testimony before Congress in February 2007, the U.S. General Accounting Office reported that SBI's border

¹ <http://www.texasobserver.org/article.php?aid=2688>.

“expenditure plan, including related documentation and program officials’ statements, lacked specificity on such things as planned activities and milestones ... and expected mission outcomes.”² As a matter of Fifth Amendment equal protection, plaintiffs and their putative class members are entitled to equal treatment under the law and in all activities undertaken by defendants to acquire land for border security pursuant to the IIRIRA.

8. 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

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1358 (condemnation), 1361 (mandamus jurisdiction) and 5 U.S.C. ¶ 702ff.

10. 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

11. 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

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<http://209.85.173.104/search?q=cache:7zSRg47zizEJ:www.gao.gov/new.items/d07504t.pdf+General+accounting+office+Secure+Border+Initiative&hl=en&ct=clnk&cd=1&gl=us>

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, plaintiff Tamez has been sued by defendants in the action entitled *U.S. v. Tamez, supra*.

12. 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 having refused to sign such a waiver, plaintiff Garcia has been sued by defendants in the action entitled *U.S. v. Garcia, supra*.

13. Plaintiff Eduardo Benavidez owns, and with his brother Jose Benavidez and sister-in-law Idalia Benavidez lives on property located on the path of the proposed border fence at 23444 W. US Highway 281, in San Benito, Texas. Defendants' agents have visited plaintiffs Benavidez several times demanding that they execute a waiver of their property rights in favor of defendants for six months under threat of suit. On information and belief, plaintiffs Benavidez finally executed a waiver of their property rights in favor of the defendants. At no time did defendants' agents inform plaintiffs Benavidez that they had a right to negotiate a fixed price for the interest that defendants seek in the property owned or occupied by plaintiffs Benavidez.

14. 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.

15. 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

16. 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 who have been served by defendants with a "Right-of-Way for Survey and Site Assessment" and "Certificate of Acceptance" or similar documents or sued under the Declaration of Taking Act, 40 U.S.C. § 3114, and who the government has not negotiated with pursuant to § 102(b)(2) and (d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 regarding a fixed price for the property interest sought by the government, or who have not been consulted pursuant to Section 564 (a)(2)(C)(i) of the Department of Homeland Security Appropriations Act of 2008.

17. 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 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, (ii) 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, (iii) whether the IIRIRA 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, (iv) whether defendants' failure to issue rules, guidelines, instructions or policies relating to the process of negotiation required by § 102 of the IIRIRA or how the government will arrive at its position on a fixed price for the property interest sought violates Fifth Amendment due process, and (v) whether defendants have violated plaintiffs' right to equal protection by failing to issue rules, guidelines, instructions or policies relating to the standards the government uses to arrive at a fixed price for the property interest sought or in their selection of properties subject to demands for right of access to survey for a border fence.

18. 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.

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

20. 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

21. 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).

22. 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 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).

23. 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.

24. 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).

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

26. 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).

27. 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).

28. Plaintiffs and their proposed class members were not timely or adequately 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.

29. Defendants have failed to explain with precision the interests in or use of plaintiffs' or class members' property they seek and have only recently--as a result of a court Order issued in the case of *U.S. v. Tamez*--commenced discussions with plaintiffs Tamez and Garcia regarding the interest the government seeks in their property and a fixed price for that interest. Defendants have engaged in no such discussions with plaintiffs Benavidez or their putative class members who executed agreements granting defendants a right of entry to their border properties without being informed about or aware of their right under the IIRIRA to negotiate a fixed price for the interest sought by the government in their land.

30. Nor have defendants re-assessed their planned Del Rio border fence or other fencing, or consulted with plaintiffs or putative class members as required by the 2008 Appropriations Act, §564(1)(A)-(D).

31. The government's so-called 2007 "town hall meetings" do not constitute consultation as mandated by the 2008 Appropriations Act and in any event 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."

32. 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.

33. 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 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.

34. Plaintiffs Benavidez have resided on their border property since 1955; plaintiffs Eduardo and Jose Benavidez have lived on the property their entire lives, and plaintiff Eduardo Benavidez inherited the property from his parents.

35. 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 segments of the border identified by Congress in a now repealed law.

VI

IRREPARABLE INJURY

36. 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 clear statutory right to negotiation over a fixed price for the interest sought *before* any interest is sought through waivers of rights or condemnation actions in the courts, violation of their clear statutory right to consultation prior to the taking of any interest in their property, selection of their properties for rights of entry or condemnation based upon impermissible factors, clouding of their title to their properties, interference with their right to privacy, and interference with their normal and exclusive use of their property and homes. Damages cannot adequately address the threatened injuries or actual injuries suffered by plaintiffs. The condemnation statutes provide for compensation for property loss, not violations of plaintiffs' statutory and constitutional rights. The Federal Tort Claims Act (FTCA) likely does not provide for damages for the types of violations alleged throughout this complaint, and its "discretionary function" waiver makes any claim for damages for the violations alleged herein through the FTCA highly speculative.

VII

FIRST CAUSE OF ACTION

Failure to Negotiate for a Fixed Priced

37. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-36 above as though fully re-alleged here.

38. In securing or attempting to secure waivers of plaintiffs' property rights under the IIRIRA without informing plaintiffs or their proposed class members of their

right to negotiate a fixed price under § 102 of the IIRIRA, or engaging in such negotiations before seeking condemnation before this Court, defendants have violated and continue to violate § 102(b)(2) and (d) of the IIRIRA, 110 Stat. 2009-554, and the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution.

VIII

SECOND CAUSE OF ACTION

Failure to issue or apply rules regarding negotiation for a fixed price

39. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-36 above as though fully re-alleged here.

40. Defendants' failure to issue or apply, or make available to plaintiffs and their putative class members, any rules, regulations, directives, guidelines, or instructions relating to how negotiations under § 102 of the IIRIRA should proceed or how a fixed price should be arrived at violates the Fifth Amendment's guarantees of equal protection and due process of law.

IX

THIRD CAUSE OF ACTION

Unlawful Taking Pursuant to the DTA

41. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-36 above as though fully re-alleged here.

42. 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" codified at 40 U.S.C. § 3113, and the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution.

X

FOURTH CAUSE OF ACTION

Consultation under the 2008 Appropriations Act, 121 Stat. 2090

43. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-36 above as though fully re-alleged here.

44. In threatening to condemn and obtaining waivers of plaintiffs' and putative class members' rights, and in actually condemning plaintiffs' and putative class members' 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.

XI

FIFTH CAUSE OF ACTION

Failure to issue or apply rules regarding the 2008 Appropriations Act

45. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-36 above as though fully re-alleged here.

46. Defendants' failure to issue or apply, or make known to plaintiffs and their putative class members, any rules, regulations, directives, instructions or guidelines to implement the consultation mandate set forth in § 564 of the 2008 Appropriations Act, violates the consultation requirement of § 564, and the due process and equal protection guarantee of the Fifth Amendment to the United States Constitution.

XII

SIXTH CAUSE OF ACTION

Violation of equal protection in selection of properties

47. Plaintiffs incorporate by this reference the allegations set out in ¶¶ 1-36 above as though fully re-alleged here.

48. Defendants' targetting of properties for surveying and likely border-fence construction in a selective manner relating to political and other considerations not rationally related to the effective and practical considerations the government is statutorily required to consider when determining where to fence the border violates the equal protection guarantee of the Fifth Amendment to the United States Constitution.

XII

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 and due process and equal protection guarantees 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

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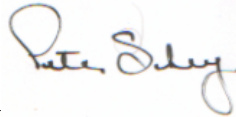
6. Grant such further relief as the Court may deem just and proper.

Dated: March 18, 2008

Respectfully submitted,

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Carlos Holguin (Cal Bar # 90754)
Dawn Schock (Cal Bar # 121746)
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