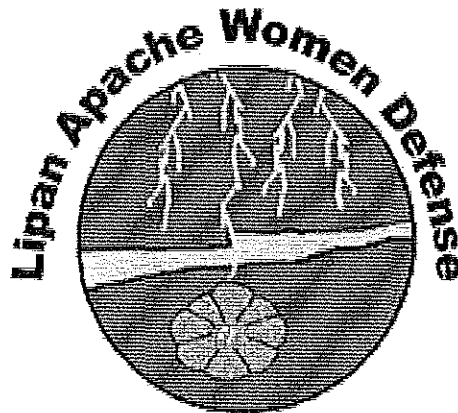




HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW



Ms. Gabriella Habtom

Secretary
UN Committee on the Elimination of Racial Discrimination
UNOG-OHCHR
1211 Geneva 10
Switzerland

**The Situation of the Texas-Mexico Border Wall: A Request for
Consideration under the Early Warning and Urgent Action Procedures of
the United Nations Committee on the Elimination of Racial
Discrimination (80th Session)**

Executive summary

The construction of the border wall has had and will continue to have a negative impact on the communities living along the border, especially indigenous communities and poor Latinos. The construction of the wall occurred in a discriminatory manner, and continues to have discriminatory effects. The intervention of the Committee on the Elimination of Racial Discrimination, utilizing its early warning and urgent action procedures, is necessary to stop the harm that the border wall is continuing to inflict on indigenous communities and poor Latinos. Intervention by CERD is warranted because five of the elements of the early warning and urgent action procedure have been met: i) adoption of new discriminatory legislation; ii) encroachment on traditional lands of indigenous peoples; iii) a

significant and persistent pattern of racial discrimination evidenced by social and economic factors; iv) lack of an effective recourse procedure; and v) lack of judicial remedy.

Beginning in 2005, the United States Congress began enacting legislation, including the REAL ID Act and the Secured Fence Act, that allowed the U.S. government to build a wall along the border between the U.S. and Mexico. The government has used many inconsistent rationales to justify building the wall, including reducing illegal immigration, preventing terrorist attacks, and controlling drug trafficking. In 2006, Congress passed the Secure Fence Act, which gave the government the ability to waive any laws that could possibly interfere with the construction of the wall. Using this power, the Department of Homeland Security (DHS) waived 36 federal and state laws, including laws for the protection of indigenous peoples and key pieces of environmental protection legislation.

The Secretary of DHS was also given the discretion to determine the location and total mileage of the wall. The wall has not been constructed as a continuous barrier—on the contrary, it is made up of different segments that stop abruptly at various intervals along the border, creating gaps in the wall. The intermittent nature of the wall calls into question the government's justifications for its construction; the gaps seem to negate the government's claims that the wall is necessary for immigration regulation, drug trafficking control, or terrorism prevention. The wall, ostensibly planned for security purposes, was erected through sensitive environmental areas, indigenous lands, and small private properties, but nonetheless skips some segments of the more lucrative properties owned by businesses.

The construction of the wall is a result of the adoption of new legislation that has had a discriminatory effect on members of the border communities. The legislation allowed the government to avoid consultation with the affected border communities, including indigenous peoples and poor Latinos, and gave the government excessive powers to construct the wall regardless of its harmful environmental and social impact. The legislation also encouraged a lack of transparency regarding the government's decisions about the wall, and led to arbitrary decisions regarding the wall's placement. The U.S. government has failed to take effective measures to review the discriminatory effects of its legislation, resulting in ongoing discriminatory effects on indigenous peoples and poor Latinos living along the border.

In constructing the border wall, the U.S. government has also encroached on the traditional lands of indigenous peoples. Several tribes have been affected. This brief focuses on three specific groups of indigenous peoples: the Kickapoo Traditional Tribe of Texas, the Ysleta del Sur Pueblo, and the Lipan Apache. The border wall has encroached on their traditional lands in various ways.

For the Kickapoo, the wall itself does not enter their reservation. However, it prevents easy crossing between tribal lands both north and south of the border, forcing Kickapoo members to pass walls and checkpoints to access their traditional land. The wall prevents easy navigation of the Kickapoo's land, which is essential for

their livelihood due to the seasonal nature of their work. The wall also cuts off access to a traditional Kickapoo burial ground and impedes rituals for which access to the Rio Grande River is necessary.

The wall goes directly through traditional land of the Ysleta del Sur Pueblo, and cuts off any access they previously had to the Rio Grande River and their traditional sites. The Ysleta del Sur Pueblo have strong connections with the land surrounding the river, and the border wall has prevented them from properly carrying out traditional ceremonies.

The wall also cuts through the traditional lands of the Lipan Apache. The Lipan Apache have not received official recognition from the federal government, which increases their need for protection from CERD. The wall has had serious detrimental impacts on the Lipan Apache's traditions, culture, and survival prospects. Testimonies from the tribe show that there is fear that the tribe, if forced to leave the land, might dissolve altogether and their history and knowledge will be lost to future generations. Affidavits from Lipan Apache tribe members highlight the urgent need for action.

Hostilities between tribe members and government agents are increasing in frequency and severity. On a wider scale, the border wall is serving to compound racial tensions, hostility, and marginalization of indigenous peoples. Definitive action from CERD is necessary to prevent further discriminatory impacts of the border wall, and to require the U.S. government to display the respect for indigenous peoples demanded by CERD.

The government has also failed to properly consult with indigenous communities living along the border. CERD recognizes that states must take special measures to ensure the full enjoyment of rights of indigenous communities, and that the obligation is especially strong with regard to the enjoyment of traditional land because of the crucial role it plays in preserving the survival of their cultural identity. The United Nations Declaration on the Rights of Indigenous Peoples requires that states cooperate with indigenous peoples and consult with them in order to obtain free and informed consent before taking any steps that would affect them and their way of life. CERD has declared in the past that this obligation relates to both specific and general ways in which traditional land will be affected.

In 2008, Congress amended the Secure Fence Act, creating obligations regarding consultation with indigenous peoples. DHS was expected to consult with affected property owners, indigenous tribes, and local governments regarding construction of the border wall in order to minimize the impact on the environment, culture, commerce, and quality of life in areas considered for the border wall. There is much evidence, however, suggesting that DHS did not fulfill the consultation requirements. For example, internal emails between government personnel show that critical steps of consultation were missed and that there was a general attitude that the outreach program was of the lowest priority. While DHS claims to have held 20 "town hall meetings" with various border communities, the Texas Border Coalition, which has

been involved in anti-border wall litigation, has publicly called the claim of having held town hall meetings “totally false,” stating that the DHS’s “public outreach program is a joke.” The evidence thus shows that the government did not fulfill its domestic or international obligation to consult with indigenous peoples about the construction of the wall.

The U.S. government is failing in its duty to treat indigenous communities with respect and dignity. It is taking into account the unique relationship between these communities and the land, and is disregarding their right to juridical personality and to full enjoyment of civil rights. The construction of the border wall has caused and will continue to cause discrimination against indigenous peoples, preventing them from exercising their human rights on an equal footing with the rest of the population. The affidavits from members of these indigenous groups explain that these problems are ongoing and will continue until indigenous peoples see some form of recognition from the U.S. government. Urgent action is necessary to prevent the continuation of the U.S. government’s increasingly hostile relations with indigenous groups.

Both indigenous peoples and poor Latino communities are disproportionately affected by the placement of the border wall. A statistical analysis conducted by the University of Texas revealed a higher income range and a higher proportion of non-Hispanic and English-speaking households in the gap areas as compared to wall-designated blocks where more Spanish-speaking and Hispanic and Native American households are concentrated. The wall was built through sensitive environmental areas, indigenous lands, and small private properties but does not run through larger and more lucrative properties owned by businesses like the River Bend Golf Resort. This arbitrary placement by CBP officials adds to the already pervasive racial tensions that exist between the U.S. government and the Latino community.

Additionally, the process by which the U.S. government took land on which to build the border wall was discriminatory and has caused irreparable harm to the border communities, especially poor Latinos. In order to acquire the land on which the wall was to be constructed, the government asserted its eminent domain powers to take title to land owned by citizens living along the border wall, including the traditional lands of indigenous peoples. In initiating these actions, DHS and the Border Patrol did not provide sufficient information to those who were having their land condemned, and did not compensate landowners for DHS’s use of their land during the surveying and planning process. Many people, particularly poor Latinos, did not understand what their rights were, and did not have any opportunity to challenge the taking of their land.

Even those who did understand that their land was being taken, however, did not have sufficient means of challenging this government action. Condemnation cases are initiated when the government sues landowners, who then need to hire lawyers to defend themselves against the suit. If landowners disagree on the amount offered, they have to pay attorney’s fees and hire several other experts to conduct studies that prove that their land has a higher value. In contrast, the federal government has

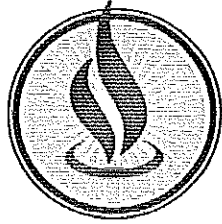
many resources at their disposal, which makes condemnation law favorable to the government.

There is currently no adequate judicial process available to challenge the racially discriminatory impact of the wall, leaving people living along the Texas-Mexico border without any effective judicial recourse. This is in violation of the CERD requirements that states provide an adequate recourse procedure and an appropriate judicial remedy for instances of racial discrimination. Under U.S. law there is no means by which victims of racial discrimination can petition the judiciary to receive any sort of effective remedy for the discriminatory harm resulting from the border wall's construction. Litigation in the U.S. has not been able to halt construction of the wall because U.S. courts have refused to hear claims for racial discrimination related to the wall and have steadily cut back on meaningful remedies, such as broad injunctive relief, that would mandate government reform.

Finally, the construction of the border wall was carried out in a racially discriminatory manner and has had and continues to have very harmful effects on indigenous populations and poor Latino communities living along the border. This satisfies the CERD requirement of a significant and persistent pattern of racial discrimination evidenced by social and economic factors. The border wall comes from, and contributes to, an environment of discrimination in U.S. immigration policy that unduly discriminates against Latinos. Last year, state legislators around the country introduced 1,607 bills and resolutions (an unprecedented number) relating to immigrants and refugees that had the effect of increasing racial profiling. The construction of the border wall is a representation of the national political debate regarding illegal immigration that has heightened concerns about discrimination against Latinos.

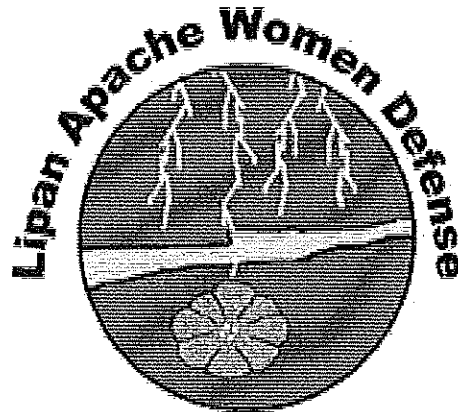
The harmful effects of the border wall did not stop once the wall was constructed. The damaging and discriminatory impacts of the wall are ongoing. Today, members of indigenous communities still feel threatened and pressured to leave their land due to the government's takings actions, as well as the increased presence of armed border patrol. The number of border patrol agents stationed at the Texas-Mexico border has more than doubled since 2004, leading to the increased sense of militarization for border communities. Citizens who have had their land taken continue to have no recourse to challenge the taking. Additionally, the border wall has continued to polarize U.S. discussion about immigration issues, lending a more racial and discriminatory tone to the debate. For instance, one recent contender for the U.S. Republican presidential nomination suggested electrifying the border wall and adding barbed wire at the top as a possible solution to illegal immigration. Other previous contenders have also proposed radical additions to the wall, including building a double wall the entire length of the over-2,000 mile border between the U.S. and Mexico. In the most recent legislative session, two bills were proposed in Congress that would deploy the National Guard to the border and would construct double- and triple-layer walls along the border. While neither bill has gone forward, these continued legislative actions show that there is a real possibility that the border wall will be extended and reinforced, and that even more government personnel will

be sent to patrol the border. As a result, the harmful effects of the border wall will only continue unless action is taken. It is necessary for CERD to intervene in order to prevent further harm from coming to the indigenous peoples and poor Latino communities living along the border.



HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW



**The Situation of the Texas-Mexico Border Wall: A Request for
Consideration under the Early Warning and Urgent Action Procedures of
the United Nations Committee on the Elimination of Racial
Discrimination (80th Session)**

ACRONYMS AND ABBREVIATIONS

ACE	Army Corps of Engineers
CBP	Customs and Border Protection
DHS	Department of Homeland Security
FOIA	Freedom of Information Act
GAO	Government Accountability Office
IAHCR	Inter-American Commission of Human Rights
IBWC	International Boundary Water Commission
OAS	Organization of American States
OBP	Office of Border Patrol
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Background.....	3
III.	The U.S. government has failed to properly consult with indigenous peoples living along the border	5
IV.	The placement of and justifications for the border wall are arbitrary and have a racially discriminatory impact on the border communities	22
V.	The U.S. has no adequate judicial process available to challenge the racially discriminatory impact of the wall	29
VI.	The construction of the border wall is heightening racial tensions along the border, harming the already marginalized populations that live there	33
VII.	Consideration under the CERD early warning and urgent action procedure is warranted.....	37
VIII.	Conclusion and request	39

Ms. Gabriella Habtom

Secretary
UN Committee on the Elimination of Racial Discrimination
UNOG-OHCHR
1211 Geneva 10
Switzerland

The Situation of the Texas-Mexico Border Wall: A Request for Consideration under the Early Warning and Urgent Action Procedures of the United Nations Committee on the Elimination of Racial Discrimination (80th Session)

I. Introduction

1. This request considers the current “border wall”¹ situation in Texas, in the Southwest of the United States. The wall’s construction is a manifestation of the U.S. government’s desire to secure the Texas-Mexico border. When construction began, however, there arose legitimate concerns of racial discrimination against indigenous communities (Lipan Apache [South Texas], Kickapoo Tribe [Eagle Pass Area] and Ysleta del Sur Pueblo [El Paso area of West Texas]) and low-income residents of Latino² descent living in the border area. Both the construction of the wall and patterns of racial discrimination are ongoing issues, as U.S. legislators have additional plans to reinforce and extend the border wall. Therefore, this request is respectfully submitted for consideration under the Committee on the Elimination of Racial Discrimination’s early warning and urgent action procedures. It is submitted by the Human Rights Clinic³ of the University of Texas at Austin, Dr. Margo Tamez (Lipan Apache Band of Texas), and the Lipan Apache Women Defense, an Indigenous

¹ While the Department of Homeland Security, Customs & Border Protection, and the Border Patrol all employ the discourse of “border fence” to describe the physical barrier along the U.S.-Mexico border, the community affected by this barrier alternatively utilizes the term “border wall.” See *Types of Fence*, U.S. DEP’T OF HOMELAND SEC. (Oct. 26, 2011), http://www.dhs.gov/files/programs/gc_1207842692831.shtm (describing the barriers constructed along the border as a “vehicle and pedestrian fence”). In keeping with their preference, the Clinic will also employ the term “border wall” in describing this barrier.

² For the purposes of this submission, we are defining the term “Latino” to encompass those persons along the border who are included in statistical data in connection to “Latin American” descent. The Clinic understands that this term is quite complex and embodies a multitude of nationalities, identities, and cultures. For example, there is critical debate about the applicability and relevance of the demographic descriptors “Latino/a” and “Hispanic,” in the U.S. and South Texas/Texas-Mexico border context, especially in light of the history of the U.S. as a racial state with a specific context of xenophobic antagonism toward Mexico, Mexican citizens, and U.S. imperialist logics regarding indigenous Mexican peoples as a non-White, homogeneous surplus labor group. See DAVID THEO GOLDBERG, *THE RACIAL STATE 190* (2002).

³ The Human Rights Clinic at the University of Texas at Austin is comprised of an interdisciplinary group of law students and graduate students, working under the guidance of Clinic Director Ariel Dulitzky. Students learn substantive human rights law through critical classroom study, discussion, and reflection. Working from the advocate’s perspective, students participate in a host of projects and collaborate with human rights organizations worldwide to support human rights claims in domestic and international forums. The Clinic’s work includes investigating and documenting human rights violations, developing and participating in advocacy initiatives before the United Nations and regional and national human rights bodies, and engaging with global and local human rights campaigns.

Peoples' Organization in El Calaboz Ranchería situated on Kónitsaąjį Gokíyaa, the Lipan Apache customary lands.

2. The U.S. government has used eminent domain powers to construct a border wall along the U.S.-Mexico border. The power was used to take peoples' land, whether the landowners gave permission or not. This request deals specifically with Texas residents in the Rio Grande (the official international border between the U.S. state of Texas and Mexico) and El Paso (Southwest) areas. Those affected are predominantly low-income residents of Latino descent or members of local indigenous tribes. While the government is entitled to exercise its right of eminent domain, the government's approach to constructing the border wall, and all of the issues that flow from it, is raising various issues of racial discrimination. The racially discriminatory impact of the border wall is ongoing, and the U.S. has failed to respond to these concerns. The government's taking of land along the border and the discriminatory effects of the border wall continue to violate the human rights of indigenous peoples and poor Latinos living along the border. As a result, intervention by CERD under its early warning and urgent action procedure is crucial in order to stop the harmful and discriminatory effects of the border wall.

3. The issues of racial discrimination can be broadly divided into three categories. First, the wall greatly affects the rights and lives of the indigenous communities along the border. The government has failed to consult with and respect these groups, two duties recognized by CERD and required by various other international conventions and treaties. Second, the wall is not continuous. Placement of the wall is arbitrary and in some places inexplicably avoids the property of high-income residents. The border wall project has disparately impacted low-income Latino residents and violated their right to equal protection. Finally, despite the government condemning several plots of privately-owned land in the border area in order to build the wall, there currently exist no plausible methods within the U.S. legal system for affected land owners to challenge these takings on the grounds of racial discrimination. In addition to these specific issues of racial discrimination, the problems are exacerbated because the border wall project is part of a wider picture of racially charged U.S. immigration policy. The project is compounding these issues, and its construction has led to increasing "militarization" and racial tension in the border area.

4. After providing a brief background, this request will detail the above three instances of racial discrimination, followed by a description of the restrictive U.S. immigration policies and the wider impact that the border wall has had. From this discussion, it is clear that five of the indicators for CERD's early warning and urgent action procedure have been fulfilled⁴ and that action by CERD is required to stop or limit this on-going and irreparable harm. The criteria fulfilled are: i) adoption of new discriminatory legislation; ii) encroachment on traditional lands of indigenous peoples; iii) a significant and persistent pattern of racial discrimination evidenced by

⁴ U.N. Report of the Comm. on the Elimination of Racial Discrimination, Feb. 9–Mar. 9, July 30–Aug. 17, 2007, U.N. Doc. A/62/18 (2007) at 117 [hereinafter CERD Early Warning Guidelines].

social and economic factors; iv) lack of an effective recourse procedure; and v) lack of judicial remedy.⁵ The report concludes with recommendations for the U.S. government regarding the steps it should take to rectify the harm created by the border wall.

II. Background

5. After the terrorist attacks of September 11, 2001, the U.S. government considered it a national priority to secure its borders by preventing the entrance of alleged terrorists, undocumented immigrants, and drug traffickers. However, as will be discussed in section IV(c), there is little evidence that the construction of the border wall is an effective method to deal with these different issues. In 1990, a barrier was erected in a small stretch of the San Diego, California area, even though, historically, no physical wall or any other barrier has separated the 2,000-mile border between the United States and Mexico.

6. Members of the U.S. Congress, a group composed of an overwhelming majority (over 80 percent) of white Christian males,⁶ approved several laws between 2005 and 2008 in order to allow the construction of the border wall. In 2005, Congress passed the REAL ID act, followed by the Secure Fence Act in 2006, in order to grant the Secretary of the Department of Homeland Security (DHS) the right to waive any laws already in place, in order to expedite the construction of barriers along the entire U.S.-Mexican border.⁷ (This submission is, however, limited to the communities that live along the Texas-Mexico border). Using powers derived from the Secure Fence Act of 2006, the DHS waived 36 federal and state laws across 470 miles of the southern border in April 2008, including key environmental laws such as the National Environmental Policy Act and the Endangered Species Act, as well as the Native American Graves Protection and Repatriation Act and the American Indian Freedom Act. The Administrative Procedure Act, which requires any government agency to provide transparency and oversight of its decision-making process, was also waived.⁸ As will be discussed more fully in section V, this legislation allowed the government to evade its legal requirements, and eliminated any incentive for the federal agency to consult with border communities about the location and construction of the border wall.

7. The 2008 Consolidated Appropriations Act mandated the construction of “not

⁵ *Id.* (guidelines 12(c), (h), (a) and (e), respectively).

⁶ R. Eric Petersen, *Representatives and Senators: Trends in Member Characteristics Since 1945*, Congressional Research Service at 7, 23, 26 (Feb. 17, 2012), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1892&context=key_workplace.

⁷ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified in scattered sections of 8 U.S.C.); Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (codified in scattered sections of 8 U.S.C.).

⁸ Notice of Determination for Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 73 Fed. Reg. 19078, 19079-80 (Apr. 8, 2008); 42 U.S.C. § 300f (2006); 5 U.S.C. § 551 (1946). See also Jenny Neeley, *Over the Line: Homeland Security's Unconstitutional Authority to Waive all Legal Requirements for the Purpose of Building Border Infrastructure*, ARIZ. J. ENV. L. & POL'Y, Vol. 1, No. 2 at 141 (2011) (discussing the laws waived by Michael Chertoff, former Secretary of the DHS).

less than 700 miles”⁹ of wall with 370 miles of priority areas along the U.S.-Mexico border. Furthermore, it left it to the discretion of the Secretary of Homeland Security, for the purpose of the expedient construction of fencing barriers, to determine the type of fencing, the total mileage of the wall, and its location.¹⁰ It is important to note that the border wall itself is not a continuous barrier, but instead is constructed as a group of different segments that stop abruptly at various intervals along the border, thus creating “gaps” in the wall. However, the use of intermittent fencing makes questionable the effectiveness of those barriers and reveals its arbitrary nature. The wall, planned for security purposes, was erected through sensitive environmental areas, indigenous lands, and small private properties, but nonetheless skips some segments of the more lucrative properties owned by businesses.¹¹

8. The construction of the wall is a result of the adoption of new legislation that has had a discriminatory effect on members of the border communities. Specifically, new legislation included the Secure Fence Act of 2006, the Consolidated Appropriations Act of 2008, and other related legislation.¹² The legislation allowed the government to avoid consultation with the affected border communities, and gave the government excessive powers to construct the wall regardless of its harmful environmental and social impact. The legislation also encouraged a lack of transparency regarding the government’s decisions about the wall, and led to arbitrary decisions regarding the wall’s placement. The U.S. government has failed to take effective measures to review the discriminatory effects of its legislation, which is in direct violation of ICERD Article II.¹³

9. According to the U.S. Customs and Border Protection (CBP), “as of January 27, 2012, CBP has completed 651 miles of pedestrian and vehicle fencing¹⁴ along the Southwest Border. A total of 352 miles of primary pedestrian fence has been constructed, while the final total of vehicle fence (the project was officially completed on January 8, 2010) was 299 miles.”¹⁵ However, the CPB has not provided information regarding what percentage of the originally planned wall has actually been built. Recently, several U.S. Republican candidates for the presidential nomination have suggested radical additions to the border wall, including electrifying the border fence and building a double wall along the entire 2000-mile border.¹⁶ In the 2011-2012 legislative session, the Border Enforcement Act of 2011 was introduced

⁹ Consolidated Appropriations Act, Pub. L. No. 110-161, Div. E, Title V, § 564(a), 121 Stat. 1844, 2090 (2007) (codified as amended at 8 U.S.C. § 1103 note 102(b) (2006)).

¹⁰ *Id.* at (2)(b).

¹¹ Denise Gilman, *Obstructing Human Rights: The Texas-Mexico Border Wall*, The Working Group on Human Rights and the Border Wall (June 2008) [hereinafter Working Group Report].

¹² *Id.*

¹³ International Convention on the Elimination of All Forms of Racial Discrimination art. 2 (Jan. 4, 1969), 660 U.N.T.S. 195 [hereinafter ICERD].

¹⁴ *Types of Fence*, U.S. CUSTOMS & BORDER PATROL (Jan. 15, 2010), http://www.cbp.gov/xp/cgov/border_security/ti/about_ti/fence.xml.

¹⁵ *Southwest Border Fence Construction Progress*, U.S. CUSTOMS & BORDER PATROL (Jan. 27, 2012), http://www.cbp.gov/xp/cgov/border_security/ti/ti_news/sbi_fence/.

¹⁶ *The Candidates on Immigration*, COUNCIL ON FOREIGN RELATIONS (Feb. 27, 2012), <http://www.cfr.org/united-states/candidates-immigration/p26803>.

to the Senate, proposing plans to deploy additional National Guard troops to the border. This bill also proposes to construct a double- and triple-layer wall along the border.¹⁷ While this bill has not progressed through Congress, these continued legislative actions show that legislators have plans to extend and reinforce the border wall, and that even more government personnel may be sent to patrol the border. Without CERD intervention, the construction and reinforcement of the border wall will likely continue and the harmful effects of the border wall will persist.

III. The construction of the border wall affects the lifestyle of indigenous peoples since the U.S. government failed to properly consult with indigenous peoples living along the border, in violation of CERD requirements.

10. The indigenous communities inhabiting the Texas-Mexico border area have had their entitlement to individual, family, and communal land unduly restricted. Generally speaking, their right to the land stems from ancestral, customary, and aboriginal title, but also from the Spanish Crown (through Spanish and Mexican land grants) and treaty-based systems established between lineal and hereditary chiefs and clans of the Lipan Apache Band of Texas with Mexico, Texas, and the United States.¹⁸ The state has used eminent domain and sovereign immunity to extinguish or simply ignore the title of these marginalized peoples in a situation of vulnerability. The crisis caused by the border wall has impacted indigenous peoples' ability to live, work, pray, and maintain kinship practices in traditional manners. As will be evidenced, the wall creates physical barriers that block or hinder access to and between traditional sites. Moreover, the climate of fear caused by the "militarization"¹⁹ and increased government presence in the border area has placed intense strain on indigenous peoples. The wall often either physically or effectively separates people from their families—the core social unit of indigenous decision-making, governance, and self-determination.²⁰

11. It is proposed that the U.S. government has shown an unacceptable disregard for the rights of these peoples. To appreciate the nature of the harm, one must appreciate that under international law indigenous peoples are entitled to have their rights treated carefully and with respect, and that this right to respect is often very specific.

¹⁷ Border Security Enforcement Act of 2011, S. 803, 112th Cong. §§ 3, 5 (2011).

¹⁸ These are numerous; however, examples include: the Colonial del Nuevo Santander Treaty (signed on March 15, 1791 with the Spanish Colonial Government); the Alcaldes de las Villas de la Provincia Treaty (signed on August 17, 1822 with the Spanish Colonial Government); the Live Oak Point Treaty (signed on January 8, 1838 with the Republic of Texas Government); and the Treaty of Guadalupe Hidalgo (signed on February 2, 1848 between the United States and Mexico).

¹⁹ "Militarization" is the term used by border residents to describe increased government presence and the increased presence of the border patrol.

²⁰ It is important to acknowledge that self-determination need not imply secession or lack of support for the U.S., especially in post 9/11 America. We must appreciate that indigenous peoples' denouncement of the border wall is part of a reaction against the wall's radical deprivation of fundamental freedoms and identity, not from any general anti-government sentiment or cynicism as to the legitimate aim of securing the border against terrorists, etc.

12. First, it is important to acknowledge that indigenous peoples have a right to occupy their traditional land because it is absolutely central to their way of life. Indigenous peoples' unique way of life and close relationship with the land makes "[t]he lands they traditionally use and occupy [. . .] critical to their physical, cultural, and spiritual vitality."²¹ CERD is one of the many international human rights organs to recognize that states must take special measures to ensure the full enjoyment of rights of indigenous communities. The obligation is especially strong with regard to the enjoyment of traditional land because of the crucial role it plays in preserving the survival of their cultural identity.²² CERD has acknowledged the obligation of states to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."²³ The Inter-American Court of Human Rights has acknowledged and applied this CERD standard, declaring that failure to meet it amounts to "irreparable harm."²⁴

13. Specifically, the government's actions with regard to indigenous peoples meet two of the criteria from the revised CERD guidelines for the early warning and urgent action procedure: the presence of a significant and persistent pattern of racial discrimination evidenced in social and economic indicators, and an encroachment on the traditional lands of indigenous peoples or forced removal of these peoples from their lands.²⁵

14. More generally, and in relation to the fundamental respect owed to indigenous peoples, the U.S. is in breach of ICERD articles demanding respect for "the right to freedom of movement and residence within the border of the state" and "the right to equal protection in cultural activities."²⁶

15. The U.S. government is also in breach of specific obligations to consult with indigenous peoples, respect treaties made with them, and ensure its actions are not harmful to indigenous peoples. ICERD demands that states take measures to examine any and all discriminatory legislation and policy.²⁷ The construction of the border wall was a result of such legislation and policy. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) requires that states cooperate with indigenous peoples and consult with them in order to obtain free and informed consent before taking any steps that would affect them and their way of

²¹ *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, I/A Comm. H.R., available at <http://www.cidh.org/countryrep/Indigenous-Lands09/Chap.I-II.htm>.

²² See Letter from Anwar Kemal, Chairperson, Committee on the Elimination of Racial Discrimination, to H.E. Mr. Minelik Alemu Getahun, Ambassador, Permanent Mission of Ethiopia (Sept. 2, 2011) (urging the state party to consult or seek prior, free, and informed consent of the indigenous community before carrying out projects that would have negative impacts on their community's livelihood); see also I/A Court. H.R., Judgment, *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Aug. 24, 2010, Ser. C No. 214 (2010), para. 182.

²³ General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the Committee's 1235th meeting (Aug. 18, 1997), UN Doc. CERD/C/51/Misc.13/Rev.4, at para. 5

²⁴ I/A Comm. H.R. Report No. 75/02, Case 11.140, *Mary and Carrie Dann v. United States*, para. 130 n. 97 (2002).

²⁵ CERD Early Warning Guidelines, *supra* note 4, paras. 12(b), (h).

²⁶ ICERD, *supra* note 13, art. 5(d)(i), (e)(vi).

²⁷ *Id.* art. 2(c).

life.²⁸ CERD has explained that the duty of consultation is a positive obligation, and ought to be undertaken with a view to seeking consent.²⁹ Further, CERD has declared in the past that this obligation relates to specific *and general* ways in which traditional land will be affected. Examples given of specific action include logging on a specific piece of land or a particular eminent domain taking. However, the requirement of general consultation means that states must carefully consider their actions at a very broad level, regardless of whether or not there exists any immediate or obvious harm.³⁰ Indigenous peoples must be entitled to enforce any treaties or agreements entered into in the past,³¹ but the general duty requires states to take steps beyond this and acknowledge the particular respect owed to indigenous peoples. It should be noted that while these rights, and several other rights found within this brief, interrelate with rights found in the UNDRIP, CERD has declared in the past that when dealing with the indigenous peoples, nations must use the UNDRIP as a guide for interpreting and understanding obligations found in ICERD.³²

16. Paragraph 12 of the CERD Urgent Action and Early Warning guidelines states that CERD will take action in cases “requiring immediate attention” and that cases will be assessed on the basis of their “gravity and scale”. Throughout the brief it will be continually explained that this situation is ongoing, but it is worth noting up front. Physical construction itself is complete in many areas. Nevertheless, this does not detract from the urgency of this situation. Fear, repression, and disillusionment amongst indigenous peoples grow on a daily basis because of the border wall. Moreover, the wall’s existence is *continuously* damaging the land, its ecosystem, and the cultural and traditional life of the indigenous peoples that live around it. Additionally, plans are continually being proposed to further reinforce the wall.

17. By examining first the overarching problem of lack of consultation, followed by in depth case studies of three indigenous tribes living in the Texas border wall area (*Kickapoo*, *Ysleta del Sur Pueblo* and *Lipan Apache*) it should become clear that the U.S. is in violation of the CERD requirements discussed above. The situation as a whole is contrary to the intention and purpose of ICERD and goes against states’ duties of ensuring “recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”³³ The situation amounts to a denial of equality and freedom

²⁸ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 19, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

²⁹ Concluding Observations of the Committee on the Elimination of Racial Discrimination, Sixty-Eighth Session, 2006, CERD/C/GUY/CO/14, At paragraph 14. Available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/c7d1cd668afb4a0ec125714c00311bbb/\\$FILE/Go641177.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/c7d1cd668afb4a0ec125714c00311bbb/$FILE/Go641177.pdf)

³⁰ Request for Consideration under the Urgent Action/Early Warning Procedure to Prevent Irreparable Harm to Indigenous People’s Rights in Papua New Guinea, submitted by *inter alia* the Forest Peoples Programme, para. 19 (Feb. 2007), available at <http://www.forestpeoples.org/sites/fpp/files/publication/2011/03/png-cerd-2011-ew-ua-final.pdf>.

³¹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 37(1), U.N. Doc. A/61/L.67 (Sept. 13, 2007).

³² Concluding observations of the Committee on the Elimination of Racial Discrimination, 72nd Session, (2008) United States of America, at para. 29, available at <http://www1.umn.edu/humanrts/CERDConcludingComments2008.pdf>.

³³ ICERD, *supra* note 13, art. 1.1.

from discrimination,³⁴ and is generally a denial of civil rights and recognition of communal juridical personality, an indigenous peoples' collective right to recognition before the law. The U.S. government has failed to take "special measures" owed to ensure indigenous peoples can use land according to their own traditions.³⁵

General Issue – Lack of Consultation

18. The U.S. government's lack of required consultation with indigenous peoples and failure to obtain their consent has had a deep impact on every indigenous community in the area. Lack of consultation will be considered at a general level, but also later in specific sections regarding each of the three tribes. The international law requirements of consultation and an analysis of the effects of legislation and policy have already been discussed. However, the U.S. government also failed to meet recently created domestic requirements.

19. In 2008, Congress amended the Secure Fence Act, creating obligations regarding consultation with indigenous peoples. DHS was expected to consult with affected property owners, indigenous tribes, and local governments regarding construction of the border wall in order to minimize the impact on the environment, culture, commerce, and quality of life in areas considered for the border wall. The legislation also required the DHS to perform an analysis of the "possible unintended effects on communities."³⁶

20. There is much evidence to suggest that none of the above steps were taken. Various invitations were made by several tribes asking that members of the U.S. Congress or Texan leaders come into dialogue with border communities in order to discuss the wall and its effects. All of the interview offers were declined.³⁷ In general, DHS claims to have held 20 "town hall meetings" throughout the various border communities.³⁸ It is unclear if these actually happened, and certainly the DHS has faced criticism over the issue. The Texas Border Coalition³⁹ has been involved in anti-border-wall litigation and has publicly called the claim of having held town hall meetings "totally false," stating that the DHS's "public outreach program is a joke."⁴⁰

³⁴ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 2, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

³⁵ I/A Court H.R., Case 12.338, *Saramaka People v. Suriname*, Judgment of November 27, 2007.

³⁶ Consolidated Appropriations Act, Pub. L. No. 110-161, Div. E, Title V, § 564(c), 121 Stat. 1844, 2090 (2007) (codified as amended at 8 U.S.C. § 1103 note 102(b) (2006)).

³⁷ Interviews of Eloisa Garcia Tamez speaking on behalf of impacted Elders and community members of El Calaboz Ranchería, conducted by and on file with Margo Tamez.

³⁸ *More on the Southwest Border Fence*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/files/programs/gc_1207842692831.shtm (last modified Aug. 20, 2009).

³⁹ According to their website, the group is "the collective voice of the border communities on issues that affect Texas-Mexico border region quality of life." They represent many communities, and members include several mayors of the region. More information available at http://www.texasbordercoalition.org/Texas_Border_Coalition/Welcome.html.

⁴⁰ Complaint at 34, *Texas Border Coalition v. Chertoff*, No. 08-0848 (D.C. Cir. May 16, 2008), available at http://newspapertree.com/system/news_article/document1/2495/TBC_Lawsuit.pdf.

21. Moreover, internal emails sent between government personnel and acquired by the University of Texas through FOIA requests⁴¹ indicate that, due to timing and monetary concerns, rash decisions were made and there was a general consensus that the outreach program was of the lowest priority. Emails between Jeffery Self, Southwest Border Division Chief of Customs and Border Patrol, and an unknown individual referred to simply as “Chief” provide evidence of parts of the outreach plan being ignored in favor of expediency. Mr. Self writes “I did approve the Communications Plan and do still think that it is a viable plan . . . critical steps were missed and expedited for time savings . . . I advised that we would be viewed as sneaky and under handed. Some Sector [sic] had different operational needs for fence.”⁴² Reading this in light of the above allegations made by the Texas Border Coalition, it becomes apparent that critical steps of consultation were omitted, and that this was known to parties within the government whose job it was to undertake these steps. Even if consultation was undertaken, it was not done so in a cooperative manner, or one which sought consent.

22. Further evidence can be found in a reply to a FOIA request from Professor Denise Gilman of the University of Texas.⁴³ The request was submitted to the Army Corps of Engineers (ACE), the group responsible for the wall’s construction. Professor Gilman requested “surveys, analyses or other documents reflecting implementation of the Secure Fence Act as it affects Native American communities or lands.”⁴⁴ In other words, any documentation pertaining to the national and international obligations of consultation. The response was blunt and telling: “ACE did not locate responsive records in its files.”⁴⁵ ACE recommended that Gilman instead look at their environmental plan on their website.⁴⁶ The information available is extensive and technical, but somewhat out of date. The most recent information on the Rio Grande Valley Area dates from July 2008.⁴⁷ The report contends that “consultations with federally recognized tribes are ongoing.”⁴⁸ The report was confident that consultation regarding “historic properties” would take place: “Customs and Border Patrol will consult with . . . federally recognized tribes . . . to avoid, minimize, or mitigate adverse effects on historic properties” but that this consultation would nonetheless take place on a “property specific and expedited basis”.⁴⁹ The only tribes specifically referenced in the report are the Kiowa Tribe of Oklahoma and the Comanche Nation.⁵⁰ This narrow focus could in itself be

⁴¹ These emails were acquired under the Freedom of Information Act 1996 (FOIA). The Act creates rights to “obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure . . .” For more information, see <http://www.foia.gov/about.html>.

⁴² Email from Jeffrey Self, South West Border Division Chief of Customs and Border Patrol, to “Chief” (May 5, 2007) (obtained by the University of Texas Working Group via FOIA request).

⁴³ FOIA Request No. 08-143 (Jan. 4 2011) (correspondence on file with University of Texas Human Rights Clinic).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *TI Environmental Stewardship*, CBP.gov, http://cbp.gov/xp/cgov/border_security/ti/ti_docs/ (last visited Mar. 2, 2012).

⁴⁷ *Environmental Stewardship Plan for the Construction, Operation, and Maintenance of Tactical Infrastructure*, U.S. DEP’T OF HOMELAND SEC. (July 2008), available at http://nemo.cbp.gov/sbi/rgv/pf225_rgv_esp.pdf [hereinafter “Environmental Stewardship Plan”].

⁴⁸ *Id.* at 8-6.

⁴⁹ *Id.* at 8-7.

⁵⁰ *Id.* at 8-3.

considered racial discrimination because of the government's focus on "federally recognized tribes": federal recognition by an individual state ought not to be determinative of whether or not a tribe can receive aid from CERD. As will be explained more fully later, lack of federal recognition is of particular relevance to the Lipan Apache tribe.⁵¹

23. It would seem, therefore, that the government intended to carry out its full duties of consultation, but testimonies and FOIA requests indicate that the government did not do so thoroughly or effectively. The evidence shows that the government neither fulfilled its domestic obligations of consultation, nor the duties of general and specific consultation recognized by CERD. Consultation requires active participation from indigenous peoples and, with regard to the construction of the border wall, it is clear that the indigenous peoples living along the border feel that they have not been consulted and that their rights have not been respected. Certainly, consent was never obtained and today there remain no plans to consult with these tribes regarding new projects of extending and reinforcing the border wall.

The Kickapoo Tribe

24. The Kickapoo Traditional Tribe of Texas is a semi-nomadic tribe living between Texas and Mexico. The tribe is the proprietor of a Federal Indian Land Trust located between the Rio Grande River and the town of Rosita South, near Eagle Pass, Texas.⁵²

25. Information gathered by the University of Texas at Austin's Working Group on Human Rights and the Border Wall from the Texas State Historical Association Handbook of Texas explains: "the group, which numbers between 625 and 650, spends the major portion of the year in El Nacimiento—about 130 miles southwest of Eagle Pass, Texas—but still lives a semi-nomadic life that has been adapted to modern economic conditions. In middle to late May most of the residents of Nacimiento divide into family-based bands and set out across Texas and other western states to work as migrant agricultural laborers. By late October or early November the bands make their way back to Nacimiento, where they pass the winter hunting, planting crops, raising cattle, and participating in religious ceremonies."⁵³ It is therefore imperative that the tribe be able to access traditional lands along both sides of the Rio Grande River in the Eagle Pass area.

⁵¹ See *supra* para 40.

⁵² Constitution of the Kickapoo Traditional Tribe of Texas, available at <http://thorpe.ou.edu/constitution/kickapoo/> (last modified Apr. 19, 1996).

⁵³ Michelle Guzman and Zachary Hurwitz, *Violations on the Part of the United States Government of Indigenous Rights Held by Members of the Lipan Apache, Kickapoo, and Ysleta del Sur Tigua Tribes of the Texas Mexico Border*, The Working Group on Human Rights and the Border Wall, University of Texas at Austin, at 11 (June 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-violations-of-indigenous-rights.pdf>.

26. The tribe has been considered part of Texas for many years, and the U.S. government officially recognized their land and reservation in Texas in 1983.⁵⁴ The U.S. government has also officially recognized the semi-nomadic status of the tribe. An agreement is codified at 25 U.S.C. § 1300b-13d and outlines the “Border Crossing, Living and Working Rights of the Kickapoo Traditional Tribe of Texas.” The agreement states “notwithstanding the Immigration and Nationality Act, all members of the Band [the Kickapoo] shall be entitled to freely pass and re-pass the borders of the United States and to live and work in the United States.”⁵⁵

27. The wall itself does not enter the Kickapoo reservation, but that is not to say that it is not an encroachment on their land and lifestyle. The problem is that the wall prevents easy crossing between tribal lands held both north and south of the border, and is therefore in direct violation of the above-stated agreement. The tribe is entitled to move freely without having to navigate past walls and through checkpoints. The right enabling the tribe to cross anywhere along the border is not only key to their identity as Kickapoo and necessary for access to traditional land, but is also essential for their livelihood because of the seasonal nature of their work. This amounts to a lack of equal protection under CERD article 5(e)(vi). The state must respect agreements made with all of its citizens and cannot disregard those with indigenous peoples.

28. The University of Texas has received detailed testimony from Kickapoo member Eric Anico describing the ways in which the tribe is and will be affected.⁵⁶ The inability to move between lands is only one of the ways in which the tribe will be harmed. After the U.S. established a reservation for the tribe, a burial ground by the Rio Grande River came into existence. The wall will deprive the tribe of access to the burial ground. This is a complete undermining of good faith by the government and displays a distinct lack of respect. Moreover, the tribe now based in the reservation plans to improve its livelihood and the economy of the area generally by turning the area into a tourist attraction and establishing a casino. The wall will prevent this from happening.

29. Anico also details the traditional ways in which the tribe’s culture and land is being encroached upon. He describes the Rio Grande River-based Kickapoo rituals that the tribe will no longer be able to carry out. He explains that the tribe must fish in the river for the “drumfish” which cannot be found elsewhere. The bones of the drumfish are integral to Kickapoo ceremonial objects. Even the traditional Kickapoo dwelling is made from canes gathered from the river. Finally, the wall interrupts the migrating patterns of animals such as deer (which the tribe are permitted to hunt): deer ribs are the basis of Kickapoo naming rituals.

⁵⁴ Constitution of the Kickapoo Traditional Tribe of Texas, *available at* <http://thorpe.ou.edu/constitution/kickapoo/> (last modified Apr. 19, 1996).

⁵⁵ Working Group Report, *supra* note 11.

⁵⁶ Letter from Eric Anico, member of the Kickapoo Traditional Tribe of Texas, to the Inter-American Commission on Human Rights (Oct. 13, 2008), *available at* <http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/iac-Eric-Anico-Statement.pdf>.

30. Adding to the general lack of consultation discussed above, it is clear that the government failed to perform an analysis of the “possible unintended effects on communities” expected under amendments to the Secure Fence Act. When the U.S. government formally assessed the impact of the wall, the Kickapoo were only mentioned once, and only with regard to the municipal water systems.⁵⁷ This omission speaks to a general lack of concern and understanding on the part of the U.S. government. Such a brief mention of the tribe is entirely insufficient and fails to grasp the semi-nomadic nature of the tribe and the various issues discussed by Eric Anico. The problem could have been rectified with proper consultation or at least with a more in depth analysis of the tribe’s situation, as the domestic legislation appears to require.

31. In sum, the Kickapoo (like all indigenous border communities) have been deeply affected by the lack of consultation in the border area. Consultation is required by CERD for general and specific interferences with indigenous peoples’ rights. Statements made by Anico prove general effects on the tribe. The lack of consultation was not made up for by the wholly inadequate analysis of municipal water systems. Moreover, the U.S. directly breached codified agreement 25 U.S.C. § 1300b-13d which is itself a violation of obligations under UNDRIP and CERD. Together, this displays a lack of the unique respect for the indigenous way of life discussed by CERD. The Kickapoo are the subject of racial discrimination in that their culture and way of life are not being respected. The building and potential expansion of the wall affects them in ways it would not affect a non-indigenous individual and the government has ignored this. Immediate attention is required in order to limit and rectify this racial discrimination and is justified by the early warning and urgent action procedure guideline regarding encroachment of indigenous land.

Ysleta del Sur Pueblo (Tigua)

32. The wall has had similar adverse effects on the Ysleta del Sur Pueblo tribe of El Paso. The tribe currently numbers 1,600 and resides primarily in a reservation consisting of two housing communities and several tracts of land in the El Paso area of Texas.⁵⁸

33. The tribe has a complicated history with Texas. The tribe’s ancestral home, Gran Quivera, was started around 800 AD in the Manzano Mountains north of El Paso. The increase of Spanish settlement throughout the 1600s forced the tribe to relocate to various sites along the Rio Grande River.⁵⁹ While the tribe and its new settlement were fully recognized under Mexican rule, the tribe was denied rights to almost all of their land in the mid-19th century when the Texas legislature passed a series of incorporation acts. These acts partitioned officially recognized land and conveyed it to new applicants. It has been suggested that the town of Ysleta was

⁵⁷ Environmental Stewardship Plan, *supra* note 47, at 10-2.

⁵⁸ Guzman, *supra* note 54, at 13.

⁵⁹ RANDY LEE EICKHOFF, EXILED: THE TIGUA INDIANS OF YSLETA DEL SUR 19 (1996).

illegally incorporated in 1871 as it incorporated the entirety of the Ysleta Grant. This caused much relocation among the tribe to small plots in the surrounding area.⁶⁰

34. The federal government only officially recognized the tribe and its land in 1987.⁶¹ The Tigua are primarily located in two housing communities and several tracts of land in the El Paso area of Texas. The tribe thrives on carrying out a diverse set of tribal enterprises providing employment for the tribe's members and members of the El Paso community. According to the tribal council these economic activities have been prosperous for nearly 40 years and tribal business remains dedicated to the common goal of self-determination and self-governance.⁶²

35. The tribe has been using sites along the Rio Grande River in a traditional manner for 300 years. A recent federal study commissioned by the U.S. Department of the Interior and conducted by two historians with expertise in Spanish colonial relations with American Indian peoples confirmed the important historical relationship between the Tigua and the land and river in the El Paso area.⁶³ This study spurred the U.S. government to sign an agreement in January 2007, accepting responsibility to aid the tribe in developing any potential land and water rights claims and to "take actions consistent with those rights."⁶⁴

36. Construction of the border wall completely severs the tribe's access to these traditional lands and goes against the policy laid out in the 2007 agreement. Maps of the wall compared to maps of the reservation clearly show the wall running directly alongside the reservation and a clear cutoff between the reservation and the river.⁶⁵ The wall run directly through their traditional land, and cuts off any access they previously had to the Rio Grande River and their traditional sites.⁶⁶ The Ysleta del Sur Pueblo have strong connections with the land surrounding the river and the border wall has prevented them from properly carrying out traditional ceremonies including new-year ceremonies and induction of tribal officials. The tribe was party to large-scale litigation attempting to obtain injunctive relief to stop the construction of the wall. The litigation raised a constitutional challenge based on the waiver of laws discussed above. However, the litigation proved fruitless and was quickly dismissed after "careful consideration" of the situation and a technical analysis of U.S. constitutional law.⁶⁷ The lack of judicial remedy for those affected is discussed in greater depth below, but it is worth noting that ineffective domestic remedy

⁶⁰ Guzman, *supra* note 54, at 12.

⁶¹ 1987 Ysleta del Sur Pueblo Restoration Act, Pub. L. No. 100-89, 101 Stat. 666.

⁶² Guzman, *supra* note 54, at 13.

⁶³ *Id.*

⁶⁴ Garry Scharrer, *Report Confirms Indians' Land Claim*, SAN ANTONIO EXPRESS-NEWS, Jan. 19, 2008 <http://www.mysanantonio.com/news/metro/stories/MYSA012008.01A.Indianland.29b80ea.html>.

⁶⁵ Guzman, *supra* note 54, at 23 figure 2.

⁶⁶ Petition for Writ of Certiorari at 44a, *County of El Paso v. Chertoff*, 129 S. Ct. 2789 (2008) (No. 08-751) [hereinafter *County of El Paso Petition*], available at http://www.law.yale.edu/documents/pdf/Clinics/El_Paso_v_Chertoff.pdf.

⁶⁷ Order Granting Defendants' Motion to Dismiss at 2, *County of El Paso et al v. Chertoff*, No. EP-08-CA-196-FM (W.D. Tex. Sept. 11, 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/law/govt-el-paso-District-Court-Order-to-Dismiss.pdf>.

constitutes a ground for action under CERD's early warning and urgent action procedure.⁶⁸

37. The undermining of the 2007 agreement regarding land and water rights claims is evident, but the situation is certainly an encroachment of *traditional* lands regardless of the status of that agreement. Of course, the general lack of consultation and the dubious "town hall meetings" will also have affected the Ysleta del Sur Pueblo. In its totality this amounts to a lack of respect for the indigenous way of life, and intervention is required to protect the rights of this marginalized group suffering severe discrimination.

Lipan Apache

38. The third tribe to be affected by the border wall is the Lipan Apache (or Ndé). The border wall currently bifurcates the community of Ranchería El Calaboz in Cameron County, Texas, and construction is continuing.⁶⁹ This traditional Ndé land is owned by Dr. Eloisa Tamez, a Lipan Apache elder, and is home to several descendants of the original Lipan Apache.⁷⁰ The Lipan Apache are well known for their history in Texas and northeastern Mexico. Nonetheless, the Lipan Apache remain federally unrecognized, making the border wall situation far more worrying for them and spreading a fear that their tribal identity may be lost altogether. This brief was prepared in close cooperation with the Lipan Apache, thus the sense of urgency necessary for CERD intervention is most apparent here, with statements from tribe members documenting problems that are occurring on a daily basis. This is not to say that similar problems are not occurring with the other tribes referenced above. The Lipan Apache should properly be viewed as an example – as a case study – for day to day discrimination being faced by every border wall community.

39. The Lipan Apache are descendants of Ndé buffalo hunters who call themselves the Cúelcahén Ndé or "People of the Tall Grass" or Ndé, which means "the people." The term Apache actually came from Spanish settlers who gave the name to Ndé buffalo hunters who settled in West Texas. The tribe was fiercely protective of their land and culture, but settlement in the Rio Grande Valley area took place after many battles with Spaniards and their allies.⁷¹ The Lipan Apache would take refuge in "rancherías" (small rural settlements) created by Spanish land grants. Over the years

⁶⁸ CERD Early Warning Guidelines, *supra* note 4.

⁶⁹ Formal letter of complaint from Eloisa Tamez to Colonel Muraski, U.S. Army Corps of Engineers (Oct. 30, 2011) (on file with University of Texas Human Rights Clinic).

⁷⁰ Guzman, *supra* note 54, at 7.

⁷¹ In fact, it has been suggested that the U.S has no claim over much of the Lipan Apache's traditional land. In recent years Ndé scholar and leader Dr. Margo Tamez has re-elevated the critical issue of Lipan Apache aboriginal title. She argues that there was never an official ceding of the land to the U.S. and therefore the U.S. has no authority to build the border wall across the affected Ranchería. If confirmed, this would provide extra grounds for arguing the border wall is a violation of human rights as the U.S. would be encroaching on land outside of its territory. See Denise Gilman and Margo Tamez, *Brick by Brick: Using Human Rights and Critical Perspectives of Indigenous Peoples' Social Movements to Build Momentum against the Texas/Mexico Border Wall*, in HUMAN RIGHTS DEEP IN THE HEART OF TEXAS 13-15 (Shannon Speed ed., 2009) ("Ndé never ceded culture, identities and presence in the traditional territory. Nor did Ndé cede the land. Ndé conceptualize decolonizing nativist fictions a key component of a critical human rights standard for dismantling the wall. This opens up critical space for constructing the recovery of lands and territories through redress.").

of settlement, the Lipan Apache genealogy became mixed with that of the Basque, Spanish, Tlaxcalteca and Nahua hidalgos, and settlers, and accordingly there is a mix of heritage, culture, and surnames.⁷²

40. Lipan Apache have faced a history of disrespect and broken treaties.⁷³ The tribe has borne witness to attempts to undermine land grants and their “Riparian [water] Rights.” The Lipan Apache used water from various points along the Rio Grande river for crop irrigation. According to Ndé and originario Elders including Eloisa Tamez, these rights pre-date Spanish and Mexican law of the 18th and 19th centuries.⁷⁴ However, during the early Texas period (1836-1865) Euro-Texan settlers created water ownership systems which disrespected customary indigenous collective ownership. Their euro-centric notions of property were not compatible with indigenous collective worldviews of ownership and any treaties made between the tribes and Spain and Mexico were ignored by settlers.⁷⁵ This heightened the protective standpoint of the tribe discussed above. At present, according to the U.S. legal system, any rights to water in the area originate with the King of Spain.⁷⁶

41. The Lipan Apache applied for federal recognition in 1999 but the application is yet to be granted. In a 2001 report written for the U.S. Army Corps of Engineers, the U.S. government *acknowledged* the tribe. The description surrounded the issue of “Docket No. 22-0” of the Federal Indian Claims Commission. The Commission was established in the 1946 to grant compensation to Native American tribes whose land had been unfairly taken by the government in the 19th century and earlier. The Lipan Apache were granted compensation, but their claim was joined with the claim of the Mescalero Apache Tribe.⁷⁷ Thus, according to Lipan Apache knowledge keeper Daniel Castro Romero, Jr., the issue of the Tribe’s identity as a unique entity within U.S. law has been left “in limbo.”⁷⁸

42. As will be evidenced, the border wall situation is causing members of the tribe to leave their traditional land. Lack of federal recognition justifies concerns that the

⁷² Guzman, *supra* note 54, at 8.

⁷³ Enrique Gilbert-Michael Maestas, *Culture and History of Native American Peoples of South Texas*, Ph.D. Dissertation, University of Texas at Austin, 2003 (discussing indigenous peoples and broken treaties generally: “Discourse regarding broken treaties provides a frame of reference by which the governments of Spain, the Republic of Texas, and the United States are held in contempt due to their dishonorable and ruthless conduct against Native American peoples. This discourse of broken treaties is another way that Native peoples in San Antonio express their knowledge about disenfranchisement and exploitation of their ancestral lands.”).

⁷⁴ Nádasí'né Ndé Isdzáné Begoz'aahí Shímaa Shíní Gokal Gow Goshjaa ha'áná'idí Texas-Nakaiyé Godesdzog, *Returning Lipan Apache Women's Laws, Lands, and Power in El Calaboz Ranchería*, Texas-Mexico Border. PhD dissertation, Washington State University (2010). See Chapter 2, “From Ndé Lenses: An Interrogation of ‘Apaches’ and ‘Enemies’ in Early to Late Colonial Spain, 1525-1821,” 54-151.

⁷⁵ *Id.* See Chapter 4, “Necropower and Necropolitics: The Violent Landscape of the Texas Imaginary,” 225-300.

⁷⁶ See *Court History*, Fourth Court of Appeals, available at

<http://www.4thcoa.courts.state.tx.us/court/history.asp> (“Later, the court addressed riparian rights in *Adjudication of Water Rights in Medina River*, 645 S.W.2d 596 (1982), rev'd, 670 S.W.2d 250 (1984). In this case, the Court had to decide the ownership of water in the Medio Creek, a non-perennial waterbed. Lackland Air Force Base's waste disposal system utilized the creek, and a ranch owner had dammed up the arroyo to create a lake. Justice Blair Reeves, in a dissenting opinion, traced the riparian rights law to the King of Spain. The Texas Supreme Court reversed the Court's majority opinion, and adopted Justice Reeves' analysis.”).

⁷⁷ Guzman, *supra* note 54, at 9.

⁷⁸ Telephone interview conducted by Dr. Margo Tamez with Daniel Castro Romero, Jr. (Dec. 9, 2009).

tribe's identity may become lost. Lack of recognition by the U.S. government cannot be an obstacle to international protection, especially given indigenous peoples' right to self-determination.⁷⁹ Dr. Eloisa Tamez owns Ranchería El Calaboz, which is traditional land of the tribe. Dr. Margo Tamez, daughter of Dr. Eloisa Tamez, has traced her paternal and maternal lineage and can identify her bloodline as Lipan Apache.⁸⁰ Ranchería El Calaboz should be protected in the same manner as any other federally recognized reservation. While it is owned by Tamez, the land is vital to the tribe as a whole. Understanding this is critical to appreciating the following argument, and understanding that any action taken against Tamez affects the entire Lipan Apache.

43. The issue of lack of consultation is again present. The government exercised its right of eminent domain over the Ranchería El Calaboz, and sought "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"⁸¹ Tamez challenged the takings on behalf of herself and many other landowners in the area, but her claims were dismissed on the grounds that it was an invalid challenge to sovereign immunity.⁸² The claims contended that DHS misrepresented the law to the landowners in the area and exaggerated what power they had under U.S. law, issuing "certificates of acceptance" for the requested access and not fully explaining the limitations of their powers. Tamez's claim directly cited the 2008 amendment to the Secure Fence Act, contending that the nature of these takings failed to meet the stated requirements of consultation.⁸³ Tamez explains that "they took advantage of our malleability, because we do not have the economic and political power to resist authoritarian government."⁸⁴ It was argued that the government was in breach of domestic obligations of consultation; however, international law requirements of consultation and consideration were obviously also present because of the traditional nature of Ranchería El Calaboz.

44. The government still pursues the Lipan Apache land of Ranchería El Calaboz and trespasses on sections it has no entitlement to. In 1936 the International

⁷⁹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

⁸⁰ Letter of Protest to Valley Morning Star Article: "Ranches of Significance," *NDÉ SELF-GOVERNANCE & SELF-DETERMINATION EL CALABOZ RANCHERIA* (Mar. 3, 2012), <http://lipanapachecommunitydefense.blogspot.com/>.

⁸¹ First amended complaint at 2, *Eloise Garcia Tamez et al v. Chertoff*, No. 08-CV-0555 (S.D. Tex. Mar. 18, 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/law/govt-tamez-Class-First-Amended-Complaint.pdf>.

⁸² Order at 13, *Eloise Garcia Tamez et al v. Chertoff*, No. B-08-055 (S.D. Tex. Jan. 27, 2009), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/law/govt-tamez-Order-in-Tamez-Class-Litigation.pdf>.

⁸³ First amended complaint at 3, *Eloise Garcia Tamez et al v. Chertoff*, No. 08-CV-0555 (S.D. Tex. Mar. 18, 2008), available at <http://www.utexas.edu/law/centers/humanrights/borderwall/law/govt-tamez-Class-First-Amended-Complaint.pdf>.

⁸⁴ Telephone interview by Dr. Margo Tamez with Eloisa Garcia Tamez (Nov. 19, 2011) (on file with Dr. Margo Tamez).

Boundary Water Commission (IBWC)⁸⁵ obtained a right of way from native landowners for flood control purposes over part of the land. Ownership, at present, remains with the tribe: it is still under contestation as an amount of compensation has yet to be determined.⁸⁶ Nonetheless, government personnel are often seen on the land.⁸⁷ The government has offended Eloisa Tamez by offering her \$100 for the land: “the United States is offering to acquire these tracts for a nominal value as the fee estate owned by your client is burdened by an easement for flood control purposes.”⁸⁸ The sum represents a lack of respect for the indigenous nature of the land. Regardless of the IBWC right of way, the land has great cultural value to the Lipan Apache. The IBWC have been uncooperative in response to requests to install traffic gates to regulate border patrol access to the land in question.⁸⁹ All of this points to CERD action being required urgently, and proves that despite construction itself being completed in many areas, problems stemming from the border wall are ongoing.

45. The tribe’s right to be on traditional land is being infringed by government agents. In a complaint letter to the Army Corps of Engineers, Eloisa Tamez explains that “I am personally subjected to numerous and frequent invasions and assaults by the U.S. Customs Border Patrol in my private residence, at times, giving me much insecurity, fear, and uncertainty about my personal safety.”⁹⁰ This is not an isolated issue nor is it caused simply by her figurehead status at Ranchería El Calaboz. This issue is widespread and there is a general feeling of fear due to the increased presence of the Border Patrol. Daniel Castro Romero Jr. explains in his affidavit attached to this brief that he has been harassed and threatened with incarceration and interrogation when being present in the border wall area. He has been told that his name is on a “persons of interest list” with the DHS; he and others face harassment purely for being on their own traditional land.⁹¹

46. Such attitudes of mistrust exist not only regarding government personnel. The attitudes are spreading to the public in general, and in turn to younger members of the tribe. Elders who continually refuse to stop using their lands on both sides of the wall are viewed by government agents as “crazy,” “trouble-makers,” “impossible,” and delegitimized in front of community members and younger generations.⁹² Margo Tamez describes the pain of having to read comments on websites documenting her mother’s anti-border wall efforts, and viewing declarations that her mother ought to

⁸⁵ This body aims “to provide binational solutions to issues that arise during the application of United State-Mexico treaties regarding boundary demarcation, national ownership of waters, sanitation, water quality, and flood control in the border region.” See *Home*, International Boundary & Water Commission, www.ibwc.state.gov.

⁸⁶ U.S. v. 0.26 Acres of Land, more or less, in Cameron County, Texas and The Estate of Eloisa G. Tamez, No. 1:2008cv00351 (S.D. Tex. July 1, 2008).

⁸⁷ Formal letter of complaint from Eloisa Tamez to Colonel Muraski, U.S. Army Corps of Engineers (Oct. 30, 2011) (on file with University of Texas Human Rights Clinic).

⁸⁸ Letter from Kenneth Magidson, U.S. Attorney, to Peter Schey, Attorney for Dr. Margo Tamez (Oct. 5, 2011) (on file with University of Texas Human Rights Clinic).

⁸⁹ Aff. of Dr. Eloisa Garcia Tamez (Apr. 10, 2012).

⁹⁰ Formal letter of complaint from Eloisa Tamez to Colonel Muraski, U.S. Army Corps of Engineers (Oct. 30, 2011) (on file with University of Texas Human Rights Clinic).

⁹¹ Aff. of Daniel Romero Castro Jr., Hereditary Chief of the Lipan Apache (Apr. 5, 2012).

⁹² Oral testimonies shared with Margo Tamez by Ndé elder Eloisa Garcia Tamez and Daniel Castro Romero, Jr. at El Calaboz Ranchería (June 25-26, 2011).

be “lynched with barbwire.”⁹³ It is worth quoting from her affidavit at length: “The wall sends a clear message, every day, to everyone driving through our community on their way to work, to the city, to the shopping centers, to the golf courses, to their churches . . . that somehow, our community along the last 70 miles of the Texas-Mexico border *did something terribly “wrong” (according to their lenses) to “deserve” being incarcerated in an open-air prison structure.*”⁹⁴ The government’s actions constitute racial discrimination, and the notion that this is somehow acceptable is spreading to members of the public. This causes doubt among younger members of the tribe. Because their land is a heavily patrolled and militarized area, younger generations see less and less value in “home” and are becoming disillusioned with traditional ways of life.⁹⁵ There is a feeling that if their home is so heavily patrolled it must be an area where “criminal,” “cartel,” “terrorist,” and “illegal” persons are “hiding.”⁹⁶

47. Indigenous peoples are facing personal harassment because of the border wall and related issues, and this is negatively affecting the manner in which the public views them. Urgent CERD intervention is required to ensure that the U.S. takes action to diffuse the mounting situation of racial discrimination that the border wall is causing both internally within tribes, and externally amongst the public at large. If conflict and disillusionment reach critical levels, the future of the tribe may be threatened.

48. In response to the trespasses at Ranchería El Calaboz, Eloisa Tamez has sought help from local police forces. However, she was told by law enforcement that they were powerless to help, because DHS had specifically ordered that they not step in to assist local residents against those individuals building the wall. Moreover, Margo Tamez explained that Eloisa Tamez has recently admitted that she is on the verge of giving up and leaving her land. Speaking solely in her capacity as a Lipan Apache member and not as an activist or party to this brief, Margo Tamez explained that “when elders leave our community, this is how our community dies.”⁹⁷ The affidavit from Eloisa Tamez indicates that she is seen as a pillar of resistance and strength amongst the Lipan Apache, throughout the border community in general, and even for First Peoples in Canada.⁹⁸ CERD action is urgently required: Eloisa Tamez herself is a vital connection to the land and to indigenous identity, and her position at El Calaboz Ranchería is in jeopardy.

49. If members of the tribe begin to leave the land, this would seem to be a confirmation of the notion that the tribe is somehow “wrong” to be on the land. The U.S. government’s actions have encroached on part of the traditional indigenous land: a criterion for CERD’s early warning and urgent action procedure. Moreover,

⁹³ *Id.* at page 11

⁹⁴ *Id.*

⁹⁵ Oral testimonies shared with Margo Tamez by Ndé children at El Calaboz Ranchería (June 24-26, 2011) (in order to protect the rights of indigenous children, names will be withheld in accordance with the principles and protocols of affected clans).

⁹⁶ *Id.*

⁹⁷ Telephone interview by the University of Texas Human Rights Clinic with Dr. Margo Tamez (Feb. 7, 2012).

⁹⁸ Affidavit of Dr. Eloisa Garcia Tamez (Apr. 10, 2012).

their subsequent actions, including their general disrespect for traditional land and rights, are forcing critical members of the tribe to leave. If illegitimate government actions are making it unreasonably difficult for indigenous peoples to remain on their land, this is an encroachment. The lack of federal recognition makes the situation all the more troubling. The tribe's connection to the land is critical.

50. This erasure of identity was heavily discussed at the summer 2011 indigenous peoples' gathering in El Calaboz Ranchería. Spokespersons from across the Rio Grande Valley area described the tribe's intrinsic relationship with the land and spoke of the need to recover a contemporary identity for the Lipan Apache.⁹⁹ They spoke of how indigenous oral history and creation and survival stories are connected to the land.¹⁰⁰ They explained the importance of the identification and visiting of sacred sites, including burial sites and ritual feasting sites used for the consumption of "First Foods."¹⁰¹ To give specific example of how the wall is preventing this, Steven A. Fernandez, Band Leader of the Kune'Tsa Ndé Band of the Lipan Apache Nation, the lineal cousins of the Cúelcahén Ndé clan, has described the "disheartening" experience of the border wall. He describes that the border wall has created "invisible lines on a map" which "continue to disrupt the lives of those who practice and live in the traditional manner of their indigenous ancestors." He explains that supplies for traditional medicines essential to traditional ceremonies are dwindling on the Texas side of the border wall.¹⁰²

51. Traditional identity is also threatened by unjustified bureaucracy. The rights of indigenous peoples to access their traditional land are constantly being infringed – as Mr. Romero puts it, the tribe is forced to "prove our Indigenous identities to bureaucrats and paper pushers."¹⁰³ He discusses that elders and other knowledge keepers have been physically separated from his branch of the Lipan Apache, and that they now have to go through "border crossing red tape" in order to access them. He explains that this places his indigenous identity in a fragile position and that the tribe is finding it difficult to remain in contact with its identity.¹⁰⁴ Fernandez further explains that "[s]ome of our traditional knowledge lies with those on the other side of the border and we have now become limited in our access to those elders who may be able to provide us with the knowledge and history of our ancestors."¹⁰⁵

52. Historical identity is also at risk. Lipan Apache members have found evidence that the wall's construction is damaging ancestral use and burial sites. Construction required that 8-10 foot deep trenches be dug out of the ground in order to build foundations. The earth from these trenches was removed using large-scale

⁹⁹ Handwritten notes taken by Cynthia Bejarano and Jeff Shepherd at El Calaboz Ranchería (June 24-26, 2011) (on file with Dr Margo Tamez)

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Testimonial Letter from Steven A Fernandez to Dr. Margo Tamez (Mar. 12, 2012) (on file with University of Texas Human Rights Clinic).

¹⁰³ Aff. of Steven Fernandez, leader of the Kune' Tsa Nde/Tu'Tssn Nde Band of the Lipan Apache Nation of Texas (Apr. 11, 2012).

¹⁰⁴ *Id.*

¹⁰⁵ Testimonial Letter from Steven A Fernandez to Dr. Margo Tamez (Mar. 12, 2012) (on file with University of Texas Human Rights Clinic).

machinery and abandoned like a heap of trash. In among these heaps was found the presence of traditional use and household objects of Lipan Apache ancestors. Indigenous archaeologists are deeply concerned about what else might be lying beneath the wall or has been (and will be if construction of the wall is allowed to continue) disrespectfully tossed around or damaged by government machinery. The government of the U.S. is displaying a lack of respect for the rights, land, and traditions of the Lipan Apache. Demonstrative of the problem, the tribe has been reluctant to release further information on this topic for fear that the government will remove evidence.¹⁰⁶ Swift CERD action could allow tribe members the opportunity to protect these historical objects.

53. Finally, the border wall has had a significant detrimental effect on plants and animals integral to the Lipan Apache's way of life, many of which are endangered. Research has shown that there has been a severe decline in biodiversity in the area surrounding the wall, as the wall acts as a serious barrier to water, mating partners, and nesting grounds. This severe habitat fragmentation has led to the area being classified as a "dead zone."¹⁰⁷ Daniel Castro Romero Jr. explains that the government has actively taken steps to reduce plant life in the area by spraying herbicides similar to those used in the Vietnam War. Romero Jr. explains that there is a feeling amongst Ndé that this is part of a wider program intended to discourage indigenous peoples from accessing land that they have a right to.¹⁰⁸ It is apparent that, although construction of the border wall was initially unjustified and unacceptable, its construction was merely the beginning of a wider system of rights violations that are ongoing and require CERD's intervention.

54. In sum, the Lipan Apache's indigenous traditions, culture, and survival prospects have deteriorated in the shadow of the wall. The wall is causing continued mental and physical stress, and problems are currently on-going as tribe members demand redress and restitution. Lack of consultation is present again here, as is encroachment on indigenous land. The fact that the tribe is federally unrecognized within the United States increases their need for protection from CERD. Testimonies from the tribe show that there is fear that the tribe, if forced to leave the land, might dissolve altogether and their history and knowledge will be lost to future generations. In her affidavit, Margo Tamez points out that half of her tribe's people are under the age of 17.¹⁰⁹ This makes it apparent that urgent action is required if the Lipan Apache tradition is to be preserved for this new generation who should not have to grow up in the shadow of the border wall.

55. Regarding indigenous peoples' rights in general across all three tribes, at every turn the U.S. government has failed in its duty to treat indigenous communities with

¹⁰⁶ Email from Dr. Margo Tamez to the University of Texas Human Rights Clinic (March 8, 2012) (on file with University of Texas Human Rights Clinic).

¹⁰⁷ Interview by Dr. Margo Tamez with April Cotte at El Calaboz Ranchería (June 28, 2011). April Cotte is a human rights activist with specialized training from Outward Bound working in the Jumano Apache community of Redford, Texas. She studied and documented the level of attrition of flora and fauna along the border wall in El Calaboz.

¹⁰⁸ Aff. of Daniel Romero Castro Jr., Hereditary Chief of the Lipan Apache (Apr. 5, 2012).

¹⁰⁹ Aff. of Dr. Margo Tamez, Co-Founder of the Lipan Apache Women Defense (Apr. 16, 2012).

respect and dignity. It has failed to take into account the unique relationship these communities have with the land. One cannot forget that the U.S. government cannot achieve its stated purposes (terrorism prevention, illegal immigration control, etc.) with the construction of this wall. If the U.S. is gaining little or nothing from the construction of this wall then its effect on indigenous communities is entirely disproportionate and unjustified. Bearing in mind that CERD has declared that obligations must be read in light of UNDRIP, the latter convention expressly states that rights may only be restricted where absolutely necessary¹¹⁰ – this is not the case here. Moreover, the U.S. has violated international law duties of consultation at general and specific levels. This is in addition to failings of domestic consultation. The government violates these communities' right to juridical personality and their right to full enjoyment of civil rights.¹¹¹ In doing so, the government racially discriminates against the indigenous communities by "impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."¹¹² There appears to have been a complete disregard for the indigenous way of life and the connection to the land.

56. Affidavits from members of indigenous groups prove that these problems will continue as long as the border wall stands, as the border wall exists as a symbol of repression, fear, militarization, and marginalization. The U.S. government must take steps to reduce ongoing problems and to reconcile with those who have been discriminated against. Affidavits from Lipan Apache members Eloisa Tamez and Daniel Castro Romero Jr. point to a much larger problem that can only be rectified by positive attempts at reconciliation by the U.S. government. Both of their affidavits speak of the racial discrimination against indigenous peoples generated as a result of the border wall.¹¹³ Steven Fernandez explains that the Lipan Apache do not feel as though they are being treated as American citizens, that they feel repressed, and that their plight is being ignored.¹¹⁴ This contradicts the intention of the United Nations Declaration on the Rights of Indigenous Peoples, as it effectively acts as a denial of the right to choose to participate as active members of the state.¹¹⁵ Urgent CERD action is necessary in order to prevent further violations of the rights of indigenous peoples, and to go some way to repair harm done.

¹¹⁰ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 46, U.N. Doc. A/61/L.67 (Sept. 13, 2007)

¹¹¹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 1, 5 U.N. Doc. A/61/L.67 (Sept. 13, 2007) ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.").

¹¹² ICERD, *supra* note 13, at art. 1.

¹¹³ Aff. of Dr. Eloisa Garcia Tamez (Apr. 10, 2012); Aff. of Daniel Romero Castro Jr., Hereditary Chief of the Lipan Apache (Apr. 5, 2012).

¹¹⁴ Aff. of Steven Fernandez, leader of the Kune' Tsa Nde/Tu'Tssn Nde Band of the Lipan Apache Nation of Texas (Apr. 11, 2012).

¹¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 5 U.N. Doc. A/61/L.67 (Sept. 13, 2007)

IV. The placement of the border wall, the U.S. government's taking of land around the border, and the government's policy justifications for the wall are arbitrary and have a racially discriminatory impact on the border communities.

a. *The placement of the border wall is arbitrary and disproportionately affects poor Latinos and indigenous peoples.*

57. Most of the border between Texas and Mexico is private property; however, federal authorities failed to treat all landowners equally during the planning and construction process of the wall. To give an example, in 2008 DHS planned to build the border wall through the property of a 76-year-old retiree but skipped the next-door property, which belongs to a Texas billionaire who is a close friend and campaign contributor of former president George W. Bush.¹¹⁶ The same happened when the University of Texas at Brownsville filed a federal lawsuit and DHS agreed to a settlement to avoid construction of a section of the wall that would have divided its campus. However, other Texas landowners had property condemned for wall construction with little recourse available, due to the waiver's limitations on appeal.¹¹⁷

58. A statistical analysis conducted by the University of Texas revealed a higher income range and a higher proportion of non-Hispanic and English-speaking households in the gap areas as compared to wall-designated blocks where more Spanish-speaking and Hispanic and Native American households are concentrated.¹¹⁸ The wall was built through sensitive environmental areas, indigenous lands, and small private properties but does not run through larger and more lucrative properties owned by businesses like the River Bend Golf Resort.¹¹⁹ This arbitrary placement by CBP officials adds to the already pervasive racial tensions that exist between the U.S. government and the Latino community. The Inter-American Commission on Human Rights (IACHR) of the Organization of the American States (OAS) has recognized these harmful and disproportionate effects of the wall: "The information received indicates that its construction would disproportionately affect people who are poor, with a low level of education, and generally of Mexican descent, as well as indigenous communities on both sides of the border."¹²⁰ The locations that DHS selected for the wall have a devastating impact on the property of individuals because border residents did not only lose the segment of their properties for the construction of the wall, but also lost access to their property on the other side of the wall.¹²¹

¹¹⁶ Melissa Del Bosque, *Holes in the Wall*, TEX. OBSERVER (Feb. 21, 2008) <http://www.texasobserver.org/archives/item/15288-2688-holes-in-the-wall>.

¹¹⁷ Neeley, *supra* note 8, at 146.

¹¹⁸ J. Gaines Wilson, *An Analysis of Demographic Disparities Associated with the Proposed U.S.-Mexico Border Fence in Cameron County, Texas*, <http://www.utexas.edu/law/centers/humanrights/borderwall/analysis/briefing-papers.html>.

¹¹⁹ Del Bosque, *supra* note 118.

¹²⁰ Press Release, I/A Comm. H.R., IACHR Concludes Its 133rd Period of Sessions, IACHR Press Release No. 46/08 (Oct. 31, 2008).

¹²¹ Working Group Report, *supra* note 11, at 8.

59. In 2009, the DHS informed landowners that in some areas the new border wall will stand more than a mile from the northern bank of the Rio Grande, and some properties ended up “outside” the wall.¹²² This fact violates freedom of movement of those landowners inside their own country. However, some owners received preferential treatment. A few miles up the river, the Landrum family, an Anglo-Settler/Pioneer family, received a large opening on their affected farmland to provide access for their large tractors and other farm equipment to their property on the south side of the wall.¹²³

60. This issue has also affected property values along the border,¹²⁴ especially the southernmost properties that ended up “outside” of the border wall. In the fall of 2011, the U.S. government informed landowners that security gates with locks and secret codes were being considered as an option for properties on the south side of the wall. The decision violates the citizens’ right of freedom of movement and residence inside their own country. A recent New York Times article pointed out that giving security codes to civilians would make them (and their families) targets for those immigrants or smugglers desperately trying to cross the border.¹²⁵

61. The article also states that the “Landowner Reference Guide,” a pamphlet distributed by the Border Patrol, explains that the gates will stay open during daytime, though the Border Patrol will have discretion over this. “Emergency personnel will have access through the gates (which are designed to unlock in the event of a power failure), but the possibility of being caught on the wrong side of the fence weighs heavily on families which properties are divided by the border fence,” the article explains.

62. An email from Southwest Border Division Chief Jeffrey Self reveals that the selection process behind the placement of the border wall was not driven by security reasons, but rather cost and time oriented priorities: “They will not build any fence in any area (urban) where real estate cost are to (sic) high [. . .] I was advised that funding and timelines are driving this deployment not operational need.”¹²⁶ In another email obtained through a Freedom of Information Act (FOIA) request, a public official stated on August 30, 2007 that: “OBP [Office of Border Patrol] has already expressed concerns over losing the high priority projects on the list in order to build operationally irrelevant segments for the sake of meeting their mileage objective.”¹²⁷

¹²² Richard Marosi, *Some Angry Texans are Stuck South of the Barrier*, LOS ANGELES TIMES (Feb. 28, 2011), <http://articles.latimes.com/2011/feb/28/nation/la-na-texas-fence-20110228>.

¹²³ Interviews of Eloisa García Tamez speaking on behalf of impacted Elders and community members of El Calaboz Rancheria, conducted by and on file with Margo Tamez.

¹²⁴ Liz Goodwin, *The Texans who live on the ‘Mexican side’ of the border fence: ‘Technically, we’re in the United States’*, THE LOOKOUT (Dec. 21, 2011), <http://news.yahoo.com/blogs/lookout/texas-americans-live-wrong-side-border-fence-christmas-183312787.html>.

¹²⁵ Oscar Casares, *Border Fence Upends a Valley Farmers Life*, N.Y. TIMES (Nov. 26, 2011), <http://www.nytimes.com/2011/11/27/us/border-fence-upends-a-rio-grande-valley-farmers-life.html>.

¹²⁶ E-mail from Jeffrey Self, South West Border Division Chief of Customs and Border Patrol, to David Augilar and Ronald Colburn (Mar. 22, 2007) (obtained by the University of Texas Working Group via FOIA request).

¹²⁷ E-mail from undisclosed sender (Aug. 30, 2007) (obtained by the University of Texas Working Group via FOIA request).

63. A multi-billion dollar contract was granted to Boeing Company in 2006, which proceeded to outsource the work to a selection of contractors, such as Kiewit.¹²⁸ SBInet, a consortium of private contractors led by Boeing Co., received a multibillion dollar contract in 2006 to secure the northern and southern borders of the United States. U.S. GAO recommended that DHS place a spending limit on the Boeing contract for SBInet since the company had been awarded an indefinite delivery, indefinite quantity contract for three years with one-year options, but DHS rejected the auditor's recommendation. These companies' focus on profit as opposed to public interest in part may explain why such an arbitrary and discriminatory placement of the wall was enforced.¹²⁹

b. Racial discrimination against minority populations has increased since the process by which the U.S. government took land for border wall construction was discriminatory.

64. When DHS first sought temporary access to border property in late 2007 and early 2008 for the purpose of surveying and mapping the land, it constituted a governmental taking of the land, as the process involved passing temporary land ownership rights to DHS.¹³⁰ Some owners voluntarily granted the access, but if they refused, Secretary Chertoff utilized the Declaration of Taking Act to sue for condemnation.¹³¹ Even if landowners granted access, they oftentimes did not have full knowledge of their rights, such as the right to demand compensation.¹³²

65. DHS officials organized public information sessions only after press coverage and pushback from the community and local government officials raised concerns regarding the proposed construction of the border wall. According to attorney Celestino Gallegos, there were more security agents than community members in those meetings, and people were not allowed to ask questions or make any comments.¹³³ The initial DHS tactic was to send uniformed border patrol officers door to door with side arms, and present people with their offers from the government and request their signature.¹³⁴ If a landowner refused to sign, DHS threatened the landowner with a lawsuit.¹³⁵

66. After these initial takings, the government sought to gain actual ownership of the land to build the wall starting mostly in the summer of 2008 and continuing well into 2009. The government filed new suits for this purpose against those who did not voluntarily give up their land for agreed-upon compensation. Within those suits for possession, the courts first considered whether it was proper to allow eminent

¹²⁸ ROBERT KOULISH, IMMIGRATION AND DEMOCRACY: SUBVERTING THE RULE OF LAW 105 (2010).

¹²⁹ *Id.*

¹³⁰ Working Group Report, *supra* note 11, at 5.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Aff. of Celestino Gallegos, former Team Manager for the Border Rights Team at Texas Rio Grande Legal Aid, Inc. (Apr. 16, 2012).

¹³⁴ *Id.*

¹³⁵ *Id.*

domain and looked at the procedural compliance and showing of government purpose. Eminent domain powers enable the government to “take property for public use without the owner’s consent upon making just compensation.”¹³⁶ Once the land was given to the government, the cases were set for determinations as to compensation. This “expedited condemnation process [denied] property owners access to due process and a full trial.”¹³⁷

67. The construction of the wall in the Texas region has been of great concern as the Texas border is more populated than the border area of other states and the construction of the wall thus affects more landowners. Most importantly, the authority granted by the federal government to the DHS, in the interest of national security,¹³⁸ combined with the process and construction of the border wall has caused, and is continuing to cause, irreparable harm to the border communities, specifically the low-income residents of Latino descent and indigenous tribes. These communities, in general, lack both the power and resources to effectively resist or dispute the taking of their land within the U.S. judicial system.¹³⁹ The most notable effects are that communities have been deprived of vital access to their land, the wall has separated families and cultures, and the wall abruptly stops – disproportionately affecting poorer communities’ lands over the more affluent landowners.

68. Although the U.S. government has the right, according to international law, to subordinate the use of private property for reasons of public utility and social interest¹⁴⁰—including national security and the control of immigration—it has not done so in a way that comports with international human rights law.¹⁴¹ Forced taking of land to allow the construction of a border wall that runs through private property was not the least restrictive, least onerous means of achieving the national security and immigration control goals of the government. Multiple pieces of legislation, press releases, policy briefings, and statements by DHS recognize the availability of less intrusive measures for securing the southern border of the United States. Those that are officially recognized and employed by DHS include the following: unattended ground sensors, truck-mounted mobile surveillance systems, remote

¹³⁶ PETER MEDOFF & HOLLY SKLAR, *THE STREETS OF HOP: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 113 (1999).

¹³⁷ KOULISH, *supra* note 130, at 117.

¹³⁸ *Fact Sheet: The Secure Fence Act of 2006*, Official Press Release from the Office of the Press Secretary (Oct. 26, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>.

¹³⁹ One of the possible challenges that could be raised is a constitutional equal protection challenge to eminent domain. However, it is extremely difficult to raise such a challenge. The claimant must show intentional discrimination (rather than disparate impact), that the government has not established a compelling governmental interest in effectuating the discrimination, and that the discriminatory actions are not narrowly tailored to meet that goal. Only one case, in Eagle Pass, Texas, argued discrimination because of the difficulty in doing so. Most claimants challenging the border wall argued procedural problems, due process problems with the Chertoff waivers, and compensation issues.

¹⁴⁰ See IACtHR, *Case of Salvador-Chiriboga v. Ecuador*, Preliminary Objections and Merits. Judgment of May 6, 2008 (only in Spanish), Series C No. 179, para. 60 (explaining that the State, in order to guarantee other important rights, can limit or restrict or even expropriate property since the right to private property is not an absolute right).

¹⁴¹ Under § 102 of the Illegal Immigration Reform and Immigrant Responsibility Act, the Secretary of DHS is authorized to contract for and buy any land adjacent to or in the vicinity of the international border when the Secretary considers it essential to control and guard the border. It also authorizes the Secretary to commence condemnation proceedings if a reasonable purchase price cannot be agreed upon. IIRIRA, Pub. L. 104-208, 110 Stat. 3009-546 (1996).

video surveillance systems, unmanned aerial systems, and fixed- and rotary-wing aircraft to detect, classify, track and respond to illegal border crossings.¹⁴²

69. By constructing a border wall across land owned by persons living along the Texas-Mexico border, the U.S. government is violating landowners' rights to property and to non-discrimination. The restrictions on the right to property defy the principle of necessity because they are arbitrary, discriminatory, and not proportional given that other less restrictive measures were available.¹⁴³

70. While the Executive Branch has the power to secure the international and maritime borders of the U.S., it does not have the right to do so in a manner that violates international treaties to which the U.S. is a party.¹⁴⁴ The U.S. federal government planned to erect an intermittent physical barrier in an arbitrary manner that created racial discrimination and violated the principles of equal protection. If the U.S. government continues with its plans to reinforce and expand the border wall, racial discrimination will become systematic against minorities in this area.

c. The policies cited by the U.S. government justifying the construction of the border wall are inconsistent, arbitrary, and ineffective.

71. While the effects of the wall are severely damaging for the local communities, the policy reasons behind its construction appear to be a mere pretext as the government's aims are simply unrealistic or unachievable. The stated goal of the Secure Fence Act of 2006 was to "make our borders more secure"¹⁴⁵ by preventing entrance to alleged terrorists, unlawful, undocumented immigrants, and drug traffickers.¹⁴⁶ In the past five years, the U.S. has continued its policy on border security even though it has demonstrated a repeated failure to correspond with the wall's stated purpose.¹⁴⁷ Furthermore, the construction of a wall is not an effective means by which to resolve these national security concerns.

72. One of the main policy justifications for the wall cited by the U.S. government

¹⁴² United States Government Accountability Office, Testimony before the Subcommittees on Management, Investigations, and Oversight, and Border, Maritime and Global Counterterrorism, Committee on Homeland Security, House of Representatives, Secure Border Initiative: Observations on Selected Aspects of SBInet Implementation (Oct. 24, 2007), available at www.gao.gov/new.items/do8131t.pdf.

¹⁴³ Working Group Report, *supra* note 11, at 7.

¹⁴⁴ *Id.*

¹⁴⁴ It is important to recognize what indigenous peoples are meaning when they refer to their rights to their lands and territories. See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007) (see specifically: art. 25, "maintain and strengthen their distinctive spiritual relationships with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas . . ."; art. 26, "lands and territories"; art. 30, "military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned"; art. 36, "in particular those divided by international borders, have the right to maintain and develop contacts, . . . with their own members as well as other peoples across borders . . ."; art. 37, "enforcement of treaties, agreements, and other constructive arrangements . . .").

¹⁴⁵ *President Bush Signs the Secure Fence Act*, Office of the Press Secretary, The White House (Oct. 26, 2006, 9:34 AM), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026.html>.

¹⁴⁶ Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, § 2.

¹⁴⁷ Daniel B. Wood, *Billions for a US-Mexico border fence, but is it doing any good?*, THE CHRISTIAN SCIENCE MONITOR (Sept. 19, 2009), <http://www.csmonitor.com/USA/2009/0919/p02s09-usgn.html>.

is that it will stop unauthorized immigration flows. However, the wall is not an effective means by which to prevent or control immigration.¹⁴⁸ Inflows of unauthorized immigrants were decreasing even before the construction of the border wall. Entries of new unauthorized immigrants averaged 800,000 a year from 2000 to 2004, but started a decreasing trend of less than 500,000 a year from 2005 to 2008, covering the period when the federal government started to plan and build the border wall.¹⁴⁹

73. A report of the U.S. Government Accountability Office (GAO) admits that part of the decline in apprehensions of undocumented immigrants could have come from sources other than the tactical infrastructure of the wall, like an increase of Border Patrol agents, and because less migrants are entering the country due to the economic downturn.¹⁵⁰ “The border fence is a speed bump in the desert”, the U.S. Border Patrol spokesman Mike Scioli said. “It slows them down long enough for us to respond.”¹⁵¹ His statement was a reaction to a video posted on the internet in January of 2011, which documents two young women scaling a section of the border wall in just 18 seconds. Scioli “acknowledged that channeling traffic into unfenced communities and natural areas is done on purpose, as part of the agency’s overall strategy.”¹⁵²

74. Another academic study proved that border enforcement efforts since 1993 have not stopped nor discouraged unauthorized immigrants from coming to the U.S. New physical fortifications and virtual surveillance systems do not have “discernible effect on the overall flow of illegal migrants from Mexico,” wrote Professor Wayne Cornelius, who conducted interviews with thousands of undocumented immigrants. These new layers of protection “give people-smugglers an additional pretext for raising fees; divert clandestine crossings to more remote and dangerous areas, multiplying migrant deaths; cause more unauthorized crossings to be made through legal ports-of-entry, using false or borrowed documents; and induce more migrants and their family members to settle permanently in this country.”¹⁵³

75. However, half of the unauthorized immigrants in the U.S. did not jump a fence or walk through the desert to enter the country. Roughly half of the 11 million undocumented immigrants entered the U.S. with valid visas through legal ports of

¹⁴⁸ See *Secure Border Initiative: Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed*, U.S. Government Accountability Office, GAO-09-896 (Sept. 26, 2009) [hereinafter GAO report].

¹⁴⁹ Jeffrey Passel and D’Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, PEW HISPANIC CTR. (Oct. 2, 2008), <http://www.pewhispanic.org/2008/10/02/trends-in-unauthorized-immigration/>.

¹⁵⁰ GAO report, *supra* note 150.

¹⁵¹ Sean Holstege, *Longer, taller fencing gives illegal migrants a higher hurdle*, THE ARIZ. REPUBLIC (Nov. 13, 2008), <http://www.azcentral.com/arizonarepublic/news/articles/2008/11/13/20081113borderclimb1113.html>.

¹⁵² Kevin Sieff, *Breaks in Border Fence Have Residents Suspicious of DHS’s Plans*, BROWNSVILLE HERALD (June 22, 2008), <http://www.brownsvilleherald.com/news/border-87851-fence-pedro.html>.

¹⁵³ Wayne A. Cornelius, *Impacts of Border Enforcement on Unauthorized Mexican Migration to the United States*, CTR. FOR COMPARATIVE IMMIGRATION STUDIES (Sept. 26, 2006), <http://borderbattles.ssrc.org/Cornelius/>.

entry, and then overstayed those visas.¹⁵⁴ The GAO reported that DHS had not adopted a program to track foreigners who had overstayed their visas.¹⁵⁵ Furthermore, the GAO's September 2009 report condemned the DHS for not measuring effectiveness of the border infrastructure and for not conclusively taking steps to demonstrate "effective control" of the U.S. border.¹⁵⁶

76. The U.S. government also cites terrorism prevention as a policy justification for the border wall. However, the border wall has not helped in preventing alleged terrorists from entering this country. In fact, all of the 19 terrorists who attacked the country on 9/11 entered the U.S. through legal ports of entry.¹⁵⁷ All but two terrorists gained entrance into the U.S. with valid tourist or student visas granted by immigration authorities. Those two exceptions crossed the U.S.-Canada border¹⁵⁸.

77. It has already been demonstrated that the wall has done little to realize its stated purpose. The main type of immigration from Mexico and Latin America is comprised of unauthorized workers and migrants seeking employment in the United States,¹⁵⁹ however, evidence suggests that the border wall is not an effective means to deter this type of immigration and instead simply shifts migrant crossings to those places along the border where there are gaps in the wall.¹⁶⁰ Finally, it has been noted that drug cartel members have developed strategic maneuvers to counter the government's security measures implemented along the wall, in order to enable drugs to continue to be smuggled through.¹⁶¹

¹⁵⁴ *Fact Sheet: Modes of Entry for the Unauthorized Population*, PEW HISPANIC CTR. (2006), <http://pewhispanic.org/files/factsheets/19.pdf>.

¹⁵⁵ Richard M. Stana, Testimony Before the Committee on Homeland Security and Governmental Affairs, U.S. Senate, *Border Security: DHS Progress and Challenges in Securing the U.S. Southwest and Northern Borders*, United States Government Accountability Office (Mar. 30, 2011), <http://www.gao.gov/products/GAO-11-508T>.

¹⁵⁶ GAO Report, *supra* note 150.

¹⁵⁷ Ted Robbins, *Nearly Half of Illegal Immigrants Overstay Visas*, NPR (June 14, 2006), <http://www.npr.org/templates/story/story.php?storyId=5485917>.

¹⁵⁸ Oriana Zill, *Crossing Borders: How Terrorists Use Fake Passports, Visas, and Other Identity Documents*, FRONTLINE, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/trail/etc/fake.html>.

¹⁵⁹ See Kate Brick, A.E. Challinor, & Marc R. Rosenblum, *Mexican and Central American Immigrants in the United States*, MIGRATION POL'Y INST. 2011, at 4-5 (June 2011), <http://www.migrationpolicy.org/pubs/MexCentAmimmigrants.pdf> ("Indeed, 60 percent of all unauthorized immigrants come from Mexico, and . . . [un]authorized immigrants make up a similar proportion of Central Americans in the United States.").

¹⁶⁰ Denise Gilman, *Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas Mexico Border Wall*, 46 TEX. INT'L L. J. 257, 279 (2011) (citing BLAS NUÑEZ-NETO & YULE KIM, CONG. RESEARCH SERV., RL33659, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER 1-2, 26 (2008)).

¹⁶¹ *Without Strategy: America's Border Security Blunders Facilitate and Empower Mexico's Drug Cartels*, TEX. BORDER COAL. (Jan. 12, 2012), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/TBC%20Report-Without%20Strategy-Final\[1\].pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/Huus/TBC%20Report-Without%20Strategy-Final[1].pdf).

V. There is no adequate judicial process available to challenge the racially discriminatory impact of the wall, leaving people living along the Texas-Mexico border without any effective judicial recourse.

78. Article 6 of the Convention ensures that states provide an adequate judicial remedy for instances of racial discrimination, requiring states to provide “to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination.”¹⁶² This right to due process of law in regard to judicial and administrative proceedings is also affirmed in the Universal Declaration of Human Rights, which states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁶³

79. In regard to challenges brought against the racially discriminatory impact of the Texas-Mexico border wall, the U.S. has not complied with its duties to make available an adequate judicial remedy. There are three main deficiencies in the availability of a judicial remedy for people impacted by the border wall. First, the government’s use of eminent domain to take property for construction of the border wall cannot be effectively challenged in court. Second, courts have not allowed claims to be brought regarding the racially discriminatory impact of the border wall. Finally, Congress has passed legislation allowing DHS to waive any law that impedes the construction of the border wall, including laws that protect indigenous peoples, the environment, and public health and safety. These issues will be examined in further detail below.

80. First, the government’s use of eminent domain to take property for construction of the border wall cannot be effectively challenged in court. U.S. courts give the government broad discretion to take property necessary for the implementation of government projects. This often involves the taking of an individual citizen’s property, which the government can do without the citizen’s consent. There are, however, two limitations to this power, found in the Fifth Amendment to the United States Constitution: 1) that the taking must be for “public use”; and 2) that adequate compensation must be paid.¹⁶⁴ The United States has defined the “public use” requirement very broadly and courts have interpreted it to mean that the government need only have a conceivable public purpose behind taking the property.¹⁶⁵ Additionally, courts tend to defer to legislative judgment on what constitutes a “public use.”¹⁶⁶ One of the U.S. government’s main justifications for the construction of the border wall is that the wall is necessary for national security reasons. This justification meets this low standard for “public use.” In her

¹⁶² ICERD, *supra* note 13, at art. 6.

¹⁶³ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810, art. 8 (1948) [hereinafter Universal Declaration].

¹⁶⁴ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁶⁵ See *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (equating “public use” with “public purpose”).

¹⁶⁶ *Id.*

affidavit, Corinna Spencer-Scheurich, an attorney for the South Texas Civil Rights Project, stated that “it was almost impossible to prevent the taking of the land,” and that from her experience as a lawyer, eminent domain is very hard to defend against.¹⁶⁷

81. In 2007, DHS began to seek temporary access to land along the Texas-Mexico border in order to conduct land surveys and mapping.¹⁶⁸ This attempt to gain temporary access to private land constituted a taking, because it required a temporary and partial relinquishment of land ownership rights to DHS. For those who did not voluntarily grant access to their land, DHS successfully initiated condemnation proceedings in early 2008.¹⁶⁹ After the initial surveys were conducted, DHS began the process of obtaining ownership of land along the border for the construction of the wall, making offers of between \$4000 and \$10,000 for the parcels of land.¹⁷⁰ For those who refused to sell, DHS initiated condemnation lawsuits. In 2007, DHS initiated condemnation proceedings against Dr. Eloisa Tamez. Dr. Tamez and the Center for Human Rights and Constitutional Law initiated a class action lawsuit, claiming that DHS had not properly negotiated with landowners before condemning their property and that the government’s condemnation suits should be dismissed.¹⁷¹ The case was appealed to the Fifth Circuit, which dismissed for lack of jurisdiction, allowing the government to proceed with the taking.¹⁷² A total of 0.26 acres were taken from Dr. Tamez’s land for the construction of the border wall, severing her access to the southern portions of her land.¹⁷³ She has yet to be granted direct access to her property on the south side of the border wall.¹⁷⁴

82. Dr. Tamez’s challenge to the government’s taking of her land is a rare case – most affected landowners were unable to challenge the condemnation suits initiated by the government. It is very hard for people to defend against these condemnation suits because they must hire a lawyer, and, if they are unsatisfied with the compensation proposal from the government, they must also hire several experts to appraise their land and argue that they should receive more money.¹⁷⁵ This procedure is very costly in both time and money, and favors the government since it has many more resources than the average landowner. Celestino Gallegos, a former Team Manager for the Border Rights Team at Texas Rio Grande Legal Aid, Inc., estimates that over half of the people whose land was condemned for construction of the border wall were unrepresented by an attorney during the negotiations and

¹⁶⁷ Aff. of Corinna Spencer-Scheurich, Regional Director of the South Texas Civil Rights Project (April 10, 2012).

¹⁶⁸ Working Group Report, *supra* note 11, at 5.

¹⁶⁹ *See, e.g.*, Complaint in Condemnation, United States of America v. 1.04 Acres of Land and Eloisa G. Tamez, Case 1:08-cv-00044 (S.D. Tex. May 28, 2008).

¹⁷⁰ *See, e.g.*, Declaration of Taking, United States of America v. 0.43 Acres of Land and Estate of Pilar Cabrera, Case 1:08-cv-194 (S.D. Tex. May 28, 2008).

¹⁷¹ Aff. of Alberto Mesta, Managing Attorney for the El Paso office of Texas Rio Grande Legal Aid (April 16, 2012); Notice of Motion and Motion for Class Certification, Eloisa Garcia Tamez v. Chertoff, Case B-08-044 (S.D. Tex. Feb. 6, 2008).

¹⁷² U.S. v. Tamez, Case 1:08-cv-00044 (5th Cir. Jan. 9, 2009).

¹⁷³ Aff. of Dr. Eloisa Garcia Tamez (Apr. 10, 2012).

¹⁷⁴ *Id.*

¹⁷⁵ Aff. of Celestino Gallegos, former Team Manager for the Border Rights Team at Texas Rio Grande Legal Aid, Inc. (Apr. 16, 2012).

proceedings.¹⁷⁶ The more affluent landowners, on the other hand, hired lawyers and initiated many complaints, eventually receiving payment of much more money than they were initially offered for their land.¹⁷⁷

83. It is highly questionable whether DHS had the authority to take the land for the construction of the border wall, especially considering the lack of clear justification for the wall. However, assuming that DHS had the ability to take the land on which the wall was actually to be built (which we do not concede), DHS exceeded even that authority by taking more land than the wall was actually going to be constructed on. The construction of the wall had the practical effect of cutting off landowners' access to any land they owned that was on the opposite side of the wall. Corinna Spencer-Scheurich noted that all of her clients had pieces of land taken from the middle of their property, sometimes up to a mile from the actual border.¹⁷⁸ As a result, the taking of property for construction of the border wall has deprived many local residents of not just their property, but also of their livelihoods. For example, the inability of property owners to directly access large portions of their property near the river, which have traditionally been used by the communities to graze and water livestock and irrigate their crops, has had a negative impact on their livelihoods. Additionally, according to Celestino Gallegos the government felt that it should not have to reimburse landowners for the loss of value of this "no-man's land" between the river and the border wall, since the wall was not actually constructed on that land.¹⁷⁹ Though landowners still lost access to that land, they were not compensated for this loss in value.

84. Second, courts have not entertained claims regarding the racially discriminatory impact of the border wall. Currently, under U.S. law there is no means by which victims of racial discrimination can petition the judiciary to receive any sort of effective remedy for the discriminatory harm resulting from the border wall's construction. The inadequacy of a U.S. judicial remedy is in part a consequence of the unlimited power given to the Secretary of DHS and the Attorney General through the Real ID Act of 2005; however, the lack of a judicial remedy is also an inherent inadequacy in U.S. law itself.¹⁸⁰ For instance, U.S. law makes it extremely difficult for a claimant to establish racial discrimination resulting from the construction of the border wall. To establish that the border wall is racially discriminatory, the claimant would have to show evidence that, in constructing the wall, the government intentionally discriminated against those living in border communities based on race or national origin.¹⁸¹ This requirement that the claimant show intentional discrimination on the part of the government creates a standard that is almost impossible to meet.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Aff. of Corinna Spencer-Scheurich, Regional Director of the South Texas Civil Rights Project (April 10, 2012).

¹⁷⁹ Aff. of Celestino Gallegos, former Team Manager for the Border Rights Team at Texas Rio Grande Legal Aid, Inc. (Apr. 16, 2012).

¹⁸⁰ The Real ID Act of 2005 included a waiver of all laws necessary to "ensure expeditious construction of the barriers and roads" related to border construction. 119 Stat. 302 (2005).

¹⁸¹ See *Washington v. Davis*, 426 U.S. 229, 235-39 (1976) (establishing the requirement of intentional discrimination in order to establish a constitutional equal protection violation).

85. Litigation in the U.S. has not been able to halt construction of the wall because U.S. courts have refused to hear claims for racial discrimination related to the wall and have steadily cut back on meaningful remedies, such as broad injunctive relief, that would mandate government reform. For example, in *County of El Paso v. Chertoff*, plaintiffs claimed that the waiver power granted to DHS was (1) an unconstitutional exercise of legislative powers by Michael Chertoff, the Secretary of Homeland Security; (2) a contravention of basic constitutional lawmaking procedures; and (3) a violation of the principles of separation of powers and federalism.¹⁸² Plaintiffs sought a preliminary injunction to prevent DHS from constructing any portion of the border wall unless DHS complied with the laws waived by Michael Chertoff, the Secretary of DHS.¹⁸³ The court refused to grant the injunction, holding, *inter alia*, that plaintiffs had failed to establish either that preserving compliance with the waived laws outweighs the public's interest in secure borders, or that plaintiffs will suffer irreparable injury if the injunction is not granted.¹⁸⁴ Additionally, in *Texas Border Coalition v. Napolitano*, plaintiffs filed a preemptive challenge to anticipated condemnations of land for construction of the border wall.¹⁸⁵ Plaintiffs claimed, among other things, that DHS violated the equal protection clause by targeting properties for condemnation based on "political and other considerations not rationally related to the effective and practical considerations the government is statutorily required to consider when determining where the fence the border."¹⁸⁶ The court dismissed plaintiffs' equal protection claim, holding that plaintiffs had not established that they were treated differently from similarly situation property owners and that the IIRIRA is not "facially discriminatory, designed to accomplish a discriminatory result, or enforced or applied in a discriminatory manner so as to violate equal protection guarantees."¹⁸⁷ As these cases illustrate, courts have yet to allow any meaningful judicial challenge to the discriminatory impact of the border wall. As a result, DHS continues to reinforce the border wall without giving affected people the opportunity of challenging the wall's construction. The authority of the government to build the wall cannot be effectively challenged and continues unchecked.

86. Finally, Congress has passed legislation allowing DHS to waive any law that impedes the construction of the border wall, without providing the opportunity to challenge these waivers. Under § 102(c) of the REAL ID Act of 2005, the Secretary of DHS has the authority to waive "all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction" of the border wall.¹⁸⁸ This authority has been used widely in the construction of the border wall. For example, in April 2008, Michael Chertoff, who was then serving as the DHS Secretary, waived 36 federal and state laws in order to "ensure the

¹⁸² Complaint at 2, *County of El Paso, et al. v. Chertoff*, EP-08-CA-196-FM (W.D. Tex. 2008).

¹⁸³ Order Granting Defendants' Motion to Dismiss, *County of El Paso, et al. v. Michael Chertoff and U.S. Department of Homeland Security*, EP-08-CA-196-FM (W.D. Tex. 2008).

¹⁸⁴ *Id.* at 27.

¹⁸⁵ *Texas Border Coalition v. Napolitano*, 614 F. Supp. 2d 54, 66 (D.D.C. 2009).

¹⁸⁶ Complaint at 27, *Texas Border Coalition v. Napolitano*, 614 F. Supp. 2d 54 (D.D.C. 2009) (No. 08-0848).

¹⁸⁷ *Tex. Border Coalition*, 614 F. Supp. 2d at 66.

¹⁸⁸ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

expeditious construction” of the border wall.¹⁸⁹ Among the laws waived were the Native American Graves Protection and Repatriation Act,¹⁹⁰ the American Indian Religious Freedom Act,¹⁹¹ the National Historic Preservation Act,¹⁹² the Archaeological Resources Protection Act,¹⁹³ the Antiquities Act,¹⁹⁴ and the Administrative Procedure Act.¹⁹⁵ While the REAL ID Act thus provided the Secretary with unprecedented authority, it also restricted the available judicial review of the Secretary’s decisions. The statute gave U.S. district courts exclusive jurisdiction over claims arising from the Secretary’s waiver, but then provided that parties may only appeal a district court’s decision to the U.S. Supreme Court.¹⁹⁶ By nature, review at the Supreme Court level is only available at the discretion of the Court, and thus far the Court has denied the petitions for certiorari dealing with the exercise of this waiver.¹⁹⁷ Thus, claimants are essentially precluded from appealing the decisions of district courts since the statute strips U.S. Courts of Appeals of jurisdiction. This restriction of judicial review has been one of the bases for the multiple constitutional challenges brought against § 102(c).¹⁹⁸ However, all of these constitutional challenges have failed, and have not been able to be appealed due to the very provision that is being challenged as unconstitutional.¹⁹⁹ If the border wall is expanded or reinforced, more land will be taken under the current legislation and without judicial remedies for affected landowners.

VI. The U.S. immigration policy debate is already racially charged, and the construction of the border wall is heightening racial tensions along the border, harming the already marginalized populations that live along the border.

87. As discussed *supra* Section I, the purported justification and rationale for why the wall was built is based on little factual evidence. Rather, the wall comes from, and contributes to, an environment of discrimination in U.S. immigration policy that unduly discriminates against Latinos. The construction of the border wall is a representation of the national political debate regarding illegal immigration that has heightened concerns about discrimination against Latinos, including those who were

¹⁸⁹ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19078 (Apr. 8, 2008).

¹⁹⁰ 25 U.S.C. 3001 *et seq.*

¹⁹¹ 42 U.S.C. 1996

¹⁹² 16 U.S.C. 470 *et seq.*

¹⁹³ 16 U.S.C. 470aa *et seq.*

¹⁹⁴ 16 U.S.C. 431 *et seq.*

¹⁹⁵ 5 U.S.C. 551 *et seq.*

¹⁹⁶ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

¹⁹⁷ *County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. 2008), cert. denied 129 S. Ct. 2789 (2009); *County of El Paso v. Napolitano*, 129 S. Ct. 2789 (2009), cert. denied; *Defenders of Wildlife v. Chertoff*, 527 F.Supp. 2d 119 (D.D.C. 2007), cert. denied (2008).

¹⁹⁸ *See County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. 2008), cert. denied, 129 S. Ct. 2789 (2009) (rejecting challenge to DHS waiver authority underpinning border wall construction); *Order of Judge Hanen, United States v. Tamez*, No. B-08-531 (April 16, 2009) (rejecting the arguments made by Dr. Tamez and granting possession of Dr. Tamez’s property to the U.S. government); *Order of Judge Hanen, Tamez v. United States*, Case 1:08-CV-0555 (Jan. 27, 2009) (dismissing Dr. Tamez’s affirmative class action litigation against the government); *Tex. Border Coalition v. Napolitano*, 614 F. Supp. 2d 54 (D.D.C. 2009) (dismissing class action litigation against the government filed by border municipalities).

¹⁹⁹ *Id.*

born in the United States or who immigrated legally to the U.S.²⁰⁰

88. Latino residents along the border have traditionally traveled back and forth between Mexico and Texas for social and economic reasons. Many families include nationals from Mexico and the U.S. with family members living on each side of the border and visiting each other regularly, while others travel daily across the border to shop, work, study, or conduct business. The border wall disrupts this way of life and culture, and harms the economy of many communities along the border.²⁰¹

89. This kind of discrimination and marginalization also extends to the Native American tribal communities living near the wall. According to FBI statistics on hate crimes, American Indians account for two percent of the victims of racially motivated hate crimes, but they only comprise one percent of the total U.S. population.²⁰² Another study from the Department of Justice found that one out of ten American Indians have been a victim of violence, a rate twice as high as the average U.S. resident.²⁰³

a. The Texas border is an area of income disparities and an economically distressed population

90. In general, U.S. counties bordering Mexico have some of the highest poverty rates in the country.²⁰⁴ Texas ranks fourth in the nation with the highest amount of people living below federal poverty lines.²⁰⁵ Specifically, Cameron and Hidalgo counties, where the border wall stands, are two of the most impoverished counties in the entire United States.²⁰⁶ Both counties have 35% of the population living below the poverty level, whereas the national average is closer to 12%.²⁰⁷ While the median annual income of American households is \$51,914 dollars, the approximate annual median income of the families in the Texan border counties is \$31,264.²⁰⁸ Additionally, the unemployment rate along the Texas side of the border is 250% - 300% higher than in the rest of the country.²⁰⁹ Border communities generally have

²⁰⁰ Mark Hugo López, Rich Morin, & Paul Taylor, *Illegal Immigration Backlash Worries, Divides Latinos*, PEW HISPANIC CTR. (Oct. 28, 2010), <http://www.pewhispanic.org/2010/10/28/illegal-immigration-backlash-worries-divides-latinos/>

²⁰¹ Working Group Report, *supra* note 11, at 12.

²⁰² Susy Buchanan, *Three Charged in Beating of American Indian in Arizona*, Intelligence Report, S. POVERTY L. CTR., issue 24 (Winter 2006), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/indian-blood>.

²⁰³ Steven W. Perry, *American Indians and Crime. A BJS Statistical Profile, 1992-2002*, Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE (Dec. 2004).

²⁰⁴ Dan Joseph, *Average Poverty Rate is Twice as High for U.S. Counties Bordering Mexico as for Rest of U.S.*, CNSN News (Dec. 16, 2010), available at <http://cnsnews.com/news/article/average-poverty-rate-twice-high-us-counties-bordering-mexico-rest-us>.

²⁰⁵ *Texas on the Brink*, Texas Legislative Study Group, Texas State Legislature, 82nd Regular Session (Feb. 2011), available at texaslsg.org/texasonthebrink/texasonthebrink.pdf.

²⁰⁶ *U.S. Census Bureau: State and County QuickFacts*, U.S. CENSUS BUREAU (Oct. 13, 2011), <http://quickfacts.census.gov/qfd/states/48000.html>.

²⁰⁷ *Id.*

²⁰⁸ *Income, Poverty and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 13, 2011).

²⁰⁹ *The United States-Mexico Border Region at a Glance*, U.S. BORDER HEALTH COMM'N, http://www.borderhealth.org/border_region.php.

lower levels of schooling and a larger share of the population that has not mastered English.²¹⁰ Approximately 432,000 individuals live in 1,200 *colonias*, which are unincorporated, semi-rural communities located mostly along the Texas border and marked by substandard housing and a lack of potable water or proper sewage systems.²¹¹

b. *An immigration enforcement approach has sparked discrimination against Latinos*

91. Nearly half of the Latinos in the U.S. reported that they were treated poorly in government offices because of racial or ethnic bias, and those who perceive a heavy local government focus on illegal immigration reported discriminatory treatment from public officers very or fairly often.²¹² Enforcement of immigration policies had a disproportionate effect on minorities, and much of the increase in the number of Latinos sentenced in federal courts has come from a strengthening of immigration policies between 1991 and 2007.²¹³

92. Last year, state legislators around the country introduced an unprecedented number of 1,607 bills and resolutions relating to immigrants and refugees that increased racial profiling, including English-only mandates and bans on renting properties to immigrants.²¹⁴ Five states – Alabama, Georgia, Indiana, South Carolina, and Utah – approved anti-immigrants laws in 2011 following the example of Arizona’s SB 1070.²¹⁵ The legislation requires law enforcement agents to ask for the immigration status of a person involved in a lawful stop, if they have “reasonable suspicion” that the person is an undocumented immigrant, which allowed racial profiling. The law also created a state violation for failing to carry an alien registration document. A federal judge blocked Arizona’s SB 1070 months after the legislation’s passage, and court challenges based on preemption and civil rights have been filed against those laws in Alabama, Georgia, Utah, and Indiana. An Amnesty International report has found that these state laws and local policies are creating barriers that are preventing immigrants from accessing their basic human rights, including rights to education and essential health care services.²¹⁶ The report states that federal immigration officials are increasingly working with state and local law enforcement agencies but improper oversight of state and local law enforcement has

²¹⁰ *Developing the U.S.-Mexico Border Region for a Prosperous and Secure Relationship*, James A. Baker III Institute for Public Policy, Rice University, at 5 (April 2009), <http://www.bakerinstitute.org/news/policy-report-38>.

²¹¹ *The United States-Mexico Border Region at a Glance*, U.S. BORDER HEALTH COMM’N, http://www.borderhealth.org/border_region.php.

²¹² *National Survey of Latinos: As Illegal Immigration Issue Heats Up, Hispanics Feel a Chill*, PEW HISPANIC CTR. (Dec. 13, 2007), <http://www.pewhispanic.org/2007/12/13/iv-perceptions-of-discrimination/>.

²¹³ Mark Hugo López & Michael Light, *A Rising Share: Hispanics and Federal Crime*, PEW HISPANIC CTR. (Feb. 18, 2009), <http://www.pewhispanic.org/2009/02/18/a-rising-share-hispanics-and-federal-crime/>.

²¹⁴ *Immigration Policy Report, 2011 Immigration-Related Laws and Resolutions in the States (January-June)*, NAT’L CONFERENCE OF STATE LEGISLATURES (Sept. 19, 2011), <http://www.ncsl.org/issues-research/immig/state-immigration-laws-january-to-june-2011.aspx>.

²¹⁵ *Id.*

²¹⁶ Amnesty International, *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest* (March 2012) at 11-12, available at http://www.amnestyusa.org/sites/default/files/ai_inhostileterrain_032312_singles.pdf.

led to increased racial profiling.²¹⁷

93. Through all these actions, U.S. local and state public authorities are compounding racial discrimination against Latinos. One result of these anti-immigrant initiatives is an increase of crimes against this group. Latinos are more likely than whites to become victims of personal crimes such as rape, sexual assault, and robbery, but are less inclined to report these incidents to the police, according to the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS).²¹⁸ A third of the Latinos who said they would not report those incidents to the police cited fear of repercussions, such as immigration enforcement or discrimination, as a reason not to contact the authorities.²¹⁹ The Federal Bureau of Investigation (FBI) reported that Latinos were the majority of the victims of hate crimes committed based on the perceived ethnicity or national origin in 2010.²²⁰

c. Border residents live with fear due to an increasing military approach at the border.

94. Latinos living in border communities in Texas are especially affected by immigration policies, as well as the construction of the border wall. The number of Border Patrol agents has more than doubled along the southern border since 2004, despite a decrease in illegal crossings along the southern border (which is reflected in fewer apprehensions of undocumented immigrants).²²¹

95. Increasingly, the Border Patrol is taking more of a military approach than a policing approach. Federal law-enforcement agencies dispatched in the border justify violations against civil rights in order to secure the border. As an example, the American Civil Liberties Union (ACLU) claims that border patrol agents violate the Fourth Amendment of the American Constitution by conducting arbitrary detentions and searches of regular citizens within a 100-mile zone around the external boundary of the United States. The organization warns that such tactics invite racial profiling of individuals who pose no threat to U.S. national security.²²²

96. Local residents can no longer go to local police for harm perpetrated against them by the Customs and Border Patrol agents. Landowners in Cameron County have reported that they have contacted local police to assist them in documented cases of trespassing and destruction of lands, but the official response was that the local police were disallowed from responding to or filing a written report about

²¹⁷ *Id.* at 11, 38.

²¹⁸ Mark Hugo López & Gretchen Livingston, *Low Confidence, High Exposure Hispanics and the Criminal Justice System*, PEW HISPANIC CTR. (Apr. 7, 2009), <http://www.pewhispanic.org/2009/04/07/iii-reporting-crimes-to-the-police/>.

²¹⁹ *Id.*

²²⁰ *Hate Crime Statistics, 2010. Incidents and Offenses*, FED. BUREAU OF INVESTIGATION (Nov. 2011), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses>.

²²¹ *Obama says border patrol has doubled the number of agents since 2004*, POLITIFACT (May 10, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/may/10/barack-obama/obama-says-border-patrol-has-doubled-number-agents/>.

²²² Melissa Del Bosque, *Life in the Constitution-Free Zone*, TEXAS OBSERVER (Feb. 17, 2012), <http://www.texasobserver.org/lalinea/life-in-the-constitution-free-zone>.

civilian complaints against the U.S. government along the border wall.²²³

97. Border community members no longer feel free to lead their normal lives. Weapons given to the Border Patrol legitimize a warfare mentality. For example, the Predators, an unmanned aircraft used in the wars in Iraq and Afghanistan, were introduced on the U.S.-Mexico border in 2005, and since then, the drones have logged more than 10,000 flight hours in this area.²²⁴

98. Suggestions have been made to enforce the wall with increased technology, heightened numbers of agents, and potentially even an electric fence.²²⁵ The United States government has every right to close its borders if it so wishes; however, doing so in a way that discriminates against one or more groups of people violates U.S. domestic and international laws of equal protection. The recent laws and immigration policies that the U.S. government has enacted in the last few years reflect the various ways in which the U.S. government discriminates against Latinos in this country. The U.S. government is thus failing in its duty to prevent public authorities or public institutions from promoting or inciting racial discrimination.

VII. Consideration under the CERD early warning and urgent action procedure is warranted.

99. The situation of the Texas-Mexico border wall constitutes a continuing pattern of racial discrimination against Latinos and indigenous peoples living near the border. The circumstances surrounding the border wall meet multiple criteria under the early warning and urgent action procedure, including: i) adoption of new discriminatory legislation; ii) encroachment on traditional lands of indigenous peoples; iii) a significant and persistent pattern of racial discrimination evidenced by social and economic factors; iv) lack of an effective recourse procedure; and v) lack of judicial remedy.²²⁶

100. First, the wall is a result of the adoption of legislation and pending plans that have a discriminatory impact, specifically the Secure Fence Act of 2006, the Consolidated Appropriations Act of 2008 and related legislation.²²⁷ The U.S. government has failed to take effective measures to review the discriminatory impact of its legislation, which is in direct violation of ICERD Article II.²²⁸

²²³ Interview between Margo Tamez and local Cameron County resident (due to safety and protection concerns, this interviewee has requested to remain anonymous).

²²⁴ *US employs more drones to watch the border*, FOX NEWS LATINO (Nov. 12, 2011), <http://latino.foxnews.com/latino/news/2011/11/12/us-employs-more-drones-to-watch-border/#ixzz1nW1Kk7Di>.

²²⁵ Lucy Madison, *Cain: Electric fence may be 'over-exaggeration'*, CBS NEWS (Oct. 30, 2011) http://www.cbsnews.com/8301-3460_162-20127620/cain-electric-fence-may-be-over-exaggeration/ (while Herman Cain acknowledged that the idea of an electric fence might have been an over-exaggeration, he also stated in this article that he "wasn't walking away from that [idea].").

²²⁶ CERD Early Warning Guidelines, *supra* note 4.

²²⁷ *See, infra* ____.

²²⁸ ICERD, *supra* note 13, art. 2 ("Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.").

101. Second, the border wall encroaches on the traditional lands of indigenous peoples and their access to the river. The Lipan Apache, Kickapoo, and Ysleta del Sur Pueblo tribes were and are still deprived of access to significant parts of their traditional lands. Each group has distinct histories with colonial and state governments, which have impacted the current-day identification with customary territories and use areas. The U.S. government did not seek the free, prior, and informed consent of these indigenous communities before encroaching on their traditional lands as required under the UNDRIP.

102. Third, the border wall is a further manifestation of existing racial discrimination against the poor Latinos and indigenous communities along the Texas-Mexico Border. The placement of the border wall, marginalization of the poor Latinos and indigenous communities, and new discriminatory national immigration policies of the U.S. government establish a significant and persistent pattern of racial discrimination along the Texas-Mexico border.

103. Fourth, a lack of effective recourse procedures under U.S. law for the harm caused exacerbates the seriousness of the discriminatory situation faced by poor Latinos and indigenous communities in Texas.²²⁹ U.S. law cannot serve as an effective mechanism to protect the rights that have been violated. For example, the U.S. Congress passed legislation giving DHS the authority to overlook laws that are normally in place to protect indigenous rights and minority groups.²³⁰ In 2008, the DHS Secretary used this power to waive 36 laws in their entirety, including the National Historic Preservation Act,²³¹ the National American Graves Protection and Repatriation Act,²³² and the American Indian Religious Freedom Act.²³³ These waivers precluded any possibility of challenging the construction of the border wall on the basis of indigenous or environmental destruction.

104. Finally, in addition to the multiple other criteria already described, there is no adequate judicial remedy for the harm inflicted on the border communities under U.S. law. In addition, there is no legal ways to challenge the current plans to expand the border wall. Although there is pending litigation in a federal court in Texas,²³⁴ this litigation does not address the racial discrimination that has and is continuing to occur as a result of the wall's construction. The litigation alleges that compensation given to property owners along the border was inadequate, and that it was given as a result of coercion and force. This litigation is limited to the issue of the inadequate compensation given to property owners for the value of their land, and has been postponed indefinitely since October 2009.

²²⁹ CERD Early Warning Guidelines, *supra* note 4.

²³⁰ REAL ID Act of 2005, Pub.L. No. 109-13, 119 Stat. 231, 306, 8 U.S.C. § 1103.

²³¹ 16 U.S.C. 470 *et seq.*

²³² 25 U.S.C. 3001 *et seq.* (requiring federal officials to consult with tribal communities if they anticipate that their activities will have an effect on American Indian burials).

²³³ 42 U.S.C. 1996 (ensuring American Indians access to religious sites by requiring federal officials to consult with tribal leaders).

²³⁴ U.S. v. Tamez, No. 1:08-cv-00044 (S.D. Tex. 2008), *available at*

<http://www.utexas.edu/law/centers/humanrights/borderwall/law/lawsuits-property.html>.

105. The effect that depriving indigenous communities of their land has on their cultural identity constitutes continued irreparable harm under ICERD.²³⁵ Indigenous peoples' unique way of life and close relationship with the land makes "[t]he lands they traditionally use and occupy [. . .] critical to their physical, cultural, and spiritual vitality."²³⁶ Decisions by CERD and several other international human rights organizations have urged that states take special measures to ensure the full enjoyment of rights for indigenous communities, especially with regard to the use of their land as it is crucial in preserving their survival and cultural identity.²³⁷ By not recognizing the legal status of indigenous communities on the Texas border, the U.S. government violates these communities' right to juridical personality and their right to full enjoyment of civil rights.²³⁸ In doing so, the government racially discriminates against the indigenous communities by "impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."²³⁹

VIII. Conclusion and request

106. The construction of the Texas–Mexico border wall has created irreparable and continuous harm through its racially discriminatory effects on the communities that live alongside the southwestern border of the U.S. The wall has abrogated these communities' property and land rights, equal protection rights, indigenous rights, and right to juridical personality, and has severely prevented their full enjoyment of fundamental basic rights as guaranteed in the International Convention on the Elimination of Racial Discrimination. The minimum demand of the community is that the wall be taken down, that the lands be returned to all impacted people, that there be a formal apology by the President of the United States to the communities affected, and that a Truth Commission be formed to investigate the injustices and to perform necessary redress, restitution, and reparation.²⁴⁰ In the interim, we request that CERD consider the situation under its early warning urgent action procedure.

107. As Jumano Apache community historian Enrique Madrid noted, "[t]he river

²³⁵ Committee for the Elimination of Racial Discrimination, Decision 2(54) on Australia, para. 4, A/54/18 (Mar. 18, 1999); I/A Comm. H.R. Report No. 75/02, Case 11.140, *Mary and Carrie Dann v. United States*, para. 130 n. 97 (2002).

²³⁶ *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, I/A Comm. H.R., available at <http://www.cidh.org/countryrep/Indigenous-Lands09/Chap.I-II.htm>.

²³⁷ See Letter from Anwar Kemal, Chairperson, Committee on the Elimination of Racial Discrimination, to H.E. Mr. Minelik Alemu Getahun, Ambassador, Permanent Mission of Ethiopia (Sept. 2, 2011) (urging the State party to consult or seek prior, free, and informed consent of the indigenous community before carrying out projects that would have negative impacts on their community's livelihood); see also I/A Court. H.R., Judgment, *Xáknok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Aug. 24, 2010, Ser. C No. 214 (2010), para. 182.

²³⁸ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 1, 5 U.N. Doc. A/61/L.67 (Sept. 13, 2007) ("Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.").

²³⁹ ICERD, *supra* note 13, at art. 1.

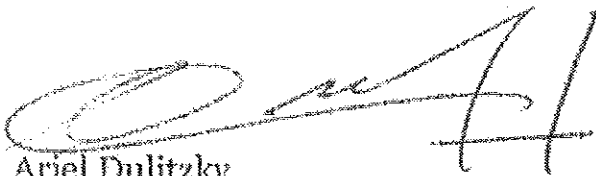
²⁴⁰ Margo Tamez, *Confronting the Wall: Ndé Principles & Protocols from El Calaboz Ranchería: Indigenous Peoples, Knowledge, Land, Territories and Human Rights*, Emilio Center for Indigenous and Human Rights (forthcoming).

has never divided us; the river has always brought us together."²⁴¹ Yet, for these border communities, the wall not only divides them, but has also begun to destroy their livelihoods, indigenous identity, culture, and knowledge systems, depriving them of land and basic necessities, and making them live in a state of perpetual fear.

Yours respectfully,

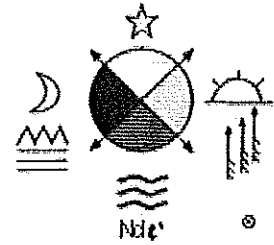
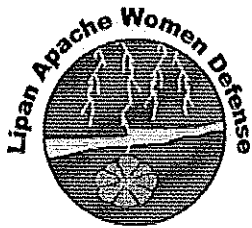


Dr. Margo Tamez
University of British Columbia Okanagan



Ariel Dulitzky
University of Texas Human Rights Clinic

²⁴¹ Interview by Dr. Margo Tamez with Enrique Madrid in Redford, Texas (August 15, 2007).



Mr. Ariel Dulitzky, Clinical Professor and Director—Human Rights Clinic
c/o Mr. Andrew Nicholson
The University of Texas at Austin
School of Law
CCJ1.324B
727 E. Dean Keeton Street
Austin, Texas 78705

Re: **Affidavit** for United Nations Committee on the Elimination of Racial Discrimination; Early Warning Measures and Urgent Action Procedures Brief on the Texas-Mexico Border Wall

By way of Ndé tradition, it is considered respectful for a human being to introduce her or his self by identifying her or his maternal and paternal family lines, place of birth, and who she or he are by way of their peoples' relationships to place.

All my ancestors, regardless of class within traditional Indigenous societies, were severely colonized through extermination wars, the politics of domination, assimilative processes, violent repression, and forced dispossession. This occurred across four sovereignties (Spain, Mexico, Texas, and the United States). Many of my foreparents adapted to colonialist structures, identities, and consciousness as a mode of surviving and adapting to radical and often abrupt changes, severe economic oppression, and violent political conditions imposed upon them as a result of the colonization and industrialization processes.

In my parents, I found stern teachings and nurturing processes were interwoven. As a result of the time in which they lived (both born in 1935—a time of severe repression) they transferred a great amount of love along with the struggle for survival in a social structure dominated by colonialism. In that, they taught traditional pillars of Indigenous ways of being, thinking, and interacting, and they taught skills to exist within a system where struggles saturated daily existence. My parents were part of a mass shift from the rural to the urban for the ranchería society of the Lower Rio Grande Valley and South Texas, and they resisted complete assimilation almost daily, which is why I think we, as a family living between San Antonio and the rural countryside, experienced so much turmoil when I was growing up.

I feel fortunate that, for whatever reason of my personality, my spirit, and my human idiosyncrasies that I learned from the 'hearth' and the 'kitchen table' the most important epistemologies and ontologies of Indigenous consciousness as a result of the many oral stories I listened to and learned in my lifetime. Oral history is not a dead archive; rather, each person contributes personal meaning to it, and being faithful to its details is crucial; even so, the individual story-teller transmits her spirit into the meaning; and she uses this as a worldview to guide her thinking through, acting out, interpreting, relating to, and shaping the reality in her cultural framework, or world view.

I have been blessed that I grew up in a time before the onset of the internet and that the oral tradition practise was still the most common form of transmitting knowledge between generations and between similar or related peoples. I am happy to be able to share some of this knowledge and how I see the Texas-Mexico border wall is a crucial part of a larger history and larger story where Indigenous peoples' experiences and knowledge are at the center of my perspective and framework of the relationships between ancestral and contemporary stories inherently embedded in an unbreakable bond between land and peoples.

I identify strongly as part of the process of decolonization, which is a

local-regional-national-transnational-transborder-hermispheric-global

social movement.

The first time I heard the term "indigenous peoples" was from my mother, Eloisa García Tamez, many years ago, before I myself even used the term as part of a larger expression of how my people are related to the land and to this continent.

At that time, when I heard her say this word, I was not living at home, because I was getting my M.F.A. degree at Arizona State University. This was about 2000 or so, when she told me, one time when I was just on a short visit, that she was being chased down by U.S. Custom Border Patrol officers when she went walking on the levee. I wrote about it in a poem, "My Mother Returns to El Calaboz," and in that poem, I discuss how she described her encounter with the U.S. CPB by saying to them, "I am an indigenous woman, from El Calaboz!" in order to show to them that she is Native American, rooted in the lands there, where all her ancestors came from, since time immemorial. This was an important moment for me as a young activist, because it was empowering to hear my mother claim her relationship to the ancestral ways of knowing about inherent ties to the land, and when she used the work 'indigenous', I felt very proud to be her daughter, because it has been very violent and extremely dangerous in Texas to outwardly speak about or to advocate for one's rights to the land and water based upon Indigeneity. Why? It has become clear to me, in all my life-long learning, that to be the Indigenous Other in South Texas and north-eastern Mexico is to always be at risk of extreme structural and physical violence. Vehement denial of one's indigeneity has been, according to many people I have interviewed in South Texas and the Texas-Mexico border, the only way to exist without suffering extreme persecution. When I grew up, in the 60s and 70s, most people do not realize that South Texas (San Antonio and all the way to the border) was extremely segregated and quite dangerous for us who were the incarcerated within that open-air colony. That is a little background.

Grass roots Indigenous communities in South Texas and north-eastern Mexico have strongly influenced my upbringing and consciousness to this day. Indigenous decolonization

movements from the 1980s, 90s, and into the present, shaped my *whole* being, which positively affected my education as an Indigenous woman of complex ancestry. I claim my *full* identity, without shame, reservation, or doubt. To do this claiming, from the lands which birthed my peoples, inherently invokes the importance of self-recognition without apology.

Indigeneity is not a 'blood quantum', nor a fractionated existence. Nor is Indigeneity a 'phenotype', or an 'I.D.' card which scaffold the false legal hierarchy of a modern-day 'casta' system, whereby Indigenous peoples' human existence in the U.S. and Texas is solely based in the nation-state's arbitrary discrimination against certain Indigenous peoples, in order to eradicate Indigenous land ownership which puts barriers in the way of business interests.

Indigeneity is lineage and relationship with ancestral knowledge systems, relationships to lands, language, values, dignity and well-being from an Indigenous stand-point. Indigeneity is recognizing, participating, actively engaging, respecting, and being involved in the continuance of one's community. Culture, history, and inherent belonging within one's culture is central to health and harmony, and for Indigenous peoples knowing and health with the land are inseparable.

Knowing and participating in one's crucial relationship with place, and the right to know, to have knowledge of, to gain knowledge of, to re-learn knowledge of, and the right to reclaim and enact knowledge of one's integral relationship to one's ancestors and relevant places is crucially vital for the health and continuance of Indigenous peoples along the Texas-Mexico border. Indigenous knowledge systems enacted by Indigenous peoples ourselves is at great risk today due to the border wall and all its entangled systems of violence which work in tandem to eradicate Indigenous knowledge systems, languages, memory, and enactment of our inherent ties—socially, spiritually, economically, and physically—to our lands, territories, and resources. The border wall could not exist, however, without hate and ignorance, because the architecture of hate and ignorance depends upon systematized and structured ideology, repression, and oppression in order to maintain the status quo of Indigenous peoples' ongoing assimilation and internalized shame to fully express exactly who we are and how this is deeply tied to our lands and resources.

Fear, doubt, negation, shame, and embarrassment have too long influenced my peoples' impression of *us*. We have had to swallow negative stereotypes of our foreparents for so long and in such saturated ways, and thus, negation and shame are twins which also work to enable the border wall to exist within our lands. Even though many people know in their heart of hearts that the stereotypes of our peoples as 'illegals', 'foreigners', 'Mexican's', 'drug lords', etc., are false, these are ideologies which are built upon older stereotypes which also led to violent persecutions of our foreparents in times past: 'thieves', 'raiders', 'bandits', 'Apaches', 'horse thieves', etc. which are false portrayals melded by colonial domination, violent oppressors, and powerful business interest.

I am honoured and proud to acknowledge who I am, *fully*, from an Indigenous community perspective, which does not value fractionated identity. True decolonial indigeneity makes a person identity their whole self. Thus, the Ndé system is highly complex, with many clans which comprise our peoplehood. The clan system of the Ndé empowers the individual to stand firm on their full being, and the inclusive Ndé system (not the 'closed' Anthropological Indian kinship fiction) acknowledges European contact, exchange, and continuity.

I say all this up front, in order to testify to the continuity of Ndé as survivors of killing histories and killing anthropologies. This is a testimony to set the record straight for all readers.

The ongoing struggle for dignity, respect, and harmony, for a complex Indigenous society such as the Ndé, who absorbed and included European descent peoples within our social, economic, religious, and physical structures and systems, is an area in which I conduct active research. I am currently very involved in numerous decolonization projects of my people. One of

these is the inter-related language revitalization projects of the Ndé ('Athabascan'), the Tlaxcalteca ('Nahuatl'), the Nahua hidalgos ('Nahuatl'), and the Euskara ('Basque') who are the peoples who converged in the Lower Rio Grande Valley, in the current-day Texas-Mexico border, and who the Ndé absorbed—or as we say informally—Apache-ified—and who are my ancestors.

Today, I am an enrolled member of the Lipan Apache Band of Texas, and I am of Ndé, Tlaxcalteca, Nahua, and Basque ancestry, directly descended from Chiefly chief peoples. I consider my birthplace, in 'Austin, Texas' to be wholly within the original and unceded Traditional Territory of the Ndé, which encompasses over 6.5 million acres of the unresolved land claim of the Ndé hereditary Chiefly Chief peoples, of whom I am a descendent. The Ndé customary lands have been traditionally considered to exist between the Guadalupe River and the Rio Grande River, the Pecos River and the Rio Conchos, Chihuahua, México, the Rio Conchos and the Rio Bravo River, Tamaulipas, México, and the Rio Bravo, Tamaulipas, and the Rio Santa Catarina, Nuevo León, México.

Traditional Introduction: Shi Margo García Carrasco Tamez. Shimaa Eloisa Esparza Cavazos García. Shidade (Daasts'a'yé dín) Luis Carrasco Rodriguez Tamez. Shichu Lydia Montalvo Villarreal Esparza. Shitsúyé José Emilio Cavazos Peña García. Shich'iné Flavia de la Fuente Rodriguez Carrasco. Shindálé Luis Rodriguez Tamez. Shi Goschish (Hada'didla') Ndé, Shi Kónitsaaíí Ndé, Shi Nkaíyé Ndé, Shi Tlaxcalteca Ndé, Shi Nahua Ndé, Shi Cúelcahén Ndé, Shi Zuazua Ndé.

English Translation: I am Margo García Carrasco Tamez. My mother is Eloisa Esparza Cavazos García. My father (deceased) was Luis Carrasco Rodriguez Tamez. My maternal grandmother was Lydia Montalvo Villarreal Esparza. My maternal grandfather was José Emilio Cavazos Peña García. My paternal grandmother was Flavia de la Fuente Rodriguez Carrasco. My paternal grandfather was Luis Rodriguez Tamez. I am born of and for the Lightning Clan, the Big Water Clan, the Mexican Clan, the Tlaxcalteca Clan, the Nahua Clan, the Tall Grass People Clan, and the Lava Bed Rock Clan. I am an enrolled member of the Lipan Apache Band of Texas. I am a citizen of the Ndé Nation of Kónitsaaíí Gokiyaa.

Our Ndé Traditional Territory is known in the mother tongue as Kónitsaaíí Gokiyaa, or Big Water Peoples' Home Lands. The Spanish Crown adopted the Ndé name of the Kónitsaaíí ('Big Water') directly from Ndé language, as a firm recognition of Ndé sovereignty and title to 'La Gran Apachería, which completely included the Rio Grande and much of north-eastern Mexico. The border wall, situated along the last 70 miles of the Lower Rio Grande River region, is located on lands to which the Ndé never ceded the Indigenous proprietary rights. Ndé land-based, extended clan kinship is still a primary social and economic organization and governance within the unceded Traditional Territory. Our governance is weakened greatly by the border wall and the inter-related relationships between Indigenous decolonization, militarization and the 'war' on terror, drugs, cartels, immigrants.

There has never been evidence produced through or by the doctrinal systems of Spain, Mexico, Texas, nor has the United States, or for that matter, any Native American, Federally Recognized, or other Indigenous sovereign of the hemisphere of Turtle Island ever extinguished the Ndé Aboriginal Title. Obviously, the Ndé were never eradicated or 'conquered'—violently colonized, assimilated, indoctrinated, and abused—yes, but not enough to extinguish the primary form of organization and governance—the maternal clan structure.

Ndé never willingly surrendered claims and rights to our customary lands and territory known to Ndé since time immemorial. The border wall is located in a contested Indigenous jurisdiction. The U.S. federal court system is an inappropriate venue over Ndé human rights claims

relative to the border wall because, as demonstrated in the brief, the U.S. has proven to be incapable of providing objective, unbiased and non-discriminatory observance of international law respective to the rights of Native Americans, Indian Tribes, and Ndé as a Southern Athabascan people with Aboriginal Title in Texas and on the Texas-Mexico border.

Our traditional governance and law systems are enacted and organized through decision-making at the level of the *gową gokal*, ('rancheria'), or ('households linked through female and male kinship structures and reciprocity). In Ndé organization, women traditionally have had strong involvement in participating in the shared decision-making and leadership capacity-building on all matters related to the spiritual, physical, mental, educational, social, economic, and political well-being of the family, clan, and extended kinship community.

I have experienced most of my life, since childhood, being educated by and alongside my parents, grandparents, and Indigenous Knowledge Experts within our traditional organization and governance systems. Today, I work to bridge Indigenous epistemologies and ontologies to the academy, and to link these to wider Ndé community concerns and aspirations. I am an Assistant Professor in the Faculty of Indigenous Studies, in the Department of Community, Culture and Global Studies at the University of British Columbia Okanagan, Canada. My life-long learning in Indigenous traditional and contemporary knowledge systems includes the following: Ndé Epistemological and Ontological Structures and Systems; Community History Recovery; Oral History; Ways of Knowing; Memory; Cosmology; Language; Inter-Generational Experience; Genealogy; Women's Spiritual and Ceremonial Practices; Elder women's knowledge; Medicinal and First Food Systems; Midwifery Practices; Indigenous Law & Governance Systems; and the revitalization of Indigenous Justice Systems. My current research program is grounded in Ndé decolonial studies, community-based practice, archival research, and human rights. My teaching focuses on decolonization, recovery, revitalization and indigeneity. My current praxis intersects Ndé History in *Kónitsaqáí Gokiyaa*, 1375-2011; Indigenous women and Indigenous gender analysis (Texas-Mexico-U.S. border region); militarization; colonialism; genocide; human rights; and Indigenous rights.

There are several urgent issues confronting Ndé peoples who have suffered, and who continue to experience harms as a dire consequence of the U.S. border wall in our lands. As you are well aware, I have analyzed that the border wall is the state's ideologically-driven architecture, largely built by and benefitting transnational corporations and their stock investors, and it was legislated and manifested into a reality by a (dominantly) White, male, Christian, highly educated, majority of the U.S. Congress. I have previously provided an intersectional ethnography of the political and human, social mapping of the U.S. Congressional vote for the border wall. I feel that discrimination should be viewed in multiple directions.

In normative analysis of discrimination, the reader is only instructed to see the perpetrated; however, in a more nuanced and rigorous analysis of power, we are given the capacity to understand and know that power must be also understood from the view of the perpetrated. In that lens, we are directed to witness, learn, experience, and to act on the salient reality of how discrimination builds momentum against the perpetrated. Through a prism of race-gender-class-education analysis, identity of the perpetrators coalesces by knowing how the exercise of authority and discipline upon the perpetrated was enacted by powerful interest groups. In the case of the Texas-Mexico border wall, one example of a significant interest group, can be understood by examining the social identity of a 'bloc' of power: White male Christian majority Congressional legislators, whose organizations and institutions represent powerful business interest groups. The view of the perpetrated, through the lenses of Indigenous peoples of Texas-Mexico border, and

Mexico, reveals an important 'profile' whereby the reader is then provided more nuanced tools for untangling the underlying ideological issues which 'built' the wall.

In a nutshell, my analysis demonstrated that a 'bloc' of White, male, Christian, highly educated, economically privileged, and conservative legislature, whose members (dominantly) live far away from the Texas-Mexico region, exercised their votes in 2006, 2007, and 2008 to approve funding for the wall's construction, to authorize the waiver of thirty-six federal laws, to clear the constitutional path to effectively void civil and constitutional procedure, and who authorized the use of U.S. armed forces and increased militarization of the U.S. Customs Border Patrol, which enabled the increased scale of technological military systems which were used to dispossess Indigenous peoples along the Texas-Mexico border.

The accumulative effect of the dismantling of U.S. law systems, the militarization of places, the restrictive climate collapsing in on Ndé who were working hard to attempt to receive consultation and culturally sensitive and relevant compensation, all led to the urgent crisis we are experiencing today in the Texas-Mexico region. My conclusion on the issue of racial discrimination, in a nut shell, is that race, gender, class, education, geography, and political power are key categories to articulate and to comprehend the perpetrators.

Currently, my analysis applies a multi-directional approach rigorously; to my knowledge, there has been no prior report in the literature which analysed the U.S., Texas, (as well as other Native American nations, ('Federally Recognized Tribes'), who may have had involvement in border security contracts relative to the carceral systems deployed against the Lower Rio Grande on the Texas-Mexico border. It is my belief that a much more thorough investigation needs attention regarding the Congressional, as well as Tribal actors, elected officials, acting as individual and as collective actors and agents under formal relationships with the U.S. Department of Homeland Security, in the systematic abuse of their collective social identity in differentiation to the social identity of perpetrated Ndé. To my knowledge, there is much repression of this, as well as much repression relative to the formal agreements made between the U.S. DHS and U.S. Tribal governments which directly or indirectly impacted the Ndé situation. Given the fact that the U.S. DHS allowed outside Tribal governments the 'rights' to make claims to the cultural resources of the Ndé, but firmly excluded the Ndé from these decisions, has raised serious questions of human rights violations which are aimed at the nation-state, as well as the nation within the nation-state. The Ndé have established—in numerous peer-reviewed papers, peer-reviewed book chapters, thesis, dissertations, and U.N. Permanent Forum on Indigenous Issues intervention statements—that there were pre-border wall contestations and conflicts related to land claims and contested cultural resources between Ndé and Federally Recognized Tribes. It is my contention that the U.S. DHS used the 'divide and conquer' tactic to further marginalize Ndé from decision-making and Free Prior and Informed Consent, and gave capacity to other Indigenous nations without regard, respect, or responsibility to the Ndé Elders, children, mothers, families, and workers to whom these resources belong, namely, Indigenous proprietary title to lands, territories, biodiversity, and the cultural-natural resources on both sides of the U.S.-Mexico border, and the border wall.

Decolonization, higher education, and digitalization of my people's knowledge systems since 1990 has led to crucial dissemination of ancestral knowledge, memory, and history between Elders of El Calaboz Ranchería and the broader Ndé nation. As a result, we have come into dialogue about the Ndé Proprietary Title ('Aboriginal Title'), pre-dating European colonization, Papal Bulls, and the destructive concept of *terra nullius*/terrenos baldios. We are studying the colonial charters and constitutions of Mexico, Texas, and the U.S., and the fictitious claims to sovereignty and lands of two nation-states and Texas in Ndé unceded lands.

Due to the severe restrictions imposed by the U.S. Federal Court, 5th District, seated in Brownsville, Texas, U.S.A., the Ndé counter-narrative to the state's discourses of 'private property' has been thoroughly quashed, and thereby made ineffective for legal purposes in U.S. courts. Ndé, still hold that the U.S. government forcibly "condemned" the lands of Eloisa García Tamez and her relations in El Calaboz, and essentially stole these lands in 2009. In protest (letters, denouncements, marches, organizational action), without the benefit of consultation, or Free Prior and Informed Consent, and without financial resources to hire Indigenous law experts, Ndé were constrained from articulating the Indigenous legal principles and perspectives of inherent Ndé title.

For example, currently in Texas, and in north-east Mexico, Ndé live in the shadows of the state's discriminatory laws which marginalize Ndé as unrecognized 'tribes'. Restrained to fully exercise self-determination under Indigenous Proprietary Title, with unceded ownership of traditional territories, lands and resources, the U.S. and Texas discriminate against Ndé to live with and in as the decision-makers, managers, and owners over our respective cultural resources and Intellectual Property within our traditional and customary territory. (Mexico has also negated this salient reality across jurisdictional borders of Texas, Mexico, and the U.S.) The U.S. and Texas share in a unilateral authority against Ndé aspirations and interests. Effectively authoritarian in its scope and depth, this exclusion and marginality works to fractionate, dismember, disband, and threaten our culture. Indigenous peoples must have the social and economic means to resist assimilation and incorporation, and if we choose to resist destruction by way of being made malleable into Texas 'Hispanic' populations.

The border wall is a violent reminder, and a catalyst, to remind the Ndé of the right to self-determination over our lands, territory, sacred sites, cultural sites, biodiversity and subsurface elements in the Texas-U.S. Amistad 'National Parks' and other relevant areas in the interior of the border. The Ndé activists who fought against the border wall also raised awareness to a broader national and international community that Ndé are not peons nor the 'poor cousins' of Federally Recognized Tribes. We are a Nation whose specific history with Mexico and the U.S. deserves more extensive investigation. For me, this would entail serious, protected, safe face to face dialogues with the support of the international legal community. In the law books, 'Lipan Apaches' were, and continue to be *still* considered to be official 'war enemies' of Mexico, Texas and the U.S. Therefore, to disrupt ongoing crisis along the wall, would mean that Mexico, the U.S., and Texas must be called upon by the international legal community to *fully* and respectfully recognize the Ndé as dynamic, resilient, productive, and significant Indigenous Nation. The recognition of the rights of Ndé to be afforded the rights articulated in the UN DRIP, would entail rigorous application of restitution, redress, and revenue sharing.

Recently, there has been much controversy, shock, and crisis over the issue of my discovery, in June 2011, of significant and irreparable damage to cultural, biodiversity, and burial sites of the Ndé in El Calaboz Ranchería. I fully documented, with still photography and film, the damage caused to our Elders, women, families, community and Nation by the U.S. Department of Homeland Security (Secretaries Michael Chertoff and Janet Napolitano), the U.S. Army Corps of Engineers, the U.S. Customs Border Patrol, and numerous private contractors which the U.S. DHS funded to enact the decision-making of Congressional elected officials (a majority White, male, Christian, highly educated, non-Indigenous (non-local), and economically privileged group).

I am in fear that the U.S. government may forcibly remove the remains and damaged earth, cultural remains, and, potentially—the human remains—which were left behind in earth heaps throughout the community of El Calaboz Ranchería. While I was documenting the evidence, I recognized, *literally*, my ancestors, for many generations, and the past—were exposed and this

frightful reality was in the fragments I scooped up into my hand, and glaring at me. These earth heaps are a crucial piece of my current research investigation. I immediately informed the Elders, the hereditary Chiefs, an archaeologist working with our community members, and spiritual advisors.

Realizing great urgency to quickly gather together a decision-making group about the startling discovery, I also have endured many sleepless nights, trauma, PTSD, nightmares, and increasing levels of stressors I carry as a researcher, a community member, a traditional leader and a human rights defender. As an Indigenous woman actively engaged in challenging the colonization of my people, I recognize each day the wall is standing and the Ndé are not protected by international human rights systems, and each day the Ndé endure feudalistic systems which belittle and demean our values and traditions, that our Elders and activists fighting this injustice along the wall *are endangered*. In the recognition of the immense responsibility we have to raise crucial evidence of inter-connected rights violations in the shadow of the Texas-Mexico border wall crisis, I wish to state that I am willing to come forward to give testimony about my documentation efforts related to the cultural remains in the earth heaps. I urgently call upon the U.N. CERD committee to offer my mother, my community, and myself protection as human rights defenders bringing forth evidence which demonstrates that the U.S. government, groups, organizations, corporations, and individuals enacted genocidal acts which are putting my people in increasing danger of eradication.

The collision of militarism, militarization, mining, extraction, and water deprivation in the Ndé traditional lands on the U.S. side of the border is telling. I have documented the coordinated plans, sponsored by the Texas Department of Agriculture and the State of Texas to wage a military war, along the Texas border against 'cartels' and 'drug lords'. I have documented the development by U.S. corporations, such as Goldman Sachs, to develop oil in the lands, in South Texas, currently bifurcated by the Texas-Mexico border wall. I have documented the U.S. Nuclear Regulatory Agency's plans to permit uranium 'yellow-cake' mining in said lands. While documenting the construction of the currently unfolding rail freight train bridge, which is constructed *above* the 18 foot wall near El Calaboz Ranchería, my mother experienced increased government surveillance by armed personnel. On numerous documented occasions, she disrupted government personnel enacting surveillance on her during early morning hours within feet and inches of her home windows and deeply in her personal space. The confrontations between government armed personnel and the Indigenous woman human rights defender is a cause for extreme and urgent attention.

It should be documented that since 2010, I raised all the above issues, in detail, in three letters to James Anaya, Special Rapporteur on the Rights of Indigenous Peoples. I spoke with the SR Anaya and his staff members about said concerns at his New York office in May 2011. To date, I have not received a formal reply addressing our concerns from the SR Anaya.

I firmly believe that the above issues, in addition to the information provided in this brief, have deepened my comprehension of the historical, intergenerational, and ongoing project of a military and ideological destruction against Indigenous peoples in our traditional lands, waged by powerful interest groups of the U.S. and Texas. This affects similarly marginalized, oppressed, and vulnerable Indigenous peoples in this region.

The ripples of state and organized corporate violence are complex, and Indigenous communities are rarely, if ever 'closed' communities, which makes the need for an international legal community to act in coordination and in principal on this issues of spatialized and intersectional racial, gendered, class, linguistic, religious, ethnic, and age discrimination.

Discriminatory policies along the Texas-Mexico border has deeply penetrated a much larger community of vulnerable Indigenous peoples of multi-origins who live, work, pray, and survive in the Lower Rio Grande Valley region beyond the conservative identifiers of 'Mexican-American', 'Hispanic', 'Chicano', and 'Latino'. The violence is not contained to the Texas side of the border. The border wall negatively affects severely marginalized peoples in the region, who may or may not outwardly claim Indigenous identity, though who are targeted through racial profiling and phenotype in many similar ways that Indigenous peoples are targeted by the Secure Fence Act of 2006. The Indigenous peoples' social movements in Mexico and Texas, is often conflated with 'terror', 'drugs', 'human traffic', and the climate of disciplining and punishing Indigenous peoples with the wall is connected, in my mind to the broader domestic policies of the criminalization of Native peoples from the region and Mexico along U.S. borders.

The Texas-Mexico border is a dynamic place where bonds are shared among many peoples regardless of how states' impose false racial categories and classifications upon us. We have and continue to share common places, experiences, and aspirations, though the border is a severely damaging architecture which, on the one hand says to us "you are unwanted" and "here is a prison for your body and mind", and psychologically tends to spatialize fear of the so-called Indian, Migrant, Illegal Other.

The wall, in my experience, has also brought Indigenous peoples into dialogues, serious debates, and equally serious alliances for social justice and human rights. Though, mostly, sadly, the wall raises a climate of fear of association with affected Indigenous peoples, who are being, in my mind, 'framed' as deviants, abnormal, and 'bad'. In a region with a large Catholic mentality, being 'bad' is like being banned and shunned. Speaking out against human rights violations has its negative impacts at the most micro-level. Not everyone can take risks that Eloisa García Tamez has taken, for she is a prominent, well educated, high ranking community member from very old families and clans.

At the same time, I have done some research about how the wall has pitted certain Federally Recognized Tribes against Indigenous peoples who were their historical rivals for resources after 1848. I have also documented how certain Federally Recognized Tribes stood to benefit socially, economically and politically from supporting the U.S. government's policies and logics for bifurcating the Ndé territory further.

The ideology of the wall has caused extensive damage, and further contained and truncated Native American peoples' (in the interior) conceptions of who is a 'Native' 'Indian' (which is a backlash, I feel, from anti-Mexican fervor, which affects in some way just about anyone who consumes mainstream radio, television, and culture). Native American tribal peoples, in general, cannot escape being deeply affected and influenced by the extensively negative climate of fear mongering and xenophobia shaping an anti- 'Mexican' view in U.S. cultures. In my interactions with Native Americans at international legal arenas (UNPFII, Native American Indigenous Peoples' Caucus) I have noted how this fervor influences the factionalism and deeper divides between Ndé and those with established 'credentials' with the U.S. recognition system. The border wall issues that Ndé seek advocacy for in national arenas (National Congress of American Indians, Apache Women's Conference) are severely marginalized. There seems to be great discomfort among Federally Recognized tribal nations Ndé advocacies for recognition, acknowledgement, redress and restitution. A few colleagues, speaking with me privately, allude that Federally Recognized Tribes are uncomfortable with Treaty-based Lipan Apaches from Texas who they perceive may be successful in our land claims and who may shift the economic power structure of lands and resources.

Despite the fact that Ndé are Treaty signers (numerous Treaties!), and carriers of extensive genealogies demonstrating in-depth care and attention to Hereditary Chiefly families. The border wall raises new excuses and rationales for excluding Ndé from our heritage, practices, governance and resources. Indigenous children, Elders, women, men, workers, families, and individuals' minds, mental well-being, mental health, and social health are impaired by the xenophobic, economic, ethnic, political excuses for why the wall needed to barricade Ndé from exercising our rights to full acknowledgement by the U.S. government, U.S. society, and U.S. Federally Recognized Tribes.

The wall seems to re-script and re-cast the colonial consciousness of 'the sovereign' and 'the subjugated'—a *recolonization* of the Indigenous mind. Sadly, the recession, hate-mongering, and paranoia about 'terrorism' also fed the insecurities of weakened and vulnerable Native American tribal entities and actors, who, wittingly or unwittingly, took part in, and benefited from, the racial, ethnic, cultural, economic, gendered, age, and national discrimination against Hereditary Ndé Chiefly peoples in our own territory. The border wall analysis of U.S. DHS contracts between the federal government and Tribes is a project I am presently documenting. At the present, it is telling how in 2008, 2009, and 2010 that Native American Tribes did participate in the increasing militarization of the U.S.-Mexico border after the Secure Fence Act, and that Native American peoples, especially in conservative 'heartland' states in the interior, did lend support to the fervor for building the border wall—even after it was made a national issue that the wall would be constructed in Ndé lands. Discrimination was not something which occurred in a binary way—it was inter-ethnic as well; other Indigenous peoples felt that they had something to gain by encouraging, supporting, or otherwise demanding that other Native American peoples' constitutional, civil and human rights be terminated. Economic incentives seemed to 'seal the deal' for Tribal nations who signed on, and the discourses, or reasons given, for this behaviour are often tied to the national discourse of 'terrorism' and 'economic stability.'

In my view, it would be equally important, in a human rights analysis, to examine the contracts, or other legally binding agreements, entered into by the Secretary Michael Chertoff, US DHS, and Tribal officials relative to 'infrastructure' or other improvements manifested for fusing and unifying Tribal and federal policing of 'drug cartels', 'illegals', and 'traffic' on the Texas-Mexico border. I have argued elsewhere that an oligarchic structure should be engaged and rigorously examined in order to fully unveil the range of actors participating in the discriminatory impacts of the Texas-Mexico border wall. We should not turn away from engaging the more difficult issues, the hard choices, the effects of coercion and influence, and the difficult questions that arise by taking a more vigorous approach to eliminating racial discrimination against Ndé. How did the state incorporate and fund numerous state agencies, federal agencies and functionaries, *as well as* Federally Recognized Tribes (comprised of individuals, with local and micro interests within a hierarchy of colonialism) to cooperate and even to benefit (socially, financially, and politically) from the dispossession of Ndé peoples, women, families, children, workers, and the larger Ndé Nation. When I hold the cultural remains of my ancestors in my hands, I have to ask these kinds of questions. It is my job mandated to me by my Elders, Hereditary Chiefs, Council, and for our children.

There is not doubt in my mind that the border wall causes people to question and to judge our community members' citizenship, our way of life, our culture, and our intrinsic value system inherently connected to the land and land-based resources. The wall sends a blanket, criminalized message to outsiders, tourists, and, I believe, firmly *fuels* white supremacists' and xenophobes' arguments that our lands and our peoples should get another layer of a gulag wall built next to the

current one. This rhetoric and dangerous discourse was spreading during the current elections in the U.S. This is evil and deeply violent. The thought of even considering further carceral architecture in our homelands—or anywhere along the U.S.-Mexico border—is psychopathic and a serious reason for urgent action on our community's behalf.

I am deeply penetrated and impacted, on an individual level, psychologically and spiritually, and yes, *cognitively*, as a result of the indignation, shame, belittlement, and outright violence that our Elders, children, families, workers, and community endure everyday along the wall of death, as they say. I have received hate mail, and even e-mail threatening my person. I have had to read, for several years now, all the racially abusive and violent 'readers comments' at the end of every article published about the Ndé fight against the wall. I have had to read comments by xenophobes and misogynists who called for my mother to be "lynched with barbwire", "strung up", burned, mutilated, and far too many other things that I have not even shared with her for fear of the damage it could cause her spirit. Though, she is so intrepid that I'm sure she has read far more threatening messages than I ever could.

The wall sends a clear message, everyday, to everyone driving through our community on their way to work, to the city, to the shopping centers, to the golf courses, to their churches... that somehow, our community along the last 70 miles of the Texas-Mexico border *did something terrible 'wrong' (according to their lenses) to 'deserve' being incarcerated in an open-air prison structure.*

This message is saturating and marinating within our peoples' bodies, minds, spirits, and causes our people to repress their culture, and forces them to assimilate at faster rates, to deny their heritage, to lose their language, to reject their ancestral ways of knowing, to see their lands and peoples as inferior, and ultimately to participate in the destruction of our very own culture. I see this occurring in my observances at community meetings.

In the sacred lands, in our mother Earth, I also witness the visual ideological messages perpetrated by the wall against her. The criminalization of the Ndé Territory and Traditions along the wall is spatialized. It is directed to our farms, pastures, gardens, sacred sites, and burial grounds, community gathering places, to our biodiversity, community centers, and our home sites. This reality has a profound effect on the local politics and local authorities, undoubtedly, which use social Darwinism, cultural relativism, and biological determinism, in neoliberal fashion, to reconstruct and to restock the myth of the 'Savage Indians', 'Savage primitives', and 'bad Mexicans'. I have noted that many long-time settlers, as well as newcomer outsiders use these tropes to this day in their ignorance of the Indigenous landlords in their midst. This is one of the most frustrating parts of my daily work alongside my Elders and my people.

I have written several Op-Eds in protest of the return of settler colonial 'histories' and 'memorials' which have surged during this crisis among our people. I am extremely affected by the pernicious ways the neo-settler society method builds upon colonial tropes of the 'Savage' 'Apache' and 'Mexican'. I see this as a *recolonization* of place, space, and knowledge. The media used by the neo-settler mindset in South Texas is an important site for further interrogation. Much more work should be done to investigate the level of complicity that the media played in building and maintaining a gulf wall in Ndé Territory.

All of this, undoubtedly, is severe punishment for Ndé and all our relatives along the walls hurtful path. I think Ndé still feel a great duty towards the many marginalized peoples who live in our territories, like our ancestors did. It was Ndé who absorbed many hundreds of Tlaxcalteca and Nahua peoples during the 18th-19th century Spanish extermination wars; and it was Ndé who absorbed many Mexican Indigena during the late 19th-20th century along the Rio Grande. We are

one of the few peoples who enacted legal mechanisms with Spain, Mexico, Texas, and the U.S., to protect peoples and our lands.

Ndé have been one of the few Indigenous Nations of North America, with archeologically and anthropologically documented records of our inherent role in the governance of Turtle Island along with thousands of other Indigenous Peoples, who were recognized by the U.S. Indian Claims Commission as an unquestioned case of Aboriginal Title in the U.S. I firmly believe that Texas and the U.S. must be confronted on the lingering question of settler colonialism and genocidal policies of erasure against Ndé. The border wall is an excellent site to engage this lingering question and to move firmly toward a peaceful and respectful resolution. This is owed to our Elders and Hereditary Chiefs.

Recently, I have had the opportunity to remember the many joys that my community members bless me with on a daily basis. Through all this misery and suffering experienced on micro, intimate, and familial levels, I have also learned more about the resilience of my people. This knowledge is what nourishes me, strengthens me, and gives me hope that a better future is still possible with the support and assistance of the international legal community.

We are currently involved in ceremonies for my daughter, who is one of many Ndé girls and their families, who have taken leadership in revitalizing one of the most ancient coming of age ceremonies in the Americas—the Naííees Isdánalesh—White Painted Woman ritual. My daughter and I, along with my family, are preparing for the year-long preparations for her ceremony. We are working to strengthen our culture, revitalize our mother tongue, to educate our people about the beauty and endurance of our culture and peoplehood. We are working to protect our sacred lands and our water—the source of all life. Without the strength to overcome fear and internalized oppression imposed upon our spirits, minds, and bodies, we have difficulty maintaining all the traditions, language, stories, and beliefs that are core to our culture. However, with architecture of hate constraining us, and economic and social policies which ensure we will be destroyed as a culture and Indigenous peoples, we cannot fully enjoy the knowledge that uniquely belongs to us, the Ndé, especially when we are confronted with how even some of our Elders who have knowledge are caught in the snares of psychological warfare. If our Elders continue to shut down and drive underground our knowledge systems, unbelieving themselves that their own experiences and knowledge is special and unique, if they continue to receive messages of doubt that their knowing is not as 'expert' or 'real' as a PhDs, or that their knowing is 'irrelevant' because it doesn't have bureaucratic, or anthropological stamps of approval on it, then the wall will achieve the objective of fully assimilating the Ndé along the border. The wall is a force that causes shame of the 'Indian' within; 'Hispanic' to south Texas Indigenas means 'citizen', not 'suspect.'

Recently, in my research alongside Elders, I learned that the Ndé water rights are in the land in El Calaboz Ranchería, as a result of the teachings given to me by my mother in one of our many walks on the land. She reminded me of the well that my grandfather José Emilio García and his father and grandmother before him, secured in the land. This well and inherent water rights were recognized by Spain, Mexico, and the early constitution of Texas, when those states first had contact with our ancestors in the colonial and late colonial periods.

My mother instructed me that her mother, and the ancestors before her grandmother, were undergoing severe repression of Indigenous ways and culture during their time. My mother instructed me that in those times of great violence, the women sometimes threw their traditional clothing, grinding stones, and sewing tools into the earth. My mother told me that my grandmother did so, and she put her Indigenous and traditional things into the well.

At the time I received these stories, I was investigating the riparian water right laws of Texas, and I realized that the U.S. DHS' pressures upon my mother, and other Elders to force the purchase or extinguishment of their mineral, water and subsurface rights through their recent 'offers' to take them for \$100.00, was an element of genocidal wars against us ongoing.

I informed my mother that the well, and its archaeology of Aboriginal water rights, and its genealogies of Aboriginal title pre-dating European colonization, is a crucial site for human rights and discrimination analysis. I informed my mother that I would continue to carry forward her wise teachings, and that I would continue to work for justice. I told her that we must keep our focus on protecting the sites of evidence.

As I stated earlier, I have been very concerned with the safety of Indigenous women human rights defenders along the Texas-Mexico border wall. Because I have been deeply involved in every aspect of my mother's and community's litigations challenging the border wall and dispossession, and I have been sought after to participate in several working groups to inform the legal sectors about the effects on the community, I rarely discuss the wall's impact on me directly. I guess my culture teaches me to put my own troubles to the side so that I can focus on being of service for the community. Or, my culture teaches me that my voice can be a tool for the many. Either way, I just don't talk about the scars, damage, and pain I experience due to the wall and what I witness in its shadow.

I have also had several encounters with heavily armed U.S. personnel, on our lands in El Calaboz and in the lands of our relations, the Jumano Apaches, in Redford Texas and Ojinaga, Chihuahua Mexico at the border crossings, and on the levee. Several times the U.S. CBP agents held me and my companions—other Apaches—for long and disturbing questioning. On one occasion, there were seven or eight heavily armed soldiers of the U.S. CPB, who held us, late at night, at the Ojinaga-Presidio checkpoint, and they stripped down my entire car—inside and outside, and underneath the car based on whatever information they have on my record. At that time, and on a separate occasion, also at Presidio-Ojinaga checkpoint, my Apache companion, Michael Paul Hill, was strip searched, and his Eagle Feathers, Hadntn (pollen), turquoise stones (used for Apache healing ceremonies), were all taken by force (Michael challenged the officers and refused to allow them to touch the sacred objects), and then thrown down forcefully, which broke an Eagle Feather. We educated and informed the armed soldiers of our rights to practice our Native American religion there and in our traditional territory beyond borders. The officers informed us: "You do not have those rights here, where we are standing."

Furthermore, on another occasion at the same checkpoint, I filmed an officer interrogating Michael again, (second time) during the day-time. They argued for a lengthy amount of time. I feared that the armed officers were going to harm and arrest Michael, however, Madeline Rios, who speaks fluent Spanish, and who accompanied us on this particular trip to our traditional lands in Chihuahua, helped to negotiate with the soldiers to let us go.

I have experienced increased amount of surveillance on me, since the border wall, especially in my air travel between Canada, the U.S., and Mexico. I used to save all the cards inserted into my suitcases, placed there by NSA, but they were stolen. In 2007, when I began to do extensive interviews of those impacted by the wall, and was traveling through Arizona on my way to Washington state, I did experience a severe level of surveillance. At a water-park recreation spot in north Tucson, my laptop, cell phone, camera, passports, and driver's license were taken from my vehicle, which was locked. However, many other valuable items of my traveling companions were not touched. When I reported the crime to the Tucson police, the officer involved mentioned to me, and I quote: "whoever did this was professional; they knew what they were looking for and

were fast and neat.” I lost my dissertation in progress, field notes, and of course, all my legal identification. I resumed my work, nonetheless, and began my dissertation anew, from scratch. On several trips to the U.S., since the installation of the wall, I have experienced my luggage and belongings severely damaged. On one trip to El Calaboz, when I returned my suitcase was burned and interior belongings—especially a traditional clothing—was burned. The airline could not explain why no other suitcases also experienced a fire and did not replace the items, they only gave me a very cheap suitcase in replacement. After that, the following trip to San Antonio, for a conference, I returned to discover that once again, I had a NSA card in my suitcase informing me that once again I qualified for a full search of my belongings, and that several traditional objects gifted to me by Dr. Cynthia Bejarano were destroyed, sadly. As I said, this occurs so frequently, that I had ceased to count or give it any further attention. I just took this as part of the terrain of the legal advocacy and human rights defense work that I do and will continue to do.

As a traditional person, and a leader, the collection of medicinal remedies, pastoral and agricultural ways of life, walking, running, recreation in our lands, a calmer way of life, community feasts, community decision-making gatherings, ceremonies, and family reunions, as well as hunting, fishing, and other First Food gathering activities, are all reduced to near standstill directly related to the hyper militarization of our lands today.

In our lands, I have witnessed, seen, observed, and documented the construction, not only of the wall, as well as the many co-related architectures of enclosure and surveillance: Light towers, watch towers, armed drones, surveillance aircraft (helicopters, low-flying airplanes), major increase in U.S. CBP heavily armed in our community; heavy vehicular traffic of U.S. CBP and contractors of U.S. Army; increased patrolling and heavier presence of Texas Department of Public Safety. However, when our community members are victimized by the above, the local authorities claim that in our lands, along the wall, none of the police or sheriff has any authority to do anything useful, nor to even take the phone call. For the most part, I think most of our community members would agree, and have stated in varying ways, that we are in a war zone.

Recently, since our last community gathering in June 2011, a serious concern I have about the wall, is how it works to further fractionate, contain, constrain, restrict and weaken the Ndé, a people who refuse to be conquered or surrender to U.S. and Texas violence against our very existence. We are a proud and vocal people. Our hereditary Chief, our Elders, and my mother, are descendents of Chiefly peoples with a long record of being peaceful, though also defenders of our lands and our rights. We have a long history of litigation in Spain, Mexico, Texas and recently, the U.S. When will the world hear our pleas and cries for justice? We are not going to go away, if anything, our population is on the rise. Native American Ndé and Indígena Ndé (close to Mexico) have a young population in a growth surge. Half of our people are under the age of 17! Ndé raise the concerns of human rights, economic, and social development with our culture, lands and territories because, as stated, we are the Aboriginal land owners, and we—without the help, assistance, or regard of Texas or the U.S. governments—are taking leadership to take care of our people’s well being and futures.

While the state and powerful interest groups have reduced and further reduced the most fundamental forms of protection and governance (civil rights, constitutional rights, local governance) for the respectful regard of Ndé peoples, lands and resources, Ndé hereditary Chiefs and Councils have, in response, increased and sought grants and support to improve and strengthen our social organization broadly across the Ndé Nation—as a direct consequence of the border wall crisis. Due to the fact of historical marginalization of Ndé by the Texas Anglo settler pioneer society; traumatic the effects of the U.S. Indian Boarding School policies against Ndé; the

intergenerational violence of the Catholic mission assimilation on Ndé; and the effect of the U.S. militarization of traditional Ndé space (Texas has largest square footage of U.S. bases in continental U.S., especially along Texas-Mexico border counties), Ndé exist at the margins of U.S. economic assistance to Indigenous Nations. It is known well that all Texas border counties rank as the most economically marginalized in Texas and in the U.S.

Today, Ndé are working vehemently to sustain our traditional governance structures—over a vast geographic area which is similar to the struggles experienced in the Arctic—and far fewer resources as un ‘unrecognized’ and ‘unacknowledged’ Treaty based people. We are working hard with our Elders and hereditary Chiefs to sustain traditional decision-making structures, and writing grants and working in collaboration with the University of Texas Human Rights Clinic, to address the crisis we are facing. The grim reality is that poverty and violence enable the powerful state to undermine many of our efforts.

Today’s ongoing laissez faire policy of encroachment, dispossession, militarization, surveillance, and assaults on our culture are viewed by me to be severe threats against Ndé land-based social, spiritual, economic, and self-determined objectives which Ndé peoples seek to adopt a balanced approach to peaceable governance of our Traditional Territory, customary lands, and resources beyond borders. Some of our people express anger and hostility towards human rights defenders, even though our work benefits them on many important levels and brings our common concerns into visibility by a global legal community. I understand their frustration and rage; jobs are scarce, education for our people is substandard, and economic issues of food, housing, and income prevail. When our people perceive that our work may cause the local government and the federal government to deny us federal acknowledgement, or to criminalize our communities more harshly than ever before, I do indeed understand when and how individuals may be forced at times to repress their Indigenous identity, to hide their ancestry, and to deny their own family members.

Sadly, I myself have experienced this form of attempted silencing and repression at a micro level. It has been something I have not discussed publically, nor even with my family members, with exception of my husband and my Hereditary Chief. At one stage of my legal advocacy, during and after the period of my testimony at the Inter-American Commission with the University of Texas Working Group on the Texas-Mexico Border Wall (Denise Gilman, et al.), I experienced severe shunning, and outright harassment—by a very close male relative. At one point, I felt so threatened and fearful for my and my children’s well-being, that I called off all my work with the advocacy work, until my community Elders and leaders helped me to address the violent force and threats I felt toward me related to my public voicing and critique of the administration. Because this powerful, and more wealthy community member felt that the national media stories portrayed our family prominently, and caused his clients to question him on his loyalty to conservative political platforms, and because as he stated to me, Indigenous women’s human rights defense was “bad for his business” and that “if anything bad happens” that I would have to “deal with him” I realized that the work I did on the legal cases—the federal and the international also influenced the potential risk and threat of increased internal violence between Indigenous peoples, classes, and genders. I wish it to be known that our Elders and Hereditary Chief came forward to stamp out this form of internalized violence in our community. My Chief ‘outed’ this issue—of inter-familial misogyny and violence— in a traditional manner, and disrupted this level of personalized violence and threat against me by a powerful male positioned to do destructive work against me. He conducted ceremony for my protection.

Finally, on this issue, I wish to say also that a strong circle of spiritual support and ceremonial leadership helped me to recuperate my self during this crisis. And, on a very intimate

level, I would not be here today physically, if not for the continued and unwavering support of my husband, Erik Tamez Hrabovsky, and my children, who witnessed the breakages and ruptures in my well-being during this threat of an attack on my person by a close community member. Through this circle of healing I have been able to rebuild my life, and to continue to advocate and research on the mandate of my Elders, Hereditary Chief, and the Chiefly peoples of Ndé who seek to be spiritually, physically, and emotionally reunited with our homelands.

At this stage, I am, sadly, pessimistic about the current U.S. administrations' utter lack of acknowledgement (after many letter campaigns to President Obama) of the Texas-Mexico border wall crisis for Indigenous peoples. Without international legal community action, I cannot see a change in the U.S. course. I view the obstruction to consultation, and obstruction to a jury trial at the 5th Circuit level—after three years of actively engaging the court systems—as a clear sign that the U.S. government has no interest in altering its present policy.

This is to say that I predict, based upon the facts presented in our co-authored brief, as well in other published papers forthcoming, that the signs of imminent and increasing threat to Ndé knowledge, recognition, traditional ecological values, First Food systems, sustainability, family structure, decision-making organization and capability, and self-determination are at a great risk. It is clear that the U.S. government, the State of Texas, and local authorities have no intention whatsoever to review, re-evaluate, or redact the current policies to increase militarization to the Texas-Mexico border which specifically target only certain communities. The government show no sign of listening to our Elders and Hereditary Chief's outcries to dismantle the wall, return our lands, and move into dialogue about the Ndé land claims and redress.

We have come face to face with a rogue, and Ndé are historically and culturally positioned to know. Speaking about the murder of Esequiel Hernandez, one of my uncles, the Jumano Apache historian, Enrique Madrid says, "How do you describe a nation that destroys its own Indigenous Peoples?" His reply: "Tyrannical." I feel that this aptly describes my impression of the U.S. national behaviour and character relative to the border wall on the Texas-Mexico border.

We continue to pursue justice, and will continue to ask the international legal community to assist us as we move to engage meaningful dialogue, consultation, Free Prior and Informed Consent on ongoing attempts to dispossess us, and for redress and restitution. My research in legal archives point to the reality of Ndé Aboriginal Title and I will continue to work toward the goal of a dignified resolution for Ndé future generations and broader humanity. Ndé are asking for nothing less than respectful and dignified consultation, FPIC, and the assistance from an international body with authority to support the process with the United States will be crucial to develop a reciprocal structure that is meaningful for Indigenous peoples. Ndé have only sought remedial procedures for peaceable solutions to improve the historical wrongs and alleviate current-day suffering. As a witness to this, I firmly believe that a vigorous engagement with Indigenous international principles and perspectives inform the actions taken by the international human rights legal community. This is desperately needed on the Texas-Mexico border for all humanity and biodiversity.

Ahe'he, dagotee' gozhoo, (Thank you and Beauty All Around)
Margo Tamez

Margo Tamez
Dr. Margo Tamez
5601 Pleasant Valley Road

Vernon, British Columbia, Canada, V1B 3L6

Assistant Professor,
University of British Columbia Okanagan

Co-Founder,
Lipan Apache Women Defense
El Calaboz Ranchería

Co-Founder,
Emilio Institute for Indigenous and Human Rights
El Calaboz Ranchería

Eloisa G. Taméz, RN, PhD, FAAN

P.O. Box 1737
San Benito, Texas 78586
956 245 7119
Eloisa.tamez1@gmail.com

April 10, 2012

To Whom it May Concern:

I am Eloisa García Taméz, born and raised in El Calaboz, Texas, on a parcel of the land grant from the King of Spain entitled San Pedro de Carrizitos. My ancestry is Spanish and Lipan Apache. In the 20th century, the peoples all over the area were classified, as a matter of economic convenience and social engineering, by the State of Texas and the United States as "Mexican-Americans" and "Hispanics", and now as "Hispanic Native Americans".

Whereas I do not consider myself an 'expert' on the macro and meso levels of Lipan Apache history, because that is the knowledge expertise of the Hereditary Chief, Daniel Castro Romero, Jr, and Council members, such as Richard Gonzalez, as well as Lipan Apache scholars, Dr. Enrique Maestas, and Dr. Margo Tamez. My specific expertise is in Indigenous customs of the knowledge and blessings passed down to me from both my parents, and my grandparents who gave me life and memory. Indigenous communities traditionally were not 'closed' racial communities, and did not segregate to the extent that Anglos of Spain, England, Germany, and France did in the Americas. The Rio Grande Valley (RGV) was a war zone after 1749, continually repressing any form of indigeneity--in all populations.

I can speak about the experiences, knowledge, and memory of the indigenous peoples who raised me in El Calaboz, who, as I now know, were the direct descendants of Basque merchants, miners, and ranchers (who were technically Spanish 'citizens' who were of Euskara [Basque] ethnic origin, and a few who were of the conquistador class, such as those who inter-married with indigenous women with land encomienda grants. I am also the documented, direct descendant of Tlaxcalteca Hidalgo and laborers. I am a documented direct descendant of Nahua land grantees of the Moctezuma Xocoyotzin hereditary lineage.

The Indigenous peoples with these land-tenure histories were directly involved in the colonization of the original lands of the Lipan Apaches along both sides of the Rio Bravo/Rio Grande River an South Texas. Many of them participated in missionizing the Lipan Apaches in missions all up and down the Rio Bravo/Rio Grande. They also participated in wars against resistant Lipan Apaches. They also inter-married with Lipan Apaches, and Lipan Apaches strategically inter-married with land grant heirs along the Rio Bravo/Rio Grande—to maintain important land-based relationships in their traditional home-lands. That is why there is so much inter-kinship relations among Lipan Apaches and many Mexican

Indigenas throughout South Texas and the RGV as well as Northeast Mexico to this day. However, underlying the land grant titles, is the Aboriginal Title of Lipan Apache peoples, who underwent persecution by all levels of the Spanish, Mexican, Texan and U.S. colonization efforts of the region.

As an Indigenous person, I have lived in the everyday forms and ways of life of El Calaboz and, yes, I proudly claim my expertise. I lived it and, while living in my culture, I was unaware that I have been living out an 'at risk' and 'targeted' life form. This is what I knew and I was saturated in it. Today, I am known as a resilient survivor who has been taught from those who were not overly assimilated by western education systems, and who still carried a significant amount of traditional knowledge, traditions, world views, customs, and ways in their everyday vernacular and way of living.

Indeed, I claim my authority on the ways of my indigenous heritage without doubt or any hesitation. This is my quest, not only for me but for those who remain ensconced and afraid to utter this claim proudly and assertively for this belongs to me. Since the border wall became a huge figure in the life of my community and my personal being, I have received many letters, e-mails, phone calls and visits from many indigenous peoples, such as Lipan Apaches, Mexicanos, and Native Americans, and now.. First Nations peoples in Canada draw strength from my story and history. I am frequently informed of how strongly the indigenous community identify with the layers of repression that I have been exposed to in El Calaboz. This repression did not begin on August 7, 2007; my ancestors had to constantly navigate and negotiate their Indigenous identity--a complex one--in order just to survive violence and aggression. My story is thousands of peoples' stories.

The 21st century has brought continued repression, violation of human rights and denial of equal protection. With all the new laws to assure tolerance and equal opportunities for all peoples, the poor, the underrepresented, and particularly the indigenous to this North American Continent do not seem to be on that list.

More recently, the U. S. government contacted me August 7, 2007, to inform me that my land was in the path of the planned construction of the border wall. The controversy ensued since I contested the will of the government stating that my human rights were being violated as well as being denied equal protection. On April 16, 2009, my plea in court was overturned and a federal judge ruled that the government could proceed with the taking. A total of 0.26 acres was taken from my land which was severed with three-quarters of the property left on the south side of the border wall. No direct access to the south side of my property has been granted by the federal government as settlement still remains incomplete.

The U. S. government claims that they have consulted with me numerous times but no real consultation of any kind occurred until we pressured for compliance with a Congressional mandate. The government claimed consultation with me such examples as: a telephone call to my office by two border patrol agents who were on speaker phone and whose introduction was not audible as well as a town hall meeting that was held in Brownsville, Texas. The latter was designed as follow: 1) a podium with a few chairs in front of it was prepared for attendees where the speaker was the contractor and not the government representative, 2) questions were to be recorded or written into a computerized document

with no reassurance that these questions would be read, by whom, or when answers would be forthcoming, 3) multitude of pictorial posters of the border wall plan were displayed in the lobby with border patrol agents in street clothes (not uniform) listening to our comments and giving unsolicited comments (I asked who they were and what their position was), 4) restricted entry into the planned town-hall meeting, 5) armed federal and local officers. The most serious infraction in regards to lack of consultation by the U. S. government occurred in April 2009. The federal judge's order for the government to consult with me before the actual construction started was blatantly violated.

Given the multitude of efforts to retain my land, I have faced tragic disappointment with the lack of regard by the U. S. government. The government is loyal to the many corporations, both domestic and foreign, who have made lucrative sums with this project but is content to rake over the indigenous in our territory without regard to the violation of our livelihood. This invasion to my being and my property has been chilling and often doubt if I can really count on the U. S. government for safety even while I have served my country faithfully and with dignity.

The U. S. government, even while they taking my land continue to keep me under surveillance. Border patrol agents (BPA) and members of the International Boundary and Water Commission (IBWC) have trespassed my land (El Calaboz and my present residence). When I discovered BPA (on foot) on my property three different times in one month and I demanded that they exit my property immediately, I then faced a second BPA in a vehicle blocking my driveway as I was attempting to leave for my work. This same BPA (on the vehicle) tailgated me going east of my property for about five miles. After the third invasion by BPA on foot, the IBWC trespassed into my land and mowed the drainage ditch in the rear of my property. When I confronted (sent my property map to indicate property lines) the Commissioner for the IBWC, I was told that there was no complicity with the BPA. No other property was mowed. There is complicity between the Department of Homeland Security (DHS) and the IBWC.

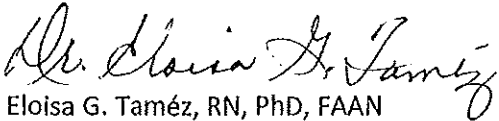
The property in El Calaboz has special meaning for me. This is the land that my ancestors bequeathed to my great grandparents, grandparents and parents. This is the land that I personally recall that my grandfather and father worked on to carve a life for all of us. It is the soil and waters of the Rio Bravo that are constant in our being. My father worked the fields planting each seed, spending long nights out by the fields as he drew water from the Rio Bravo to channel its nourishment to the various rows that he had planted with the only resources he had—a plow and a horse. My father spent hours dusting the plants with “azufre” to keep the insects away with the one other resource—a pair of goggles. He walked miles and miles, up and down each row as he delicately treated each plant. At night, my mother would prepare compresses for his burning eyes with a solution made from the “golondrina” plant. The goggles did not keep all of the “azufre” dust from his eyes. This land has meaning.

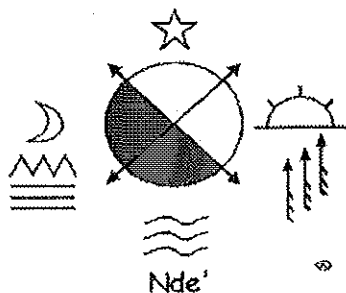
There is no end to my pain, suffering and fear because the U. S. government is relentless and is still today pursuing the taking of more land. The U. S. government intends to ‘relieve’ my burden by taking the land under the levee (which lies south of the border wall) and have offered me \$100. According to the Cameron County Appraisal District, the land under the levee is my property given that the IBWC only secured a right of way in 1936. The IBWC will not commit to my request to install traffic control gates on the levee at each corner of my property, communicating that they must wait until DHS completes the

border wall project. To my knowledge the project was completed in April 2009. While the IBWC has informed me that I have full authority to have this done, it has failed to make a decision in more than two years. The installation of the traffic control gates would impede the BPA from travelling continuously on the levee. The DHS has made the levee a highway; this activity directly impacts on the purpose for which the levee was constructed—safety for the community from the floods of the Rio Bravo.

Additionally, the IBWC is claiming a 300 feet right of way when my deed clearly shows only 100 feet. Those lines have been completely violated by DHS because that agency took land immediately over the 100 feet right of way that IBWC had and, to my knowledge, IBWC representatives have not contested that invasion. The IBWC did not expose the 300 feet claim until after the controversy started with DHS. My sentiment is that rather than pursue DHS, IBWC is pursuing my holdings.

Yours truly,


Eloisa G. Taméz, RN, PhD, FAAN



Lipan Apache Band of Texas

515 Freiling Drive, San Antonio, Texas 78213-3908

Website: <http://www.lipanapachebandoftexas.com>

Email: lipanchief@yahoo.com

General Council

Daniel Castro Romero, Jr. Richard A. Gonzalez
Virginia Castro Romero Frank A. Gonzalez
Ezequiel Cavazos Rudy Soto Perez
Domingo Castro Carrillo

Andrew Nicholson
University of Texas Human Rights Clinic
727 East Dean Keeton Street
Austin, Texas 78705

April 5, 2012

Re: Affidavit from Chairman Daniel Castro Romero, Hereditary Chief
 United Nations Committee on the Elimination of Racial Discrimination

Dear University of Texas Human Rights Clinic,

For the Record, I am the *Nantá áñi* (Hereditary Chief) of the *Ndé* (Lipan Apaches) I am Traditional Oral Historian for the indigenous *Cúelcahén Nde* (People of the Tall Grass) with historic oversight of the, *Tú é diné Nde* (Tough People of the Desert), *Tú sis Nde* (Big Water People), *Tas steé be glui Nde* (Rock Tied to Head People), *Buíf gí ũn Nde* (Many Necklaces People), *Hada'didla' Nde* (Lightning People), and *Zuá Zuá Nde* (People of the Lava Beds) that have continuously lived in their traditional homelands for over a milieuumem.

For the purpose of this affidavit I asked that the "*Lipan Apache*" be identified by its ancestral and traditional name "*Ndé*," rather than its colonial, anthropological, historical, and linguistic imposed label name Lipan Apache, subjugated onto the *Nde* people at First Contact by Spanish Explorer Pánfilo de Narváez in November 1528.

The *Nde* traditional homeland range consisted of more that "*six million acres*" of land. In terms of size, the modern geographic homeland ranges from El Paso, Texas northeast to Lubbock extending southeast to Waco, Texas, extending down south to Victoria, Texas, extending southwest to Brownsville, Texas, and back north to El Paso, Texas.

Historically, all legal instruments of peace, compacts, and contracts of agreements that span hundreds of years that were negotiated among the governments of Mexico, Republic of Texas, Texas, and the United States Government have yet to be honored. These treaties and binding agreements include the Mission Valero de Bexar (The Alamo) - August 19, 1749, Colonia Del Nuevo Santander Lipan Apache Treaty - March 15, 1791, Alcaldes de las Villas de la Provincia Laredo Treaty - August 17, 1822, Live Oak Point Treaty - January 8, 1838, Tehuacama Creek Treaty - October 9, 1844 and San Saba Treaty - October 28, 1851.

Based on our "*traditional knowledge system*" the Ndé have preserved its distinct cultural identity and customs since memory. The Ndé Nation considers themselves as "*stewards*" and "*guardians*" of our traditional homeland range based four critical factors that are meshed into a larger conscious that are inclusive of its social, religious, spiritual, and cultural realms. These realms should not be confused or theorized with any European or colonial models based on historical accounts that are considered in error by the Ndé.

Factor number one; consist of the seasonal hunting cycles associated with the animal migration patterns that encompass most of Texas and all of the Mexican Border States. The tightly meshed Ndé band's would meet before and after the summer and spring solicits to trade, intermarry, socialized, and hunt. The Ndé people were semi nomadic and moved across large expanses in quest of game with the hunting being the main source of sustenance. Among the game animals sought were the bison, antelope, deer and other small animals, such as rabbits and possums. Hunting was not strictly an individual or group activity, and required family mobility in the seasonal pursuit of game.

The Ndé of today, traditional hunting practices have been eliminated with the building of the border wall. Spiritually, the Ndé have been subgatted to a life without a center with the elimination of our traditional hunting practices and activities within the Rio Grande river system region that extends from New Mexico to the Gulf of Mexico. The Department of Homeland Security DHS cites and justifies the forced restrictions within and near the border wall as a national security issues. However, the Ndé were never consulted by DHS in respects to disruption and "*destruction*" of the Ndé traditional homelands and environment that has suffered "*irreversible*" damage of our foods and animal habits alike. As the true indigenous guardians the Ndé have suffered not only cultural shock, but a renewed distrust of a system of checks and balances that predate the founding of the U.S. Government.

Factor number two, deal with the harvesting, gathering, and planting of our traditional foods, such as the prickly pears, algerita, mesquite, carrizo cane, buffalo gourd seeds, peyote, maize, squash, other wild foodstuffs. Such methods include the "*Three Sisters*" planting and harvesting methods that were documented by the Spanish as having established, maintained, or revisited various regions throughout the Rio Grande Valley during the growing season, while gathering activities were continued.

The Ndé of today, continue to practice their time honored harvesting and gathering activities of the prickly pears, algerita, mesquite, carrizo cane, buffalo gourd seeds, and peyote. In 2007, the Lipan Apache Band of Texas Elders Committee, published the *Identification and Reintroduction of the Lipan Apaches Foods* with a federal grant through the U.S. Department of Health and Human Services, Administration for Children and Families, Administration for Native Americans, Grant No. 90NA7913-01, 2007. However, with the building of the border wall such activities have come to a halt due to the destruction of the Ndé foods. The DHS has employed and sprayed defoliation and herbicides similar to the one use in Vietnam in the eradication of all life on the Rio Grande river beds and between the border wall. The eradication of Ndé foods, resulting in the systematic poisoning of our soils and water system. DHS claim's that this was done in the name of national security despite its use of electronic and video surveillance of the region. The Ndé are of the strong belief that the U.S. Government has employed a modern form of "genocide" in the destruction of our culture via the border wall and the use of the Patriot Act in securing lands with the destruction of our natural resources and plant life. The Ndé view the border wall as a replica of the "Berlin Wall" that has no social or moral place in our traditional homelands.

Factor number three, include the ceremonial and religious practices of the Ndé along the entire Rio Grande, Pecos, Nueces, Frio, Medina, Guadalupe, and San Antonio Rivers. In *Texas Indigena: Origins and Migrations and Culture of Indigenous Peoples in South Texas*, authored by Lipan Apache Band of Texas Anthropologist, Enrique G.M. Maestas, PhD., the use of water and its sources are a part of our Puberty Ceremonies and Creation Stories that have been documented. Historically, the Ndé would meet in preselected areas on the Rio Grande regions every year that was based on availability of foods, water, and carrizo cane in hoisting our traditional ceremonies based on a matricidal system that governs our ceremonies. The Ndé bands would meet before and after the summer and spring soloists to trade, intermarry, socialized, and hunt.

The Ndé of today, are struggling to practice their Puberty Ceremonies with the elimination of the Rio Grande river prickly pears, algerita, mesquite, and carrizo cane that are essential in the ceremonies outlined. The Ndé religious communion with the earth and its environment are key to survival of the Ndé, a cultural, spiritual, and religious way of life. The building of the border wall has forever altered the traditional method by which our religious and spiritual ceremony sites are selected. Again, the destruction of the Ndé foods in the Rio Grande region with the use of defoliation and herbicide agents by DHS has forever altered our spiritual and religious connection with Mother Earth. The Ndé consider the building of the border wall and the destruction of our foods an act of aggression toward our way of life. Among our Elders, the building of the wall is considered an act of forced "genocide" that has scared our land and traditional sense of equality. Without consultation of our elders and leaders the US Government has once again, failed to keep its word in protecting our scared sites that has resulted in the disruption of our *way of life* in concert with all natural things in the Rio Grande Valley that extends north to El Paso, Texas.

Factor number four, includes the daily use of our traditional homelands along the entire Rio Grande, Pecos, Nueces, Frio, Medina, Guadalupe, and San Antonio Rivers. With the destruction of Ndé foods on water ways and restriction on the use of our traditional homelands has begun to take its toll on the cultural fiber that has balanced all things among the Ndé.

The Ndé of today, are fearful of entering our traditional ceremonial sites between the Rio Grande river beds and the border wall, claiming that the defoliation agents and herbicides used to kill the plant life will poison them personally. More importantly, the Elders have instructed all Ndé to not eat our traditional foods from the other river systems in Texas, claiming that the U.S. Government has already sprayed defoliation agents and herbicides in these areas. For generations the Ndé have enjoyed this important connection with their homelands that is now off limits due to the destruction that was placed upon the Ndé by DHS. Ndé members who have gone into the border wall section are required to give proof that they reside in the area were they are entering. For many of members, we/they have crossed these same paths for generations without giving proof of their origins and now are being harassed and detained by cultural sensitive DHS agents.

I personally, entered the section and was asked what I was doing in the area, I stated that I was enjoying the view of our homeland. I was quickly bombarded by questions from twelve DHS agents. I refused to answer citing my standing under the Live Oak Treaty of 1838. As I refused to answer their questions, I was threaten with incarceration and interrogation. I finally, pulled out my military ID card. I asked each of the twelve DHS agents, if they were ever in the military, none answered. I stated, that means I am patriotic right, I walked away. While conducting Ndé business in Mexico, I have been detained for vehicle inspection each of the four times I have crossed the U.S.-Mexican Border.

I finally asked why I was being inspected every time I crossed the border. I was told by DHS agent that my name was on a list of persons of interest that causes an automatically vehicle inspection and harassment by DHS agents. DHS continues to violate standard court protocol of how it treats persons associated in lawsuits against DHS. The Ndé are under the understanding that to build the "*Berlin Wall*" in Europe was built to keep out communism and to deter acts of aggression from eastern bloc nations that cost billions of dollars over a generation. The Ndé people ask who we are being protected from. We have not experienced any acts of aggression from the south or Mexico, so why the wall? Many of elders, use an example, imagine waking up in New York City and looking across the bay to see that a twenty foot wall has been erected around the Statue of Liberty, now imagine what the people of America would say? The answer is simple; a wall will never be built in the name of security around the Statue of Liberty, why? It has no social or moral place in America.

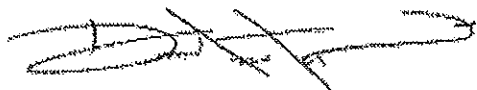
Recently, I had been listening to the Ndé Elders in general with regards to the border wall issue and how the Ndé feel that the U.S. Government has been placing much of its energy into causing disharmony among the Ndé. It must be noted that the Lipan Apache Band of Texas has been investigated by the Internal Revenue Service and U.S. Department of Health and Human Services without cause. In examining this dilemma, our members are of the strong conviction that the Ndé are being punished for the actions Ms. Tamez took in preserving the Hada'didla' Ndé way of life. I also under the belief that the U.S. Government has imposed its own brand of genocide against the Ndé in its quest to silence Ms. Tamez and their mission to militarize the U.S.-Mexican International Border.

In closing, the Ndé Nation fully supports Ms. Tamez's in her legal battle with the U.S. Government that will have a long lasting impact on our people for generations to come. Among the Ndé oral traditions, it has always been an Ndé woman that has brought the Ndé people back from the brink of disaster. Keep in mind that three previous governments have all failed in completely eliminating our people from this world. Thus, I am of the strong conviction that the Ndé people have suffered at the hands of the U.S. Governments agencies.

I would like to thank the University of Texas Human Rights Clinic for giving me this opportunity to articulate the Ndé position on the issues faced.

If you have any questions, please feel free to contact at (210) 789-7969.

Respectfully,

A handwritten signature in black ink, appearing to read 'Daniel Romero, Jr.', with a long horizontal flourish extending to the right.

Ndé Nanta' án
Daniel Romero, Jr., M.S.W.
General Council Chairman
Lipan Apache Band of Texas



Kuné Tsa Nde

The Big Water People of the Lipan Apache Nation of Texas

April 11, 2012

Dazho,

My name is Steven Anthony Fernandez, I am the current leader of the *Kune' Tsa Nde/Tu' Tssn Nde Band of the Lipan Apache Nation of Texas*. My heritage is that of the old Nadahende (Natage) who became Lipan Apache, Payaya Coahuiltecan, and Hispano. My family lines extend from Fernandez; Cadena; Longoria; Garcia; de la Garza-Falcon; Hinojosa; Chapa, Benavides; Flores; Rodriguez; Montelongo; and many others crossing into our family lineage. I am 14th generation of the Jose Matias Longoria Chapa family line from the original Spanish Land Grants and descendent of the founders of Carmargo; Matamoros; Muzquiz; Satillo; Cerralvo; Laredo; La Grulla; Granajado; El Calaboz; San Pedro to name a few.

I currently reside in San Antonio, TX as most other Lipan Apache descendents do (Some are members of the Lipan Apache Band of Texas, with others who are members of the Lipan Apache Tribe of Texas), but we have no land to speak of any longer in part to the policies instituted by the Republic of Texas legislature. Our territory once extended from west Texas to the very tip of the Texas– Mexico border, sharing this with our kin the Hada' Didla Nde (Lightning Storm Band), Tcha shka-ózhäye Nde (Little Breechcloth Band), Zit'is'ti Nde (Rock tied to Head Band), and other Lipan and Natage bands. With the failure to recognize the Treaty of Hidalgo-Guadalupe, we have lost lands that generations of Lipan-Natage people once called their homeland all in the name of progress through "Manifest Destiny" policies. Within south Texas and northern areas of Mexico grows our medicines and resides our sacred places we hold fast to, this land is our mother and she has always provided for the Big Water People in kind and abundance.

Although this "border wall" does come through old tribal lands, our people have only been affected by it through cultural and psychological means. Culturally because now our traditional knowledge bases, i.e. Lipan Apache elders, are now inaccessible and can only be contacted by going through border crossing red tape and its bureaucracy. This has made the band rely more on other groups and academic endeavors as our only sources of new information and reference. Without these first hand witnesses to our historical record, we lose valuable cultural knowledge and facts that help our people to understand their own community. It also affects our people psychologically because it is a symbol of the imperialistic governance that has been forced on our community for over 500 years. Despite their best efforts to make us citizens of this country, they continue to ignore the plight of the Indigenous peoples of this land and take for their own selfish reasons any resources they deem fit to utilize under the guise of "Homeland Security." This Border defense initiative is just a reminder despite having the illusions of freedom in this land, we still must ask for our sacred Eagle feathers, be recognized by this oppressor government, register to obtain our traditional medicines, and prove our Indigenous identities to bureaucrats and paper pushers.

We have not had any contact or encounters with the Department of Homeland Security, but we are aware of other sections of the Border wall in the works and in first stages of construction. We realize that billions of taxpayer dollars are being allocated to this project through legislative slight of hand tactics and padding of Senate and House



Kuné Tsa Nde

The Big Water People of the Lipan Apache Nation of Texas

April 11, 2012

Page 2

Bills introduced for voting by elected representatives. This kind of activity remains unchecked and seems to be a sanctioned practice among those in power position of authority up in Washington DC.

I agree with both Eloisa and Margo Tamez when it comes to the future of our people. This Declaration of the Rights of Indigenous Peoples show it is our right to access and repatriations of our ancestral lands by our own communities that if we allow this project to continue and we do not speak against the militarization of the border and the criminalization of other Indigenous groups along this "invisible line in the sand", we lose most if not all ancient cultural identities and practices if this is allowed to move forward on a well based lie. The Kune'Tsa have and always will support the Tamez family, the Hada'Didla Nde, and the Lipan Apache community as well as all Indigenous groups in and around the border of the United States and Mexico. These statements are true and accurate to the best of my abilities.

Sincerely

I'ladee Ii'ta'I (Lipan Apache)
Lanza Volante (Espanol)
Steven A Fernandez
Nata'an/Traditional Appointed Leader
Kune'Tsa Nde/Koniitsaa Nde/Tu' Tssn Nde Band
Lipan Apache Nation of Texas
San Antonio, TX

**Mr. Ariel Dulitzky, Clinical Professor and Director—Human Rights Clinic
c/o Mr. Andrew Nicholson
The University of Texas at Austin School of Law
CCJ1.324B 727 E. Dean Keeton Street Austin, Texas 78705**

**Re: Affidavit for United Nations Committee on the Elimination of Racial
Discrimination; Early Warning Measures and Urgent Action Procedures Brief on
the Texas-Mexico Border Wall**

My name is April Cotte. I was born and raised in Massachusetts and got a BA in Sociology and Latin American Studies from Wesleyan University in CT. I began a career as an Outdoor Educator from 1991 until 2009 when the Outward Bound program I worked at was closed. I am currently a full time parent. For 14 winters, I lived and worked as an Outward Bound Instructor and Course Director in the Rio Grande Outward Bound Program in Redford, Texas, (on what is currently the US Mexico Border), the Sierra Rica area across the Rio Grande River in Chihuahua, Mexico and during 7 of those winters in the Copper Canyon in Chihuahua, Mexico.

Cross Cultural Experiences/Exchanges, backpacking and river travel along the Rio Grande were part of the Outward Bound educational expeditions in the South West Texas and the Chihuahua, Mexico region. Redford and the communities across the Rio Grande from it are unrecognized Jumano and Jumano-Apache communities and the Copper Canyon communities we visited are Tarahumara. I got to know indigenous people in these 3 areas as friends, colleagues and some, like family. Through these relations, I met Lipan Apache and Chiracahua Apache relatives and friends and worked closely with Margo Tamez and a working group on the issue of the border wall in both of our communities.

My work allowed me to see the border wall issue in a unique way because I spent so much time with rural indigenous people that are related on both sides of the Rio Grande (currently the US/Mexico border). During my first years in the area, the Redford crossing was a Class B informal crossing and the Border Patrol allowed people to move freely back and forth across the river. In Mexico, I experienced how Tarahumara people lived off the grid in traditional Indigenous ways and saw similar traditions in Redford and the surrounding areas in the US and Mexico.

I experienced my Indigenous neighbors and their families living in some ways, very much as I understand they have lived for thousands of years; in clan compounds with their extended families, visiting each other, mentoring children, respecting elders, connecting in person, sharing food, farming in the flood plains of the Rio Grande, Rio Conchas and Rio Nogales, tending the wild, grazing livestock, using the desert and river corridor for recreation along with hunting, fishing, gathering clay for pots, mud for houses and harvesting wild plants for medicine, food, baskets, firewood for cooking and warmth, and materials for building homes ramadas, temascales and fences. And always, children accompanied adults, playing and learning. Our Outward Bound program also had educational experiences with Border Patrol representatives so we learned how they perceived the local situation.

My time was split between the US/Mexico border and a house on a Pacific Ocean beach in Northern California so I saw many differences.

In Redford, the worst example of military/border patrol violence against Indigenous people was in the 1997 US Marine killing of an 18 year old, Jumano-Apache, high school student, Esequiel Hernandez, Jr. some 200 yards from his home while he was herding goats. At the time of the shooting, at the request of the Border Patrol, Marines' Joint Task Force 6 was secretly stationed in Redford, hiding in the brush in ghillie suits, monitoring activity at the traditional border crossing. This was a Class B crossing where the border patrol allowed people to cross back and forth and trade goods.

From this tragedy we learned the dangers of having the military working among US civilians and that the border patrol had an inaccurate assessment of local conditions. They trained the marines that 70-75% of this community was involved in drug trafficking and armed smuggling which is not possible in a community of 150 people that includes farmers house-makers, goat and cattle ranchers, scholars, teachers, 50 elementary school children, elderly people and Outward Bound staff. Please see the Congressional Oversight Investigation of the Death of Esequiel Hernandez Jr.,¹ the Marine Corps Investigation to Inquire into the Circumstances Surrounding the Joint Task Force-6 Shooting Incident,² and the 2007 Documentary, The Ballad of Esequiel Hernandez, produced by Kieran Fitzgerald.

In 2008, an Indigenous leader of the farmers/ranchers who spoke out against the killing of Esequiel Hernandez Jr. was watched and followed regularly with his family at his home and day and night as he went from his home to his fields to irrigate. In one incident, a Border Patrol agent harassed him, his wife and 2-year-old grandchild for an hour and a half in front of his house until the farmer finally said in exasperation, "I'm going to hurt you. I'm going to call the Texas Rangers." A local FBI agent labeled this: "a terrorist threat to a border patrol agent" and had him arrested with a felony charge a few days later.

Months after the floods when a Mexican farmer passed the above US farmer's horses back across the Rio Grande because they were eating his crops, the US farmer and his son were apprehended by Border Patrol agents who took the horses and took the men in for questioning. It was reported to the local paper as the "smuggling of terrorist goods." The farmer went to the USDA office to pay fines and fill in paperwork to get his horses back and was told by the officer he met there, that he was under arrest when 5 Border Patrol agents came out from hiding in the horse trailer in combat gear and a BP vehicle came from around back. In both instances, he was questioned about who in Redford was doing drugs and terrorism. He was told he would be better off not living in Redford if he did not want to be arrested and questioned like this.

At the Presidio port of entry in 2008, a customs official violated the sacred objects of a Chirachahua Apache medicine man after he told her there was a federal law protecting those objects. When he expressed concern about the harm this could cause, 5 more agents approached with their hands on their guns. In a separate

instance, a border patrol agent looked at the tribal ID cards of two Apaches and called them foreigners.

Through ongoing phone calls with Dr. Eloisa Tamez in El Calaboz I witnessed the pressure that was put on her by multiple visits by government personal at her home and workplace pushing her to sign away rights to her land. We learned of regular visits to her property by the border patrol day and night that seemed very intimidating. I also saw in person how looking south from any point on the land that her people have been on for generations one is assaulted by the border wall, a monument to militarization and separation from the sacred waters of the Rio Grande and her people on the other side of the river. It brought me to tears and is too painful to even imagine that happening in Redford.

A local Indigenous scholar said, "we don't have a wall in Presidio but we live with a virtual wall in which all our movement is monitored and we are regularly stopped and interrogated." At times people (including me) are stopped by multiple Border Patrol vehicles every time they leave their houses and are followed into their driveways by agents that sometimes get out of vehicles with guns out, high emotions, questions and commands when family members of all ages are present. BP vehicles drive at times at night with lights out past houses and roads where children are playing. Border Patrol agents were questioning farmers that were fixing their pumps at the river, and at a the water district board meeting and telling people they should not be at the river or on the levy. But their livelihood depends on being at the river and on the levee. People do not know what their rights are in the border region.

With the current shooting and unwarranted charges and arrests atop a violent history against "Indians" in the Redford area, Indigenous people live in fear but do not want to leave their place and are reluctant to expose their existence for fear that knowledge of their identity or culture could be used against them. A local Indigenous scholar fears that historical and cultural information he writes on his people to pass on their knowledge and help in their recognition process will be used against them in Human Terrain Systems.

After each assault by the Border Patrol, FBI, military and other agencies on community members, there are losses, fear increases and more local Indigenous people move out or don't return. After the killing of Esequiel Hernandez Jr. by the marines, people gave away their goats and ended a multi year cooperative goat cheese factory initiative that many herders were involved in. The farmer/rancher leader moved out to avoid continuing to get arrested and be harassed by the FBI and Border Patrol. He drives 4 hours each way to come to Redford Water District Meetings.

Indirect consequences of the militarization and actions by other agencies further challenge these low-income, at risk communities and the biodiversity of the region. In Redford, Presidio and other communities, the increasing population of high paid Federal agents effects local elections and political decisions. In 2002, the Marfa

Public School District closed the Redford Elementary School at the same time they built a new Gymnasium for Marfa children. Currently, an agency of the US government is eradicating Salt Cedars along the Rio Grande in the Big Bend area but they are not being replaced with other trees.

After the flood of 2008, an agency of the US Government told Redford farmers that it was not economically feasible to fix their levee. In communities surrounding Redford, namely Presidio TX and the communities across the river in Mexico, money was given to fix the levees and farms. At the same time, there was an offer by an environmental organization to pay farm owners some \$300.00 per acre to put the land in permanent conservancy. There is currently pressure from some water district members to sign the Redford Water District farms and levies over to a government agency.

The Border wall and militarization in our communities inhibits the mentoring of children by elders necessary for protection of biodiversity and cultural renewal. Though the years in Redford, I witnessed Indigenous people of all ages moving through the landscape on both sides of the river doing traditional activities. Children tag along with parents, grandparents and relatives who are mentoring them in the fields, the desert and the river corridor. I've seen children learning from elders, adults and other children how to harvest cactus berries, fruits, flowers, pads and roots, which plants to use for medicines and basket making, which clay for pottery and mud for houses, how to swim and spend time in the cool shade, how to hunt and fish in the river corridor and the desert, what different animal and bird behaviors and signs mean, how to predict the weather, how to use local materials to feed animals, collect human and animal medicine, make fences and traps, build and fix adobe houses, roofs, shade structures and sweat lodges. Throughout these experiences, relationships between all living things are taught and respect is developed.

With the increased harassment by the Border Patrol and FBI, of local people using the river corridor, Jumano-Apaches are not sure they are allowed to do traditional activities and are scared they could be arrested or cause trouble for their families by going near the river. Families are reluctant to allow children to roam freely through the desert and the roads for fear they will be stopped by the Border Patrol

During my visit to El Calaboz, I saw the border wall challenge some of the traditional education of the grandchildren of the Lipan Apache elder we were visiting. Where they should have been able to explore daily through the land down to the river and bring stories and questions back to their grandmother and other relatives, instead, they only went to the river corridor a few times in a week. A grandmother told tales of berry picking along the river but the children could no longer go easily nor alone to the river behind her house to see if the berries were ripe. The children watched the birds, but the wall modified the bird language and behaviors so we could not count on their communication to inform us of the activities and movement of other species on the land. We tracked animals and saw them waste energy to

move all the way around the wall. At one point, tracks we were following suggested a rabbit had crossed through the wall but the coyote chasing it could not.

One day we walked to Eloisa Tamez' access to the river with a group of friends and relatives. Some elders did not make it because it was too far to walk around the wall. Soon after we crossed the opening in the wall, we were approached by 2 border patrol vehicles that scared away wildlife we might have seen and shifted the focus many of us had on examining plants, animal tracks and bird behaviors with elder mentors. The agents then questioned and conversed with us, delaying our walk. For me was stressful because the wall made our walk to the other side long and the interaction with the border patrol took more time while my 6 month old, nursing baby was waiting for me way back at the house.

I am concerned that there will be continued and increased militarization of these Indigenous communities on the US/Mexico border based on propaganda calling for a war on Narco-Terrorism as put forth in the report by General Barry McAffry and Robert H. Scales, PhD, Texas Border Security: A Strategic Military Assessment.ⁱⁱⁱ There was also housing built for 200 more Border Patrol agents in Presidio, TX which borders Redford and has a population of about 6,000.

I am concerned that more killings and violence upon innocent Americans could occur because the recruitment for Homeland Security law enforcement jobs uses military propaganda, Veterans returning from the wars in the Middle East fill these jobs, and receive training and strategic military assessments that fail to show true local conditions in our communities (in fact, positioning local indigenous people as dangerous enemies).

In both Redford and El Calaboz: I am concerned that the Indigenous residents and all residents are harassed, watched, hunted, detained and at risk of arrest by the Border Patrol and other US government agencies when they do anything in the river corridor. This creates an unsafe environment for people and causes them to fear doing things at the river that their people have always done. In El Calaboz, the extra walk/drive required to access the river corridor also deters Dr. Eloisa Tamez, her relatives and other Lipan Apaches from access. This essentially blocks indigenous people from traditional cultural properties, and education of the young, and could be used in the future to claim that Indigenous people do not require access to the river corridor any more.

It concerns me that if Government agencies take over the land and environmental agencies influence locals to change use patterns on the land, it will seem like it is no longer needed as a traditional cultural property of Indigenous people and will be even less protected from the border wall. The biodiversity of the river corridor is at risk if the Indigenous people that utilize, tend, and protect it are not able to access it and mentor their children in their relationship with the land.

ⁱ 105th Congress 2nd Session Committee Print Ser. No. 11
Oversight Investigation of the Death of Esequiel Hernandez, Jr.,
A Report of Chairman Lamar Smith to the Subcommittee on Immigration Claims of the
Committee on the Judiciary House of Representatives Henry J. Hyde, Chairman,
November 1998 US Government Printing Office Washington: 1998

ⁱⁱ United States Marine Corps Investigation to Inquire into the Circumstances
Surrounding the Joint Task Force-6 (JTF-6) Shooting Incident that Occurred on 20 May
1997 Near the Border Between the United States and Mexico, From: Major General John
T. Coyne USMC To: Commanding General, I Marine Expeditionary Force
5800 JAGT/jtc 07 Apr 98.

ⁱⁱⁱ Texas Border Security: A Strategic Military Assessment, General Barry R.
McCaffrey and Robert H. Scales, PhD. 9/20/2011, Colgen LP

Sincerely,



April Elisabeth Cotte

17 Shelter Cove

Pacifica, CA 94044

and

PO Box 145

Redford, TX 79846

and Robert H. Scales, PHD, 9/20/2011, Colgen LP.

**Affidavit of Celestino Gallegos regarding
the construction of the border wall in Texas.**

My name is Celestino Gallegos and I am an attorney licensed in the State of Texas. I was the Team Manager for the Border Rights Team at Texas Rio Grande Legal Aid, Inc. ("TRLA") from 2007 until 2010. TRLA is a non-profit organization that provides civil legal aid for low-income Americans in all of the counties located on the Texas-Mexico border, starting in the city of El Paso in the west to the city of Brownsville, in the southeast. From 2007 to 2010, I coordinated of a team of attorneys, paralegals, and outreach workers who dealt with community education and litigation regarding the land condemnation along the border for the construction of the border wall in the Texan cities of El Paso, Eagle Pass, and in the Rio Grande Valley.

TRLA was counsel of record in six condemnation cases brought in federal court, both at the District Court level and before the Fifth Circuit Court of Appeals. Additionally, we advised about two dozen individual property owners on issues relating to the border wall construction, as well as dozens more through community forums and meetings. All of our clients regarding the border wall cases were Mexican-Americans with diverse backgrounds; some were first generation immigrants, and others had long historical and family ties to the area.

The legal and legislative background of the construction of the border wall set the stage for the violation of individual rights that took place when the Department of Homeland Security (DHS), the administrative agency that was in charge of the border fencing construction, carried out the project. Congress gave DHS a lot of power through two legislative acts: the Secure Fence Act and the Real ID Act. The Secure Fence Act gave DHS the authority to condemn property "along the border" for the purposes of constructing a double layer fence with roads running along the barrier, along the entire length of the U.S.-Mexico border. Section 102 of the REAL ID Act, allowed for a waiver of compliance with many environmental and cultural protection laws for the construction of the border wall. The only check on this otherwise unbridled concession of power to DHS, was the requirement from an amendment to the Secure Fence Act which required consultation with the local and state officials in the affected communities regarding the appropriate type of border security infrastructure to be constructed in along the U.S. - Mexico border.

In addition to the broad authority given to DHS that was specific to the Border Wall project, U.S. law regarding land condemnation is very unfavorable to private property owners whose property is being taken by the government. The procedure for filing a land condemnation case begins with a government lawsuit against a landowner whose property is going to be purchased for a "public use" by the government. There used to be a doctrine of defense against condemnation of land that was not for "public use," but this was severely diluted by the Supreme Court in the case of *Kelo v. The City of New London* in which eminent domain was used justify the condemnation of privately owned buildings to a group of private investors who intended to build a shopping center on the property. The Supreme Court justified the condemnation by finding that economic development is a permissible public use, even if the condemnation does not result in ownership by a public entity but rather another private owner. There was no legal possibility for challenging the construction of the border wall under the "public use" doctrine,

since the federal government was going to own the land, and the border wall was justified on national security grounds.

Therefore, the only defenses available left for most landowners in the border wall cases was to either challenge the government's siting of the project on their property, or to fight over the amount of money that they would be compensated for the construction of the border wall. If the owner disagrees with the government offer of compensation for the use of his or her property, he or she will have to hire a lawyer and several other experts to conduct studies that prove that the property has a higher value, or that the remaining property is going to be devalued as a result of the government's use of the neighboring property. This procedure is very costly in terms of both time and money. Other than attorney's fees, there are fees for hiring appraisers and other real estate experts to challenge the government's valuation of land. In addition to the law favoring the federal government, they also have a lot of resources, including a large legal department to handle these cases. For example, during one meeting with DHS, three attorneys from the Department of Justice, one attorney from the Department of Homeland Security, a land-man from the U.S. Army Corps of Engineers, and three border patrol agents were present to negotiate with my client and me about the location of the border wall through his property.

During the initial planning phase of the construction of the border wall in Texas, DHS offered minimal explanations to affected landowners about the process, options, and legal consequences related to the condemnation of properties for the construction of the border wall. The initial DHS tactic was to send border patrol officers door to door in full uniform with side arms, to present land owner's in the border wall construction area with the government's waiver of property rights and request their signatures. When a landowner refused to sign the waiver, DHS would threaten to sue them. In my experience as an attorney, most people don't want to deal with a lawsuit, so they would quickly give in and sign. Low-income families are especially reluctant to fight the government because they don't have the resources, and they fear the power and authority of the government. Many property owners were initially coerced or otherwise convinced to sign the waiver admitting access to government agents without full disclosure of the content because of these tactics. The broad wording of the initial waiver allowed government agents free access to landowners' property allegedly for the purposes of surveying, but also allowed destruction of any obstacles that would impede the construction of the border wall.

In my opinion, the reason that the government withheld the lack of information is that DHS had two conflicting purposes. On the one hand, as a government agency responding to the public, DHS had the obligation to explain to people the means, motivations, and methods of the border wall construction. At the same time, as a purchaser of land, DHS was trying to keep costs down so that the project would come in on budget. This led to some of the tactics that were complained about from the outset: convincing people to sign waivers, not advising people of their legal rights, threatening legal action, and sending people "low ball" offers for the acquisition of their property rights.

One of my clients, an elderly couple from Los Ebanos, Texas, initially came to us because border patrol agents came knocking on their doors and requested that they sign the aforementioned waiver to permit DHS access their land for surveying purposes. The border patrol agents spoke Spanish, but the waiver documents were in English. The elderly couple was primarily Spanish speaking naturalized

citizens with little formal education. The reason that they called our organization was because they did not understand what they had refused to sign. When they were served with a condemnation lawsuit a couple of weeks later, these documents were also in English. They were initially very concerned about being sued by the federal government, and we met with them extensively to explain that they had done nothing wrong by exercising their rights.

It was only after press coverage about pushback from the community and opposition from many local government officials that DHS made a show of consultation with the community that was required by the Secure Fence Act. Unfortunately, the culture of DHS permeated these "public information sessions" in which there more security agents were present than community members. Oral presentations were given, but no one was allowed to ask questions or offer any comments. The message was clear: the government was going to do this according to its own pre-conceived plan, border residents would have to comply, and they were only providing information to border communities as a courtesy. I would describe DHS compliance with the community consultation requirement as a top down security focused effort.

The border fence project and the underlying legislation were subjected to several legal challenges in courts across the border. Several environmental groups challenged the constitutionality of the broad waiver of compliance with environmental laws from Section 102 of the REAL ID Act. They lost in federal district court in Arizona, and the Supreme Court denied the petition for certiorari to the Supreme Court, ending that constitutional challenge. TRLA tried to challenge the authority of the government to construct the fence so far from the actual border, but this argument was rejected by the District Court. There were attempts to challenge the condemnation process by raising defenses of insufficient due process. The Texas Civil Rights Project and the Center for Constitutional Rights attempted to bring a class action lawsuit against the government, requesting an injunction that would have halted the construction of the fence. The injunction was denied by the District Court, and the class was not certified. While that case languished in Court the fence was built.

The exercise of the government's eminent domain power left landowners little legal recourse to actually oppose the use of their land for the construction of the border fence. They did not have any opportunity for input on the situs of the fence on their land, nor did they have an opportunity to discuss the design or operation of the fence. This led to a lot of confusion, resentment, and suspicion of special favors paid to landowners whose land was not fenced since the fence was not continuous.

It took a significant amount of time in litigation just to learn the federal government's rationale for the placement of the wall. The answer had little to do with security, and everything to do with compliance with the border treaty with Mexico. In reality, the success of the project did not consider areas where illegal activity occurred, but rather whether the area where the wall was to be constructed would impermissibly alter the flow of the river. Whether or not owners had their land condemned was just a question of whether a levee ran through their properties. This was the reason that the wall was built as far as a quarter of mile from the actual border in many locations, cutting tracts of property off from the river.

The results of the blunt force and wide latitude given to the DHS to plan, construct, maintain, and patrol the border wall significantly reduced the utility of the land for many landowners along the riverbank. The wall was not constructed right on the banks of the river. It was typically built several hundred yards away from the actual riverbank, in some cases up to a quarter of a mile. This left large swaths of land between the river and the wall inaccessible to the property owner. Access to land on both sides of the fence was a sticking point for many people. DHS proposed building gates and providing codes or keys to those gates. They didn't want to build them everywhere, so the big fight was how far down the road someone would have to drive to get to a gate where s/he could cross the fence and then drive back along the fence to get to their land.

The government's plan never considered how these landowners were going to access their riverfront property neither felt that it should not have to reimburse them for the loss of value of this "no-man's land" left in limbo between the river and the wall. Many of the landowners willingly allowed federal agents on their land for preliminary studies, with the promise of continued negotiations over the finer points of the precise location of the fence, access to wells, irrigation gates, and general access to areas cut off by the fence. However, these landowners were angered when their concerns were put on the back burner for expediency's sake.

I suspect that well over half of the people whose land was condemned for construction of the border wall were unrepresented by an attorney during those negotiations/proceedings. The more affluent landowners, on the other hand, hired lawyers who fought the issue of devaluation of the remaining land, and eventually received higher compensation than what they were initially offered for their land. One of my own clients was paid many thousands of dollars more than the initial "low ball" offer that the government presented at the beginning of the condemnation process, confirming the important role of counsel for an affected landowner. Ironically, landowners who agreed to negotiate with DHS in order to avoid a lawsuit, were sued as a matter of procedure despite their compliance.

The border wall effects on the civil and human rights of the people who live in the path of the fence are alarming and constitute violations of several Articles of the Universal Declaration of Human Rights (UDHR) as well as the International Convention on Civil and Political Rights (ICCPR). The idea of fencing off the southern border of the United States, while leaving the northern border relatively free and unrestrained is facially discriminatory. Articles 1, 2, and 27 of the ICCPR speak to the rights of people to freedom of social and cultural development, as well as respect for human rights without distinction of race, color, language, or social origin, and the right of ethnic minorities within a member state to enjoy their own culture. The construction of the border wall is a significant infringement on the rights of people in the Texas-Mexico border area, which is rich in multi-cultural tradition and history that is unique to both nations. The residents of the southern border of the U.S. and the northern border of Mexico have long standing cultural, familial, and economic ties that distinguish each region internally from the dominant culture of their respective States. The U.S. has unilaterally engaged in a deliberate policy of cultural repression in this region under the guise of security concerns.

While security concerns form an exception to the right of freedom of movement within the boundaries of a member state found in Article 12 of the ICCPR, this exception is inconsistent with other

Affidavit of Corinna Spencer-Scheurich
Regional Director
Attorney at Law
South Texas Civil Rights Project

My name is Corinna Spencer-Scheurich and I am an attorney at the South Texas Civil Rights Project, a nonprofit organization that promotes racial, social, and economic justice through litigation, education, and social services for low and moderate-income communities, who traditionally are the least able to defend themselves in Texas.

Through my organization, I provided legal counsel to property owners during the planning and construction of the border wall in Texas. My organization was also local counsel for the lawsuits against Dr. Eloisa Tamez, a Lipan Apache band member and owner of the property El Calaboz, one of the lands affected by the construction of the border wall.

I witnessed how, in the initial planning of the border wall construction, there was no official communication from the federal government to landowners about the land taking process/surveying/mapping in the area. Many of them were led to believe that the federal government was asking for access to their land for Border Patrol agents, which was already happening before the construction of the border wall. The majority of families I talked to in the beginning did not understand that the government was planning on building a wall on their land and had signed away a temporary easement to their properties that was extremely broad without any compensation. Landowners did not understand from the document that the temporary easement was to allow survey crews on their property and that it gave them the right to remove structures and landscaping before any permanent eminent domain was going to happen. Furthermore, this document was very difficult to understand for people who are not familiar with legal terms. By nature, the lack of information from the federal government to compel people to sign away rights to their properties was a coercive method. Government officials visited people's homes to try to convince them to sign. Peter Schey, from our partner organization, the Center for Human Rights and Constitutional Law, led an effort to attack the lack of information and the way that the government was attempting to take the land to prevent the land taking. However, this effort was unsuccessful in court.

Dr. Tamez sounded the alarm about the federal government's attempt to get a temporary easement on her property in the fall of 2007. Along with the attorneys from Texas Rio Grande Legal Aid ("TRLA"), I conducted numerous outreach meetings to inform landowners of their rights and to collect information on the government actions in the beginning. We tried to find representation for as many as possible; however, we were unable to reach everyone through these efforts because many residents were too scared to go up against the federal government. In general, people who live along the Texas-Mexico border have either lived there for generations or are first generation immigrant families. The long-time residents seemed to be somewhat resigned to the fact that they had no power when facing up to the government of the United States, while immigrants were too scared to "cause trouble," believing that any opposition to the border wall construction might have negative consequences for their families due to federal immigration policies.

Surveyors invaded my clients' privacy by walking through their land. The wall went up very quickly for Dr. Tamez; and I believe Benito Garcia, another former client, lost access to irrigation water that was his right. The Real ID Act and other laws that gave the government the power to build the wall waived many environmental, indigenous, and social protection laws. In the end it was almost impossible to prevent the taking of the land, and the exercise of eminent domain powers meant that all of our clients lost pieces of their property right in the middle of their land. The land lost was up to a mile from the actual border. From my experience as a lawyer, eminent domain is very hard to defend against.

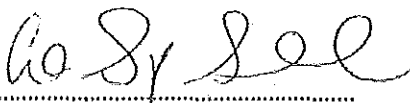
Most of the cases reached an agreement because everything came down to money. There was no better prospect of winning anything else. Most landowners felt that they would do better by settling instead of letting a jury choose the amount. South Texas Civil Rights Project represented some of these cases, along with Texas Rio Grande Legal Aid, and the Center for Human Rights and Constitutional Law, two nonprofit organizations that offer free legal aid to people who meet certain requirements. Other lawyers represented more wealthy landowners, universities, school districts, and businesses. I was not party to the compensation settlements, but as far as I understand, those cases where individuals had an attorney ended up with much more fair compensation for the landowners.

It is also important to mention that the federal government avoided certain properties, and after looking at the maps, I can tell no rhyme or reason for the locations that they chose. Despite our attempts to get information regarding the placement of the wall, we have never been given a reason for its locations.

The border wall has dramatically changed the border community. Before the wall, the Border Patrol enjoyed a generally positive relationship with landowners along the border. Border Patrol agents knew individual owners and many of the landowners were sympathetic about the job that these federal agents were doing. In my opinion, the existence of the wall has soured the relationship between the Border Patrol and long-time residents. Landowners in Cameron County believed that prior efforts to cut down on drug and arms smuggling through electronic monitoring systems had been successful in their area, and did not understand how or why a wall was necessary when very little movement was happening in their area. I believe this undermined the relationship between landowners and Border Patrol. Nowadays, the wall and what it represents to landowners serve as a daily reminder of the injustice and capriciousness of the policies of the U.S. government on border security.

State of Texas, United States, April 10th, 2012.

I swear under the penalty of perjury that the forgoing is a true and accurate statement of facts, to the best of my knowledge.


.....
Corinna Spencer-Scheurich

**Affidavit of
Alberto Mesta
Managing Attorney for El Paso office at
Texas Rio Grande Legal Aid, Inc. (TRLA)**

My name is Alberto Mesta, Jr. and I am the managing attorney for the El Paso office of Texas Rio Grande Legal Aid, Inc. (TRLA), a nonprofit organization that provides free legal services to the residents of Southwest Texas who are unable to afford legal representation. As part of the border rights team of TRLA, I contributed to the project with legal research and I also disseminated information in the border city of El Paso and attended public forums being held by Department of Homeland Security (DHS) and clients concerned by the border wall construction plans. The border city of El Paso is part of the district of US Congressman Silvestre Reyes, a former border patrol chief. Congressman Reyes started the "Border Security Conference" at the University of Texas at El Paso, at which bi-national topics were discussed and vendors who made up the majority of the defense contracts displayed the latest in military and security options for the border.

Residents potentially affected by the border wall experienced a lot of anxiety and stress during 2007 and 2008 because DHS provided little information to the public about the specific details of the border wall such as its location, timeline for construction, or properties to be affected. DHS agents provided documents to affected landowners that were very difficult to understand and none of those documents were available in Spanish, although many residents in this area have limited English proficiency. As a result, many organizations participated in protests against the construction of the border wall in the area of the border city of El Paso, including a 30-mile walk along the border to raise awareness.

The construction of the border wall in El Paso area has had very negative consequences for the environment and for the colonias, which are residential areas along the Texas-Mexico border that often lack some of the most basic living necessities such as potable water and sewer systems, electricity, paved roads, and safe and sanitary housing. The construction of the border wall further deteriorated the living conditions in the colonias by increasing noise and pollution, and by the ever-increasing presence of border patrol agents and technology. Some of our clients live in those areas because my organization has qualification guidelines that require clients to meet certain poverty levels or belong to a community organization whose membership is comprised of people who would qualify individually for our services. Those that qualified for TRLA obtained legal representation at no charge, but it still took many resources for our organization to represent our clients affected by the border wall. I personally assumed a plethora of cases in which homeowners got letters offering compensation for very minimal amounts. In my opinion, the agreement to access land was very one-sided in favor of the government.

Starting in 2007, several lawsuits were filed by the government against landowners and vice versa. Several lawsuits were filed against several landowners in Cameron County by DHS in the Southern District of Texas on January 17, 2008, including a suit against the Public Utility District of Brownsville. Instead of merely granting the *ex parte* relief requested by the government, Judge Andrew Hanen set the cases for hearing on January 25, 2008. After a hearing, the Judge expressed some concern about potential damage that might be done by agents conducting surveys and investigatory work for the construction of the border wall, as well

as DHS efforts to contact and provide notice to affected landowners. Nonetheless, he granted DHS request for access to the defendant's property.

On January 31, 2008, more lawsuits were filed against landowners in the Rio Grande Valley, including landowners in Hidalgo County. Dr. Eloisa Tamez was a named plaintiff in one of these suits. I represented TRLA clients Pamela Rivas and the Muñiz family who were also named plaintiffs. A hearing was set in Brownsville for February 8, 2008 in front of Judge Hanen.

On February 1, 2008, TRLA filed responses to the condemnation suit in McAllen District Court. TRLA's response requested that the condemnation proceeding be halted because the government failed to negotiate any price terms with landowners before filing suit, a necessary requirement under the statute cited in the condemnation lawsuit, 40 U.S.C. §3114.

Five days after, the Center for Human Rights and Constitutional Law (CHRCL) filed a class action lawsuit against DHS claiming that the procedures used to condemn the land for access were improper, and that the government's suits should be dismissed. CHRCL cited the Appropriations Act requirement for consultation with local communities and the provisions of the REAL ID Act as a basis for their argument. The Court heard arguments from the parties on February 7, 2008. No decision was issued at the conclusion of oral argument on that day.

The Cases reached the Fifth Circuit Court of Appeals where the Department of Homeland Security's actions were upheld, thus ending the litigation. There were little alternative legal remedies available for affected landowners. In this case, the concept of homeland security was contradictory with the American doctrine which defends individual property rights. Our clients disagreed with the decision but everyone had to abide by the court's ruling.

State of Texas, United States, April 16, 2012.

I swear under the penalty of perjury that the foregoing is a true and accurate statement of facts, to the best of my knowledge.



Alberto Mesta

IN APPRECIATION FOR YOUR TIMELY CONTRIBUTION ON THE PRELIMINARY FENCE 225 US BORDER PATROL RIO GRANDE VALLEY SECTOR PROJECT



Jim Hogg County

Brooks County

Kerady County

Starr County

Hidalgo County

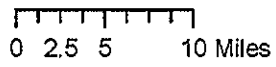
Willacy County

Cameron County

MEXICO



Legend		



RESOLUTION NO. 2007-071

**A RESOLUTION OF THE CITY COMMISSION OF
BROWNSVILLE EXPRESSING OPPOSITION TO THE
CONSTRUCTION OF A BORDER WALL ALONG THE
BROWNSVILLE, TEXAS -MATAMOROS, MEXICO BORDER.**

WHEREAS, we the City Commission and the residents of the City of Brownsville agree with Valley Interfaith that we should "Invest in families -- not the wall"; and

WHEREAS, together with the Texas Border Coalition and the Rio Grande Valley Network of organizations oppose spending our tax dollars on the construction of an ineffective border wall that can easily be breached in seven (7) minutes; and

WHEREAS, \$1.2 billion of federal funds, intended for the border wall, should be invested in health care, housing, education, job training, and infrastructure that will provide a visible and tangible return such as reduction of diabetes, childhood obesity, and other preventable maladies; and

WHEREAS, the border wall represents a human rights crisis for indigenous peoples living along the borders and the human rights crisis at the southern border of the United States has resulted in over 4,000 migrant deaths in recent years, and

WHEREAS, the border wall will have devastating consequences on Texas border economies, environment, human rights, will result in landowners and farmers losing land and critical access to river water irrigation and, and will affect the relationship between the United States and Mexico, and

WHEREAS, the border wall will also affect historical sites along the Rio Grande River that are important to Brownsville such as: a national historic marker of Fort Texas, which is the site of the first battle of the Mexican-American War, the Palmetto Hill battle site, which is where the last battle of the civil war was fought, the Chisolm Trail historical site, which is the origin of the famous cattle drive to Kansas City, the Brownsville, Texas/Matamoros, Mexico ferry crossing historical site, which has been in operation since before international bridges were built; and

WHEREAS, the federal government, through its power to waive in their entirety the Endangered Species Act, the Migratory Bird Treaty Act, the National Environmental Policy Act, the Coastal Zone Management Act, the Clean Water Act, the Clean Air Act, and the National Historic Preservation Act, the Archeological Resources Protection Act, the Safe Drinking Water Act, the Noise Control Act, the Solid Waste Disposal Act, Endangered Species Act, the Wild and Scenic Rivers Act, the Farmland Protection Policy Act, the Administrative Procedures Act, and the Fish and Wildlife Coordination Act, would construct a border wall that would slice through the heart of the Rio Grande wildlife corridor, would clear hundreds of miles of riparian habitat affecting migrating birds, bats, butterflies, ocelots, and other wild animals, would adversely affect the ecosystems of the Santa Ana National Wildlife Refuge, Bentsen-Rio Grande Valley State Park, and World Birding Center, Roma Bluffs World Birding Center, the NABA International Butterfly Park, the Sabal Palm Audubon Sanctuary, the Nature Conservancy's Southmost Preserve, and numerous United States Fish and Wildlife tracts that front the Rio Grande; and

WHEREAS, the border wall would provide a false sense of security based on the known fact that a wall can be easily breached within minutes, would not stop illegal border crossings, and would be less effective than a smart virtual fence which could be achieved through raising the river level to 26 feet above sea level, widening the river to 300 linear feet, via the construction of a weir dam; and

WHEREAS, together with the Texas Border Coalition we support alternatives to fencing that are smart and effective and ultimately achieve true security, such as the Vega Project in Webb County, the Eagle Pass Park Project, the Brownsville Weir and Reservoir Project, the IBWC's reinforcement of levees and the clearing of Rio Grande vegetation such as Carrizo cane that provides hiding places for illegal immigration and other illegal activity; and

WHEREAS, we support physical barriers, in remote areas where they make sense, and they are agreed to by County and Municipal officials and we strongly support smarter, more effective solutions where fences would be ineffective, that include radar, cameras, sensors, and more effective deployment of Border Patrol personnel;

WHEREAS, our nation needs to find real solutions to our immigration issues instead of constructing a wall that would prohibit the creation of a river walk for the revitalization of downtown Brownsville and for the benefit of the citizens of both countries; and

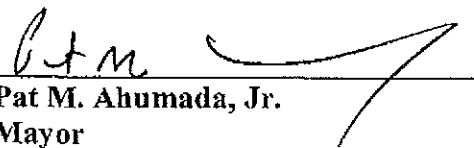
WHEREAS, construction of the border wall would adversely affect the delicate local economy, destroy vital ecosystems, cost taxpayers billions of dollars, and put at risk hundreds of lives by herding people to dangerous desert crossings

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF BROWNSVILLE:

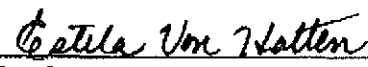
Section 1. The City Commission of the City of Brownsville, and Brownsville residents, hereby express strong opposition to the federal funding and construction of the border wall, which would be imposed upon our international border by the U.S. Federal Government, as an infrastructure project that would not meet the strategy for comprehensive immigration reform for the U.S., and cause untold damage to human life, wildlife, ecosystems, local economy, private property, historical property, farmland, and international relations between Mexico and the United States.

Section 2. The attached petition, signed by local residents, public and private entities, hereby reflects their opposition of the proposed border wall, and they join with the Texas Border Coalition and the Rio Grande Valley Network of organizations who oppose the border wall construction.

DONE this 4th day of December, 2007.


Pat M. Ahumada, Jr.
Mayor

Attest:


Estela Von Hatten
City Secretary



From: SELF, JEFFREY
To: (b) (6)
Cc: AGUILAR, DAVID; COLBURN, RONALD
Subject: Project 225
Date: Thursday, March 22, 2007 4:07:45 PM

Chief,

Situational Awareness Report:

Engineers have visited the Sectors (unknown to any BP elements as we discussed) and identified fence locations. These will be briefed at the March 27th SRR. Won't be there have to go to the Hill.

No secondary fence will be built under P225.

The decision was made to build only primary fence earlier this week. ORBBPs call for pedestrian. After discussion they relented to looking at building pedestrian fence in the urban areas. I'm trying to save them money but I don't think they get it. The PMT will look at ornamental fence for those urban areas that insist on something pleasing to the eye. I was told not count on it though.

OBP needs to identify where the Sectors want pedestrian fence. (working it)

OBP needs to verify with the Sectors where ornamental fencing will be requested. (working it)

Funding concerning Real Estate issues will drive the priority of building any fence in urban areas. They will not build any fence in any area (urban) where real estate costs are too high. I advised that this would be operationally impacting. I was advised that funding and timelines are driving this deployment not operational need but they would do what they can to facilitate our needs.

P225 must be completed by Dec. 08 and 200 miles of vehicle barrier also by Dec. 08. (b) (6)
VB and TO VB count towards the 200 miles of VB.

WHAT WE ALREADY KNOW: IBWC controls the property between the river and the levy. IBWC (Treaty with Mexico) says we can't obstruct water flow. IBWC says we also can't build in flood plain. If we build in a flood plain and then it floods we will be altering water flow. There is also an Executive Order that stipulates that no Government Construction will take place in flood plain. **IMPACTS AND WHAT WE DIDN'T KNOW:** The engineers have identified 100 miles in Texas and 20 miles in Yuma where they are going to build fence but as a result of above (flood plain), the fence will be built a half mile to a mile north of the International Boundary. I told them this was unacceptable. They pushed back with timeline issues.

They will not be doing any ROEs to access the land. They said they don't have the time. OJS said that they didn't identify all the land owners when we ran that drill so we can't provide it to them. The problem being if they don't have ROEs to enter the property how do they get on the property to do the environmental investigations prior to purchase. They need to do the environmental to make sure they are not purchasing a toxic waste dump. If they purchase a toxic waste dump then the Government has the responsibility of cleaning it up. ACE Legal thinks if they ride with BP it will be illegal for the purposes of doing environmental/real estate work which gets them to the purchase. If the purchase of a property goes to court they are worried that our (BP) statutory authority to enter private lands could be called into question along with their actions which got them to where they could purchase the property. CBP Legal is working with ACE to explore the possibility to slide ACE onto our statutory authority to enter private lands for the purpose of doing these studies.

From: SELF, JEFFREY
To: (b) (6)
Subject: PF 225
Date: Saturday, May 05, 2007 8:50:01 PM

Chief,

Now that I have had time to review the e mail storm concerning the PF 225 Communication Plan I would like to make the following known:

In reviewing the messaging between Greg the Deputy Commissioner and the Commissioner, yes I did approve the Communications Plan and do still think it is a viable plan. What's not mentioned in the e mails is my continuous warnings to SBI that it was not being executed as written. Critical steps were missed and expedited for time savings. When I found out that ACE was contacting the County Assessors Offices before any outreach had begun I told them that these communities were close knit and this would get out. I advised that we would be viewed as being sneaky and under handed. I told SBI that the present execution of this plan was a snowball headed for Hell and it arrived there last week.

Fence Laydown:

Chief,

This was not executed correctly from the start. SBI was given the TI Bible with the warning that it was outdated and anything it was used for, OBP should be advised so the SMEs could identify the problems with using it for the desired purpose. SBI is claiming that OBP has changed the laydown three times which is a threat to the delivery date. This is not the case, we have simply gone back and taken the critical steps they missed.

I became a member of the 225 PMT a month after they had already started work. During the first meeting I was advised that ACE Engineers were in the field with the TI Bible looking at the desired laydown of fence locations. OBP and the Sectors had no knowledge of this. I again told them that the TI Bible was a historical document and fence locations needed to be identified with coordination with the Sectors. It was too late. ACE had picked and surveyed the locations and because of time constraints they had initially declined to accept any changes. We pushed back and SBI agreed to allow us to verify the locations with the Sectors. Some Sector had different operational needs for fence. This was change number one.

Change two came about when ACE said that they can't build fence in Texas because there were too many red flags. We disagreed with this but were once again told time and funding were driving this mission.

Sometime later S-1 was given three options because we didn't agree with their laydown. S-1 decided we would go with the original 370 laydown vs the desired SBInet plan. Once again this is where they say OBP changed the laydown again.

The claim of change three is connected to change two. I told SBI that the original 370 option needed to be presented to S-1 with the caveat that there would be no fence in LRT. This was not done and they are claiming that we have changed it three times now.

You may already know this but I wanted to make sure. There is a lot of historical data that has led us to where we are today and it is the result of the SMEs not being listened to. I just want you to know that I am focused on the road ahead but keeping the past in mind so history doesn't repeat its self.

Jeff

From: (b) (6)
To: (b) (6)
Subject: Re:Fw: PF225 Buffer Miles
Date: Friday, August 24, 2007 10:19:42 AM

To: ALL

The attached spreadsheet does not reflect any buffer miles related to P225 for the Del Rio Sector. Any additional miles that could be identified within the AOR would present the same realty/engineering issues that are present in our current P225 projects in Del Rio, TX and Eagle Pass, TX.

We have no potential areas within the Sector that could be accomplished sooner than those already being worked on. There are no potential sites that are government owned or that include environmental assessments completed in relation to fence placement.

Thanks

(b) (6)
Del Rio Sector
(b) (6)

Reply Separator

Subject: Fw: PF225 Buffer Miles
Author: (b) (6)
Date: 8/23/2007 4:05 PM

----- Original Message -----

From: (b) (6)
To: (b) (6)

Cc: SELF, JEFFREY D; (b) (6)
Sent: Thu Aug 23 10:37:04 2007
Subject: PF225 Buffer Miles

All,

OBP was just advised that the completion deadline for PF225 has been reset to the original date of 12/08. Subsequently, SBInet has requested that OBP identify 100 additional miles that can be used to supplement the effort. The buffer miles identified will be used to supplement the projects that have severe environmental, real estate or engineering issues that cannot be constructed within the time restraints. OBP has already expressed concerns over losing the high priority projects on the list in order to build operationally irrelevant segments for the sake of meeting their mileage objective. OBP has been given the assurance that subject high priority projects will be built and will be instituted at the same time as other projects. However, due to the additional time required to resolve associated issues will be completed sometime in '09.

With that being said, please review the attached spreadsheet that consists of projects that were identified but did not meet the original cut for the PF225 lay down. Each project was reviewed by respective sectors during the original lay down but due to non-operational value, low priority or sensitive location (TX) these projects were removed. I'm quite sure that not much has changed since early April but either way it is requested that these projects be revisited and I need to capture all of your concerns and/or change of direction. I included ACPAs from all Southwest Border Sectors in order to capture any additional projects that aren't listed on the spreadsheet that 1) has operational value and 2) has limited issues and is considered "easy build" (if there is such a thing). Any newly identified projects must meet the PF225 criteria as primary, aesthetic or hybrid (vehicle/pedestrian) fence. All vehicle barrier-only requirement projects are to be incorporated into the VB200 project at a later date.

(b) (5)

Thanks,

(b) (6)

Assistant Chief

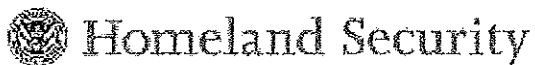
OPA Division

Office of Border Patrol

1300 Pennsylvania Ave., NW Suite 6.5E

Washington, D.C. 20229

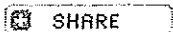
(b) (6)



This is Archived Material

This information is not current, is not being updated, and may contain broken links.

Statement of Secretary Michael Chertoff Regarding Exercise of Waiver Authority



Release Date: April 1, 2008

For Immediate Release
Office of Press Secretary
Contact: 202-282-8010

Securing the Border: A Priority for DHS. In order to secure our homeland, we have to secure our borders. For at least the past decade, illegal entry into the United States along our southwestern border has been a significant problem. The flow of illegal traffic through the border region imperils our ability to fight terrorism by stopping the illegal entry of terrorists, and exposes our border communities—and the rest of the United States—to the ill effects of drug smuggling, human smuggling, and gang activity. Illegal border traffic has also caused severe and profound impacts to the environment.

Congress's Mandate. Mindful of these things, Congress called upon the Department of Homeland Security (DHS) to construct—in the most expeditious manner possible—the infrastructure necessary to deter and prevent illegal entry on our southwestern border, including pedestrian and vehicle fencing, roads, and virtual detection technology. Section 102(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) requires installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwestern border. This total includes 370 miles of priority pedestrian fencing to be completed in 2008, in areas most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States. Congress has insisted, and I have promised, that DHS will meet this goal.

DHS's Successes. In recent years, through the deployment of additional personnel, tactical infrastructure, and technology, DHS and its components have made great strides in effectively securing the border and reducing the number of people that illegally enter the United States through this region. We already have constructed 309 miles of border fencing along the southwest border.

Congressionally-Granted Waiver Authority: To Ensure Congress's Goal Is Met. In addition to its mandate for additional roads and barriers, Section 102(c) of IIRIRA grants to me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure expeditious construction of this much-needed border infrastructure. As envisioned by Congress—and in order to meet DHS's congressionally-mandated timeline for completion—I exercised this authority today by signing two waivers to ensure the expeditious construction of the important border infrastructure projects that are underway or planned for completion. The waivers cover approximately 470 miles of border, on which we plan to construct and install the border barriers specified by Congress in Section 102 of IIRIRA. I employed this authority to ensure that these projects will proceed without unnecessary delays caused by administrative processes or potential litigation. These waivers should cover the remainder of additional fence construction that will be accomplished in 2008.

DHS's Environmental Stewardship Has Been—And Will Be Continue to Be—Strong. Although the exercise of my authority under Section 102(c) of IIRIRA means that certain laws will be waived, DHS is neither compromising its commitment to responsible environmental stewardship nor its commitment to solicit and respond to the needs of state, local, and tribal governments, other agencies of the federal government, and local residents.

For example, for the majority of the miles covered by the waiver, we have prepared either a draft environmental

assessment or an environmental impact statement. (For *all* of the miles on which we plan to build pedestrian fencing, we have prepared at least a draft environmental assessment or environmental impact statement.) For a number of these miles, it was determined that the proposed border infrastructure would have only insignificant impacts on the environment and cultural resources. DHS has also begun the environmental process for the roughly 22 miles covered by the Hidalgo waiver. We will continue to take the results of this work into account—even after the waivers—in our building and construction. For the rest of the area, DHS will continue to engage with federal and state resources management agencies and the local community to carefully identify natural, biological and cultural resources potentially affected by construction of border barriers, and we will identify ways to reduce and mitigate the impacts. In areas where no such discussion has already taken place, DHS will consult with appropriate groups and perform environmental work before significant construction is undertaken.

DHS has already shown that, even after use of my waiver authority, we do our best to plan and construct border infrastructure mindful of our obligation as stewards of the environment. For instance, DHS is currently negotiating an agreement with the U.S. Fish and Wildlife Service (USFWS) to transfer \$800,000 to help with mitigation and recovery efforts for two species—the endangered Sonoran Pronghorn and lesser long-nosed bat—on the Cabeza Prieta National Wildlife Refuge and Barry M. Goldwater Range (BMGR). DHS has taken this action even though the Endangered Species Act was waived for construction in the BMGR—a waiver that allowed expeditious construction of crucial pedestrian fencing and other infrastructure. I also issued a waiver in November 2007 that allowed border fencing to be built in and around the San Pedro National Riparian Conservation Area (SPRNCA) in southern Arizona. Since I signed that waiver, DHS has pursued several measures in cooperation with the USFWS to reduce the impact of the fencing. Specifically, DHS agreed to refrain from installing fence within the San Pedro River basin, unless and until we determined that lack of fencing affected our ability to deter illegal entry. DHS also delayed construction in order to excavate and study a culturally significant site at an expense of over \$1 million. In addition, DHS agreed to implement a number of measures designed to reduce and monitor invasive plant species, erosion, and sediment problems.

DHS will continue to take a similar approach here. As noted above, DHS has already invested substantial time and effort consulting with resource agencies and preparing documents to satisfy the National Environmental Policy Act (NEPA) and other environmental laws for the areas covered by this waiver.

It is our goal to implement measures to minimize the effects of construction on cultural, biological and natural resources wherever possible. For example, DHS has funded several excavation sites along the construction route in order to allow archaeologists to gather information about pre-historic and Native American culture. DHS has also partnered with the USFWS to develop best management practices that are tailored for specific locations and which can be incorporated into construction projects to minimize the impacts to wildlife and their habitat. As a result of these efforts, DHS has an understanding of potential environmental effects and how to minimize and mitigate them. For example, USFWS has provided advice on modification of certain projects to avoid or reduce effects on threatened and endangered species. In some cases, DHS was able to adjust the planned locations of fences, access roads and staging areas to reduce potential effects.

It is also important to note that our partners at the Department of Interior suggested this waiver in order to construct on areas of high entry that are managed by DOI under the Wilderness Act and the National Wildlife Refuge System Administration Act. They wrote that "Interior managers have attempted to facilitate the construction of these facilities. . . . We have determined that we cannot, consistent with [our] legal obligations, provide the approvals that would be necessary to allow DHS to construct certain infrastructure on Interior lands that are subject to these laws. . . . As a result, we see the need for you to invoke a . . . waiver of Interior statutory requirements." We will continue to work with DOI and other federal resource management agencies to reduce any impact of construction on the environment.

Solicitation of Views From The Community. As noted above, DHS will also continue to solicit and respond to the issues and needs of local border communities. As it has planned for the construction of additional border infrastructure, DHS has regularly consulted with state and local governments, federal land management and resource agencies such as DOI and USFWS as well as the local residents themselves. As a part of the NEPA process, DHS actively reached out to the public and stakeholders. DHS has distributed a number of draft NEPA documents for public comment and review, held numerous public meetings, and cooperated with various resource agencies. The environmental review process, however, is not the only means by which DHS has reached out to state and local stakeholders. As part of its outreach efforts, DHS contacted almost 600 different landowners and held meetings with state and local government officials, local law enforcement, Native American tribes, and concerned citizens and citizen groups. All of these efforts were focused on providing all interested stakeholders the opportunity to provide input and comments regarding proposed projects in their areas. DHS will continue to

engage stakeholders and border communities to address the needs of the local community.

Hidalgo County: Working With The Local Community. On February 8, 2008, I announced that DHS is committed to working with local officials in Hidalgo County, Texas—specifically, Hidalgo County Drainage District No. 01—to combine DHS's plans to construct border infrastructure with Hidalgo's project to address its flood control concerns by raising its levees. I noted that the proposed levee/barrier project is a prime example of how, through partnership, communication and cooperation, the federal government and local officials can accomplish two critical goals: securing America's borders and protecting people and their property from floods. It also demonstrates the value of collaboration between DHS and local governments.

Despite the critical importance of constructing fence at the border and the need to do so quickly, DHS listened and responded to issues raised by state, local, and tribal governments, local residents, and others, including federal land management and resources agencies, such as the Department of Interior and United States Fish and Wildlife Service, in developing plans for construction of barriers, roads, and virtual detection technology. The joint levee/barrier project with Hidalgo is the product of these efforts. As I said before, I commend Hidalgo for both alerting DHS to the fact that DHS's construction could potentially overlap with the County's flood control efforts, and offering a sensible solution which provides the opportunity for DHS and Hidalgo to work together to incorporate the construction of a concrete border barrier into its plans to raise the levees.

This project will allow DHS to move closer to the congressional mandate of operational control of the border, and at the same time provide the people of Hidalgo County with increased security from drug smugglers, human smugglers, and gangs—all of which bring added risk of border violence—as well as protection against the very real threat of Rio Grande floods. Of course, DHS and Hidalgo have not been alone in working to make this project a reality. The International Boundary and Water Commission (IBWC) has been an important partner in this effort, and USFWS is continuing to work with DHS to address potential environmental impacts.

We are working with Hidalgo to finalize the most appropriate vehicle for this effort. The department's authority to enter into such vehicles is found in § 102(b)(2) of the Homeland Security Act of 2002, P.L. 107-296. Through this anticipated arrangement, DHS will transfer funding, plans, and other resources, to allow Hidalgo to implement the project to meet its flood mitigation needs, while also satisfying DHS's requirements—and the mandates of the IIRIRA—to construct border infrastructure in an area of high illegal entry. DHS anticipates it will be substantially involved with Hidalgo and IBWC in accomplishing the activity that we expect to be approved in the agreement.

In addition to the waiver described earlier, I have also exercised this statutory authority to dispose of the legal impediments that threaten to impede or interfere with the expeditious construction of the joint levee/barrier project with Hidalgo. Even though I have executed this waiver, DHS is committed to carrying out this project in a way that protects the border, is environmentally responsible, and is protective of public funds. Indeed, a major impetus for the joint levee/barrier project is the cost savings that can be realized by constructing the border barrier with the levee improvements.

The 2008 Appropriations Act provides that “none of the funds under this heading may be obligated for any project or activity for which the Secretary has exercised waiver authority pursuant to section 102(c) [of IIRIRA] until 15 days have elapsed from the date of the publication of the decision in the Federal Register.” DHS will not expend any restricted funds until that time period has elapsed.

By utilizing my statutory waiver authority, I have ensured that DHS can meet its mandate of securing and maintaining operational control of the border in the most expeditious manner possible, and that DHS and Hidalgo County can move forward with a project that addresses the needs of both parties. DHS remains committed to protecting the Nation and deterring illegal entry and other crimes through control of the border, while acting to protect the environment, spend public funds wisely, and work closely with state and local stakeholders to understand and respond to the needs of border communities.

This page was last reviewed/modified on April 1, 2008.

One Hundred Ninth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,
the third day of January, two thousand and six*

An Act

To establish operational control over the international land and maritime borders
of the United States.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Secure Fence Act of 2006".

SEC. 2. ACHIEVING OPERATIONAL CONTROL ON THE BORDER.

(a) **IN GENERAL.**—Not later than 18 months after the date of the enactment of this Act, the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States, to include the following—

(1) systematic surveillance of the international land and maritime borders of the United States through more effective use of personnel and technology, such as unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras; and

(2) physical infrastructure enhancements to prevent unlawful entry by aliens into the United States and facilitate access to the international land and maritime borders by United States Customs and Border Protection, such as additional checkpoints, all weather access roads, and vehicle barriers.

(b) **OPERATIONAL CONTROL DEFINED.**—In this section, the term "operational control" means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

(c) **REPORT.**—Not later than one year after the date of the enactment of this Act and annually thereafter, the Secretary shall submit to Congress a report on the progress made toward achieving and maintaining operational control over the entire international land and maritime borders of the United States in accordance with this section.

**SEC. 3. CONSTRUCTION OF FENCING AND SECURITY IMPROVEMENTS
IN BORDER AREA FROM PACIFIC OCEAN TO GULF OF
MEXICO.**

Section 102(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104–208; 8 U.S.C. 1103 note) is amended—

(1) in the subsection heading by striking “NEAR SAN DIEGO, CALIFORNIA”; and

(2) by amending paragraph (1) to read as follows:

“(1) SECURITY FEATURES.—

“(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall provide for least 2 layers of reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors—

“(i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California, port of entry;

“(ii) extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry;

“(iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas;

“(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.

“(B) PRIORITY AREAS.—With respect to the border described—

“(i) in subparagraph (A)(ii), the Secretary shall ensure that an interlocking surveillance camera system is installed along such area by May 30, 2007, and that fence construction is completed by May 30, 2008; and

“(ii) in subparagraph (A)(v), the Secretary shall ensure that fence construction from 15 miles northwest of the Laredo, Texas, port of entry to 15 southeast of the Laredo, Texas, port of entry is completed by December 31, 2008.

“(C) EXCEPTION.—If the topography of a specific area has an elevation grade that exceeds 10 percent, the Secretary may use other means to secure such area, including the use of surveillance and barrier tools.”.

SEC. 4. NORTHERN BORDER STUDY.

(a) IN GENERAL.—The Secretary of Homeland Security shall conduct a study on the feasibility of a state-of-the-art infrastructure security system along the northern international land and maritime border of the United States and shall include in the study—

- (1) the necessity of implementing such a system;
- (2) the feasibility of implementing such a system; and
- (3) the economic impact implementing such a system will have along the northern border.

(b) REPORT.—Not later than one year after the date of the enactment of this Act, the Secretary of Homeland Security shall submit to the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report that contains the results of the study conducted under subsection (a).

**SEC. 5. EVALUATION AND REPORT RELATING TO CUSTOMS AUTHORITY
TO STOP CERTAIN FLEEING VEHICLES.**

(a) **EVALUATION.**—Not later than 30 days after the date of the enactment of this Act, the Secretary of Homeland Security shall—

(1) evaluate the authority of personnel of United States Customs and Border Protection to stop vehicles that enter the United States illegally and refuse to stop when ordered to do so by such personnel, compare such Customs authority with the authority of the Coast Guard to stop vessels under section 637 of title 14, United States Code, and make an assessment as to whether such Customs authority should be expanded;

(2) review the equipment and technology available to United States Customs and Border Protection personnel to stop vehicles described in paragraph (1) and make an assessment as to whether or not better equipment or technology is available or should be developed; and

(3) evaluate the training provided to United States Customs and Border Protection personnel to stop vehicles described in paragraph (1).

(b) **REPORT.**—Not later than 60 days after the date of the enactment of this Act, the Secretary of Homeland Security shall submit to the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report that contains the results of the evaluation conducted under subsection (a).

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*

H.R.2764

Consolidated Appropriations Act, 2008 (Enrolled as Agreed to or Passed by Both House and Senate)

BORDER SECURITY FENCING, INFRASTRUCTURE, AND TECHNOLOGY

For expenses for customs and border protection fencing, infrastructure, and technology, \$1,225,000,000, to remain available until expended: *Provided*, That of the amount provided under this heading, \$1,053,000,000 is designated as described in section 5 (in the matter preceding division A of this consolidated Act): *Provided further*, That of the amount provided under this heading, \$650,000,000 shall not be obligated until the Committees on Appropriations of the Senate and the House of Representatives receive and approve a plan for expenditure, prepared by the Secretary of Homeland Security and submitted within 90 days after the date of enactment of this Act, for a program to establish a security barrier along the borders of the United States of fencing and vehicle barriers, where practicable, and other forms of tactical infrastructure and technology, that includes:

- (1) a detailed accounting of the program's progress to date relative to system capabilities or services, system performance levels, mission benefits and outcomes, milestones, cost targets, program management capabilities, identification of the maximum investment (including lifecycle costs) required by the Secure Border Initiative network or any successor contract, and description of the methodology used to obtain these cost figures;
- (2) a description of how activities will further the objectives of the Secure Border Initiative, as defined in the Secure Border Initiative multi-year strategic plan, and how the plan allocates funding to the highest priority border security needs;
- (3) an explicit plan of action defining how all funds are to be obligated to meet future program commitments, with the planned expenditure of funds linked to the milestone-based delivery of specific capabilities, services, performance levels, mission benefits and outcomes, and program management capabilities;
- (4) an identification of staffing (including full-time equivalents, contractors, and detailees) requirements by activity;
- (5) a description of how the plan addresses security needs at the Northern Border and the ports of entry, including infrastructure, technology, design and operations requirements;
- (6) a report on costs incurred, the activities completed, and the progress made by the program in terms of obtaining operational control of the entire border of the United States;
- (7) a listing of all open Government Accountability Office and Office of Inspector General recommendations related to the program and the status

of Department of Homeland Security actions to address the recommendations, including milestones to fully address them;

(8) a certification by the Chief Procurement Officer of the Department that the program has been reviewed and approved in accordance with the investment management process of the Department, and that the process fulfills all capital planning and investment control requirements and reviews established by the Office of Management and Budget, including Circular A-11, part 7;

(9) a certification by the Chief Information Officer of the Department that the system architecture of the program is sufficiently aligned with the information systems enterprise architecture of the Department to minimize future rework, including a description of all aspects of the architectures that were and were not assessed in making the alignment determination, the date of the alignment determination, and any known areas of misalignment along with the associated risks and corrective actions to address any such areas;

(10) a certification by the Chief Procurement Officer of the Department that the plans for the program comply with the Federal acquisition rules, requirements, guidelines, and practices, and a description of the actions being taken to address areas of non-compliance, the risks associated with them along with any plans for addressing these risks, and the status of their implementation;

(11) a certification by the Chief Information Officer of the Department that the program has a risk management process that regularly and proactively identifies, evaluates, mitigates, and monitors risks throughout the system life cycle and communicates high-risk conditions to U.S. Customs and Border Protection and Department of Homeland Security investment decision makers, as well as a listing of all the program's high risks and the status of efforts to address them;

(12) a certification by the Chief Human Capital Officer of the Department that the human capital needs of the program are being strategically and proactively managed, and that current human capital capabilities are sufficient to execute the plans discussed in the report;

(13) an analysis by the Secretary for each segment, defined as no more than 15 miles, of fencing or tactical infrastructure, of the selected approach compared to other, alternative means of achieving operational control; such analysis should include cost, level of operational control, possible unintended effects on communities, and other factors critical to the decision making process;

(14) a certification by the Chief Procurement Officer of the Department of Homeland Security that procedures to prevent conflicts of interest between the prime integrator and major subcontractors are established and that the Secure Border Initiative Program Office has adequate staff and resources to effectively manage the Secure Border Initiative program, Secure Border Initiative network contract, and any related contracts, including the exercise of technical oversight, and a certification by the Chief

Information Officer of the Department of Homeland Security that an independent verification and validation agent is currently under contract for the projects funded under this heading; and

(15) is reviewed by the Government Accountability Office:

Provided further, That the Secretary shall report to the Committees on Appropriations of the Senate and the House of Representatives on program progress to date and specific objectives to be achieved through the award of current and remaining task orders planned for the balance of available appropriations: (1) at least 30 days prior to the award of any task order requiring an obligation of funds in excess of \$100,000,000; and (2) prior to the award of a task order that would cause cumulative obligations of funds to exceed 50 percent of the total amount appropriated: *Provided further*, That of the funds provided under this heading, not more than \$2,000,000 shall be used to reimburse the Defense Acquisition University for the costs of conducting a review of the Secure Border Initiative network contract and determining how and whether the Department is employing the best procurement practices: *Provided further*, That none of the funds under this heading may be obligated for any project or activity for which the Secretary has exercised waiver authority pursuant to section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note) until 15 days have elapsed from the date of the publication of the decision in the Federal Register.

SEC. 564. IMPROVEMENT OF BARRIERS AT BORDER. (a) Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note) is amended--

(1) in subsection (a), by striking 'Attorney General, in consultation with the Commissioner of Immigration and Naturalization,' and inserting 'Secretary of Homeland Security'; and

(2) in subsection (b)--

(A) in the subsection heading, by striking 'in the Border Area' and inserting 'Along the Border';

(B) in paragraph (1)--

(i) in the heading, by striking 'SECURITY FEATURES' and inserting 'ADDITIONAL FENCING ALONG SOUTHWEST BORDER'; and

(ii) by striking subparagraphs (A) through (C) and inserting the following:

'(A) REINFORCED FENCING- In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

'(B) PRIORITY AREAS- In carrying out this section, the Secretary of Homeland Security shall--

`(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

`(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

`(C) CONSULTATION-

`(i) IN GENERAL- In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

`(ii) SAVINGS PROVISION- Nothing in this subparagraph may be construed to--

`(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

`(II) affect the eminent domain laws of the United States or of any State.

`(D) LIMITATION ON REQUIREMENTS- Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.'; and

(C) in paragraph (4), by striking 'to carry out this subsection not to exceed \$12,000,000' and inserting 'such sums as may be necessary to carry out this subsection'.

(b) No funds appropriated in this Act for U.S. Customs and Border Protection 'Border Security Fencing, Infrastructure, and Technology' may be obligated unless the Secretary of Homeland Security has complied with section 102(b)(2)(C)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1103 note) as amended by subsection (a)(2).

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

The Working Group on Human Rights and the Border Wall

Leah Nedderman, Ariel Dulitzky and Denise Gilman

2008

Introduction

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

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

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

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

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

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

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

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

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

Domestic Law on the Border Fence

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

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

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

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

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

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

⁵ P.L. 110-161.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ *Ibid.* para 84.

¹⁸ *Ibid.*

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

²⁰ *Ibid.*

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

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

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

Arbitrary Distinctions with Regard to the Location of the Fence

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

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

The Legislation Makes Arbitrary Distinctions

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

²² *Ibid*, para. 137.

²³ *Ibid*, para. 136.

²⁴ *Ibid*, para. 136.

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

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

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

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

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

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

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

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

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

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

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

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

Senator John Kerry made similar arguments to the Senate:²⁹

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

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

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

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

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

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

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

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

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

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

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

The Planning and Construction Make Arbitrary Distinctions³¹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

http://www.valleymorningstar.com/news/fence_21831__article.html/university_government.html.

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

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

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

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

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

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

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

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

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

⁴¹ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

(See Appendix 1 for text of the agreement and a map showing the original and the revised proposed location of the fence).

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

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

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

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

State Restrictions on the Right to Property are Not Proportional

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵⁸ Interview May 02, 2008.

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

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

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

Conclusion

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

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

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

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

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

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

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

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

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

**United States District Court
Southern District of Texas
FILED**

MAR 19 2008

**Michael N. Milby
Clerk of Court**

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)

v.)

Civil Action No. B-08-56

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

ORDER OF DISMISSAL

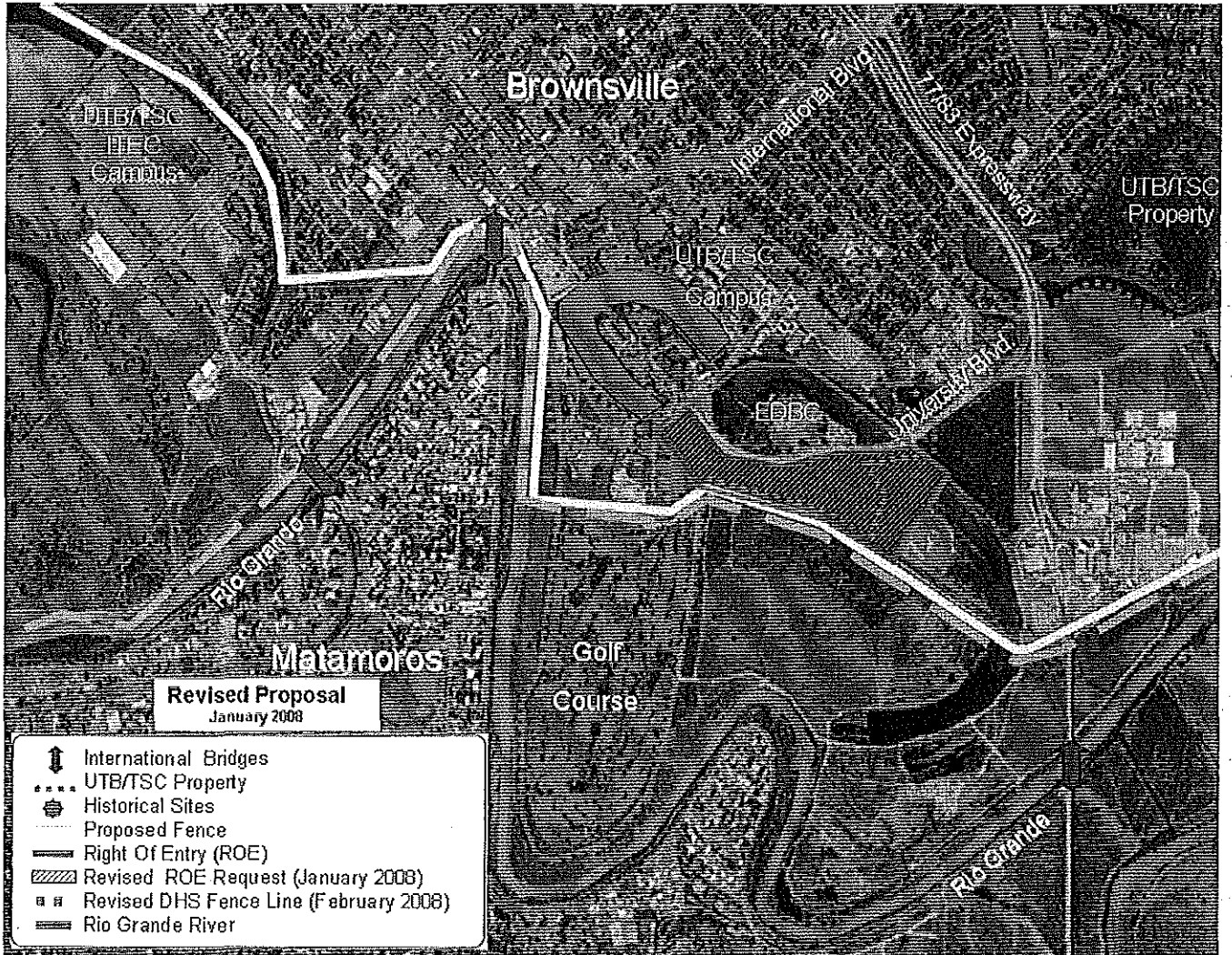
On this day, the Court considered Plaintiff's Motion for Order for Immediate Delivery of Possession (Docket No. 4) and ORDERS as follows:

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

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

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

Signed this 15th day of March, 2008.



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

