IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

ELOISA GARCIA TAMEZ, ET AL. PLAINTIFFS, V. MICHAEL CHERTOFF, DECRETARY, US DEPARTMENT OF HOMELAND SECURITY; ET AL., DEFENDANTS.	§ CIVIL ACTION NO.: B-08-044 § PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; § SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES § § JUDGE: HON. _____ § [FILED CONCURRENTLY WITH DECLARATION OF ANGELA § VIRAMONTES; PROPOSED ORDER]

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION

To Defendant and it's attorneys of record:

PLEASE TAKE NOTICE that on _____, 2008, at _____ in the Courtroom of the preising judge in this case in the Federal Courthouse in Brownsville, Texas, or as soon thereafter as counsel may be heard, Plaintiffs will and do hereby move the Court for an order certifying this case as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure on behalf of the following classes of similarly situated persons:

> 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.

This motion is based upon the accompanying memorandum of law and exhibits, and upon all other matters of record herein. A proposed order is lodged concurrently herewith.

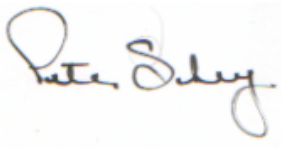
In accordance with Local Rule 7.1, Plaintiffs' counsel conferred with Defendant's counsel on February 5, 2008, regarding Plaintiffs' Motion for Class Certification. *See* Declaration of Angela Viramontes, Exhibit 1, at ¶ 2. Defendant's counsel stated that Defendant would oppose the Motion. *Id.*

Dated: February 6, 2008

Respectfully submitted,

Peter A. Schey (Cal Bar #58232)
Carlos Holguin (Cal Bar # 90754)
Dawn Schock (Cal Bar # 121746)
Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
Telephone: 388-8693, ext. 103
Facsimile: (213) 386-9484

James Harrington (Tex. Bar #09048500)
Abner Burnett (Tex. Bar #03425770)
Corinna Spencer-Scheurick (TX Bar #24048814.Fed.No. 619918)
South Texas Civil Rights Project
P.O. Box 188
San Juan, Texas 78589
Telephone: (956)787-8171
Fax: (956) 787-6348



By
Peter Schey

By:_____-s-_____
Abner Burnett
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

This action seeks class-wide declaratory and injunctive relief on behalf of all persons or entities that own real property along or in close proximity to the United States-Mexico border in the Rio Grande Valley and Del Rio US Border Patrol Sectors who have been served by defendants with a "Right-of-Way for Survey and Site Assessment" and "Certificate of Acceptance" or who have been sued by defendants under the Declaration of Taking Act, 40 U.S.C. § 3114, and have not been consulted pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-554, as amended by Section 564(2)(C)(i) of the Department of Homeland Security Appropriations Act of 2008 ("2008 Appropriations Act"), 121 Stat. 2090 (to be codified at 8 U.S.C. sec. 1103(b)(2) (hereinafter "Appropriations Act of 2008").

A. Statement of the Nature and Stage of the Proceeding

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).

B. Statement of Issues to be ruled upon by the Court

Whether the proposed class satisfies the requirements of Federal Rules of Civil Procedure, Rule 23(a) and (b)(2).

C. Summary of the Argument

The proposed class definition meets the requirements of Fed.R.Civ.Proc., Rule 23(a) and (b)(2). *The proposed class s*atisfies the four requirements of Rule 23(a): (1) The proposed class of land owners is so numerous that joinder is impractical, (2) there are questions of law or fact common to the proposed class of land owners – namely whether Defendants use of the Declaration of Taking Act to take an interest in plaintiffs' property is lawful and whether defendants have consulted with plaintiffs as required by the 2008 DHS Appropriations Act, (3) the claims of the named Plaintiffs are typical of the class claims, and (4) the named plaintiffs will fairly and adequately protect the interest of the class because they are landowners subject to the challenged actions and their counsel has extensive experience litigating class actions against defendants.

The proposed action also satisfies Rule 23(b)(2) because defendants have "acted or refused to act on grounds applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

II. THE PROPOSED CLASS DEFINITION SATISFIES THE REQUIREMENTS OF FED.R.CIV.PROC., RULE 23

Courts have adopted a liberal approach to class certification by requiring that "[i]f a Court errs, the Court should err in favor of the maintenance of a class action." *Rubenstein v. Collins*, 162 F.R.D. 534, 536 (S.D. Tex. 1995 (Hoyt, J.). Thus, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the

merits, but rather whether the requirements of Rule 23 are met." *In re Enron Corp. Securities Derivative "ERISA" Litigation*, 228 F.R.D. 541, 555 (S.D. Tx. 2005) (*quoting Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974)).

Rule 23 includes an implicit requirement that the class be adequately defined so that the class membership is clearly ascertainable. In a (b)(2) class, however, the actual membership of the class need not be precisely drawn. *Bratcher v. Nat'l Standard Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972). The requirement that a class be clearly defined is not particularly stringent, and plaintiffs need only establish that "the general outlines of the membership of the class are determinable at the outset of the litigation." 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1760 at 118. In other words, the class must be sufficiently definite "that it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* at 121.

Here, the proposed class definition comprises all owners of land along the US-Mexico border Rio Grande Valley and Del Rio US Border Patrol Sectors 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, 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.

"'Defining a class as consisting of all persons who have been or will be affected by the conduct charged to the defendants is entirely appropriate where only injunctive

or declaratory relief is sought.'" *Fischer v. Dallas Federal Sav. & Loan Assoc.*, 106 F.R.D. 465, 470 (N.D. TX. 1985) (quoting *Rice v. City of Philadelphia*, 66 F.R.D. 17 (E.D. Pa. 1974). Here the proposed class is clear and is defined explicitly by whether class members will suffer a specific injury. The class definition accordingly meets the requirements of Fed.R.Civ.Proc, Rule 23.

III. THIS ACTION SATISFIES THE REQUIREMENTS OF FED.R.CIV. PROC., RULE 23(a)

A. Numerosity and Impracticality of Joinder

The proposed class satisfies Rule 23(a)(1) because the class is "so numerous that joinder is impractical." Courts have found the numerosity requirement of Rule 23(a)(1) satisfied where relatively few class members are involved. *See e.g., Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1381 (5th Cir. 1974) (number of class members assumed to be 28); *Arkansas Education Association v. Board of Education*, 446 F.2d 763, 765-66 (8th Cir. 1971) (class membership of 20 persons). *See generally*, 3B MOORE'S FEDERAL PRACTICE ¶ 23.05 [1], at 23-154 to 23-155 (1978).

Rule 23(a)(1) does not require the moving party to determine the exact size of the class, especially where it would be unreasonable to require moving party to identify the names of all class members. *Bratcher*, *supra*, 365 F.3d at 415 (certifying class "although exact number of class members continuing to pay discriminatory premiums was unknown"); 7 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 1762. Rather, "the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists.'" *Yaffe*, *supra*, 454 F.2d at 1366. "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982); *see also*, *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (plaintiff must offer only a "reasonable estimate of the number of purported

class members"). The numerosity requirement of Rule 23(a)(1) is satisfied here. *See* Declaration of Angela Viramontes; February 5, 2008; at ¶ 3. The United States has already field 36 lawsuits against landowners in the impacted area. *Id.* Thus, the proposed class plainly satisfies the numerosity requirement of Rule 23(a).

B. Common Questions of Law or Fact

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The Fifth Circuit has held that the test for commonality "is not demanding and is met where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1997) (quoting *Lightburn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)).

Here, the common questions of law presented are whether defendants m,ay rely upon the Declaration of Taking Act to gain an interest in plaintiffs' and the putative class members' property, and whether defendants have complied with the congressional mandates in the Appropriations Act of 2008 to consult with the proposed class before serving them with the "Right-of-Way for Survey and Site Assessment" and "Certificate of Acceptance" agreements or suing them to gain an interest in their lands.

Even where there are individual variations in the facts or legal issues as they relate to a particular named plaintiff or proposed class member, the commonality requirement is satisfied so long as the class shares some common question of law or fact.[1] It is clear that the claims plaintiffs present raise questions of law and fact common to the proposed class members.

---

[1] *See, e.g., Lightbourn v. County of El Paso, supra,* 118 F.3d at 426 ("allegations of similar . . . practices generally meet the commonality requirement"); *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976) (class certification

Center for Human Rights & Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
213/388-8693

C. Typicality of Claims

Rule 23(a)(3) requires that the claims of the named plaintiffs be "typical of the claims ... of the class." Meeting this requirement usually follows from the presence of common questions of law. *See, James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001) ("critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class"); *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002) (same); 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2, at 23-325. As set forth above, plaintiffs' claims present common questions of law and fact.

Plaintiffs here have no interest that conflicts with those of the proposed class. The named Plaintiffs have identical legal theories and will seek the same injunctive and declaratory relief for themselves and for the class as a whole. Plaintiffs seek to vindicate the rights of unnamed class members, rights that are violated through the application of defendants' uniform policies and practices. No conflict exists between plaintiffs and the class they seek to represent; the issues herein arise out of a common pattern and practice of illegal activities. The typicality requirement of Rule 23(a)(3) is therefore satisfied.

D. Adequacy of Representation

The final requirement for class certification, set out in Rule 23(a)(4), is that the named plaintiffs "will fairly and adequately protect the interest of the class." The two principal elements of this requirement are: (1) that the class representative's interests

---

granted in employment discrimination action brought on behalf of Black employees even though it was "manifest that every decision to hire, fire or discharge an employee may involve individual considerations"); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2nd Cir. 1968) (class certified in challenge to relocation practices of urban renewal project despite the different treatment suffered by each tenant during the relocation process); *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546, 559 (E.D.N.Y. 1977) (class certification granted in lawsuit challenging

are co-extensive and not antagonistic to the class members' interests; and (2) that counsel for the named representatives is qualified. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124-25 (5th Cir. 1969).

The interests of the class representative here are not antagonistic to those of the proposed class members. Their mutual goal is to declare defendants' challenged policies and practices unlawful and to enjoin further violations.

Plaintiffs' lead counsel are employed by a non-profit organization specializing in federal litigation against the DHS. They have successfully litigated numerous major class actions and individual cases in the federal courts. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982); *Ramon Sepulveda v. INS*, 863 F.2d 1458 (9th Cir. 1988); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982*); Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977); *Immigrant Assistance Project v. INS*, 709 F. Supp. 998 (W.D. Wa. 1989); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982); *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997); *Reno v. Catholic Social Services*, 509 U.S. 43 (1993); *Reno v. Flores*, 507 U.S. 292 (1993). Thus, counsel will adequately represent both named and unnamed class members. The requirements of Rule 23(a)(4) are satisfied in this case.

/ / /

IV. THIS ACTION SATISFIES THE REQUIREMENTS OF RULE 23(b)(2)

In addition to satisfying the four requirements of Rule 23(a), a certifiable class action must meet one of the requirements of Rule 23(b). This action meets the requirements of Rule 23(b)(2): "the party opposing the class has acted or refused to act

---

coercive practices in obtaining political contributions from public employees even though "fact questions specific to each instance of the alleged coercion will remain").

Center for Human Rights & Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
213/388-8693

on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . "

Analysis of the requirements of subsection (b)(2) reveals "that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly situated, his acts apply generally to the whole class." 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1775, at 19.

In this case, defendants have used the Declaration of Taking Act against plaintiffs and putative class membes to gain an interest in their property and has not consulted with plaintiffs and the proposed class members as mandated by the Appropriations Act of 2008. Thus, the proposed class in this case has been created by defendants' challenged policies and practices. The requirements of subsection (b)(2) have accordingly been met.

/ / /

Center for Human Rights & Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
213/388-8693

IV. CONCLUSION

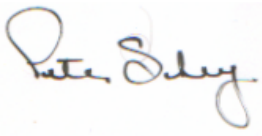
For the foregoing reasons, this action should be certified as a class action pursuant to Fed.R.Civ.Proc., Rule 23(a) and (b)(2).

Dated: February 6, 2008

Respectfully submitted,

Peter A. Schey
Carlos R. Holguin
Dawn Schock
Christopher Scherer
Angela Viramontes
Center for Human Rights and
Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
Telephone: (213) 388-8693
Facsimile: (213) 386-9484
Email: pschey@centerforhumanrights.org,
crholguin@centerforhumanrights.org

Abner Burnett
Corinna Spencer-Scheurich
South Texas Civil Rights Project
P.O. Box 188
San Juan, 78589
Telephone: (956) 787-8171
Facsimile: (956) 787-6348
Email: lawyerburnett@gmail.com



By
Peter Schey

By:_____- s -_____
Abner Burnett
Attorneys for Plaintiffs

PROOF OF SERVICE

I declare and say as follows:

1. I am over the age of eighteen years and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 S. Occidental Blvd., Los Angeles, California, 90057, in said county and state.

2. I hereby certify that a true and correct copy of the foregoing Notice of Motion and Motion for Class Certification; Supporting Memorandum of Points and Authorities was served via the District Court's electronic filing system on this 6th day of February, 2008 to the following counsel:

DONALD J. DeGABRIELLE, JR.
United States Attorney
515 Rusk Avenue, Suite 1102
Houston, Texas 77002
Tel. 713-567-9000
Fax 713-718-3300
Donald.DeGabrielle@usdoj.gov

CHARLES WENDLANDT
Assistant United States Attorney
800 N. Shoreline, Suite 500
Corpus Christi, Texas 78401
Tel. 361-888-3111
Fax 361-888-3200
Chuck.Wendlandt@usdoj.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of February, 2008, at Los Angeles, California.

_____