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Officials In South Texas Join Class-action Lawsuit Challenging Border Wall

by LADB Staff

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A coalition of officials from southern Texas has joined in a class-action lawsuit against the US Department of Homeland Security (DHS), challenging the construction of 153 miles (245 km) of wall along the Texas-Mexico border. The lawsuit is partly intended to counter legal action that the federal government has taken against local communities and landholders who have refused to sell their properties to make way for the fence. The DHS is also in conflict with environmental advocates, who have joined local officials in protesting the potential damage that the fence would cause to ecosystems along the US-Mexico border. Homeland Security Secretary Michael Chertoff on several occasions has waived several US environmental laws to remove obstacles that would have prevented the timely construction of the fence to proceed.

The Texas Border Coalition (TBC) comprising mayors, county judges, and economic development officials decided in mid-April to join the class-action lawsuit, which had been filed by five residents of the Rio Grande Valley. The plaintiffs took the legal action in response to lawsuits by the US Department of Justice (DOJ) seeking to seize properties where the border fence was planned. The federal government had filed about 75 lawsuits against property owners as of early April, 50 of which were against Texas residents. "We are joining this lawsuit to protect the interests of communities across Texas and to minimize the impact the border wall will have on our environment, culture, commerce, and quality of life," TBC chairman Chad Foster said on April 15 in announcing the move to join the class-action suit. The wall was part of the immigration-reform legislation introduced in the US Congress in 2006 (SourceMex, May 31, 2006 and October 11, 2006).

The TBC, which represents about 3 million border residents, was considering legal action against the fence as early as 2007 (SourceMex, July 11, 2007). The coalition has hired Peter Schey, president of the Center for Human Rights and Constitutional Law in Los Angeles and an expert in constitutional law, to coordinate its legal actions against the government, said the Internet paper Rio Grande Guardian. "We had to do this. As a group, the Texas Border Coalition wanted to stay united and we have done that. We are now getting a bigger buy-in from all the elected officials," said Foster, who is also mayor of Eagle Pass, Texas.

The TBC official accused Chertoff of failing to conduct the proper consultations with residents and officials of border communities before proceeding with its legal action. "The secretary continues to ignore the Omnibus bill. He continues to work under the Secure Fence Act, which was amended. He ignores those amendments," Foster said. Foster also discussed the TBC’s opposition to the border wall at the 17th annual meeting of the Border Legislative Conference (BLC) in Saltillo, Coahuila state, in April. He said undocumented immigrants have found ways to circumvent the wall in places where it has already been erected. "The US government is spending US$49 million on the construction of a wall that will only slow down undocumented immigrants by two or three minutes," Foster said.
The BLC, composed of state legislators from the 10 states along the US-Mexico border, also condemned the wall. Texas state Sen. Eliot Shapleigh, who chairs the BLC, said legislators from Texas, New Mexico, and Arizona do not want to see a "wall of hate" being erected along the US-Mexico border. Participants at the BLC meeting addressed such issues as water, immigration, and agriculture, said the Mexico City daily newspaper El Universal. "We discussed our vision for the Americas, from one brother to another," said Coahuila state legislator Horacio del Bosque, who hosted the gathering.

**Federal government accused of seizing land without consultation**

The suit against the DHS centers on the tactics of the department, which has ignored directives in the Secure Fence Act to negotiate a price with private landowners in exchange for access to their property. "This negotiation process is legally supported by a number of laws that govern how the federal government may condemn private land, thereby gaining control for federal use, and the Fifth Amendment of the US Constitution," said the International Relations and Security Network (ISN). "Once the negotiation is complete, according to the Secure Fence Act, the DHS may then access the land." Organizations like Texas Rural Legal Aid, which has defended residents along the US-Mexico border, contend that the DHS has simply told a number of landowners to sign a Right of Entry waiver or face the consequences. "Those who did sign the waiver relinquished control over their land, allowing the DHS and the US Army Corps of Engineers access and permission to use the land as they see fit," said ISN.

The DHS moves have affected entire communities. For example, in January of this year, a federal judge ruled in favor of the DHS and ordered the city of Eagle Pass to "surrender" access to 233 acres (94 hectares) of city-owned land to government surveyors working on the proposed fence along the border with Mexico. "The people of Texas should be outraged by the sneaky, underhanded methods used by the Department of Homeland Security to steal 233 acres from the people of Eagle Pass. Informing the city after the judge ruled that their land is already taken is not the Texan or American way of justice," said Monica Weisberg-Stewart, who chairs the TBC’s immigration committee. "It demonstrates again that we are losing our liberties to a federal government that is without restraint and out of control."

**Some members of US Congress also taking action**

Some members of the US Congress are also planning to bring legal action against the federal government, citing concerns about damage to the environment. This is particularly because of the Bush administration's move to bypass legislation such as the Clean Water Act and the Endangered Species Act to move forward with construction of the wall. The legislators, most of whose districts are located in southern Texas, were planning to bring the brief to the US Supreme Court at the end of April. "While this is absolutely the right thing to do, it should be one of a blizzard of legal protests aimed at the wall and the arrogance and temerity of Homeland Security Secretary Michael Chertoff in trying to waive the laws," said The El Paso Times. US Rep. Silvestre Reyes (D-TX), one of the legislators bringing the action against US President George W. Bush's administration, said the waiver to circumvent the law is unconstitutional because it violates the separation of powers between Congress and the executive branch. Others involved in the action include Reps.
Salomon Ortiz, Henry Cuellar, Ciro Rodriguez, Lloyd Doggett, Gene Green, and Ruben Hinojosa, all Democrats from Texas. "That challenge seems to have some merit and should be doggedly pursued," said The El Paso Times. "Chertoff and the Bush administration seem to be looking for something, anything, to hang their hats on as a legacy. Apparently they will peremptorily dismiss or skirt laws that inconveniently stand in their way. If the Bush administration wins, many people along the border lose, and Rio Bosque [Wetlands Park] is just one example."

Other observers concurred with the criticism of the Bush administration's decision to circumvent environmental legislation. "We are concerned that fencing will isolate populations of wildlife on either side of the border everything from common species like mule deer and coyotes to endangered species like jaguar and the cactus ferruginous pygmy owl," said Matt Clark, southwestern representative of Defenders of Wildlife. "It will be a disaster on the ground. One example of what's at risk is the Lower Rio Grande Valley National Wildlife Refuge. It runs in checkerboard fashion along the 200 miles of the Rio Grande before it empties into the Gulf of Mexico," said The New York Times. "When the fence is finished, most of the refuge's 95,000 acres and the ocelots, jaguarundis and other rare species that live there would wind up on the side of the fence closest to Mexico, virtually impossible to monitor and protect. Other sensitive areas in California, Arizona, New Mexico, and Texas would also be affected."

Legal experts suggest, however, that the legal challenges by US House members and environmental activists face an uphill battle because it was Congress that gave the DHS broad powers. A rider attached to the Real ID Act of 2005 gave the DHS almost unlimited authority to circumvent any laws necessary to construct the wall. "There is a legitimate legal gripe here, in that there are serious questions about how much power Congress can delegate to other branches of government," Jonathan Turley, a constitutional-law authority at George Washington University Law School told The Dallas Morning News. Even so, some members of Congress have taken steps to rectify this situation.

Rep. Raul Grijalva (D-AZ), whose district is on the US-Mexico border, has introduced a bill to repeal provisions of the Real ID Act that enable Chertoff's waivers, require "full public notice and participation" by local communities in border-security efforts, and create a Borderlands Conservation Fund to help respond to borderlands-habitat destruction, said the weekly newspaper SA Current, based in San Antonio, Texas.

**Bush government working against deadline**

The Bush government's rush to construct the border wall at all costs is related to a deadline imposed by Congress in the Secure Fence Act of 2006, which set a date of Dec. 31, 2008, for the administration to complete the wall. The DHS scaled back its target early on, reducing it to 300 miles (480 km) of vehicle barrier and 370 miles (592 km) of pedestrian barrier. As of February, 302 miles of barrier had been constructed, mostly on federal land in Arizona, New Mexico, and California, and slightly over half of this has been built under the new law. There have been mixed reviews on whether the wall project has been effective. Because of the cost of the project, the reinforced wall is being constructed on only some sections of the US-Mexico border.
In those areas, the new barriers have been effective in reducing illegal immigration. In the area near Yuma, Arizona, for example, immigration officials have seen a decline of 72% in the number of apprehensions since the double- and triple-layered wall was erected. "This wall works," US Border Patrol agent Michael Bernacke told The Christian Science Monitor. "A lot of people have the misconception that it is a waste of time and money, but the numbers of apprehensions show that it works." But critics say the people who would have tried crossing through Yuma are now finding other locations to enter the US, such as lesser-populated areas like Naco in southeastern Arizona. In those areas, authorities have erected weaker barriers made of materials such as corrugated steel, railroad rails, and barbed wire. "This [fence] is just too easy to cut into, climb over, or go under or around," Dawn Garner, who owns property in southeast Arizona, told The Christian Science Monitor. "Anyone can plainly see this wouldn't stop a flea, let alone a migrant or terrorist." The New York Times, in an editorial, suggested that the money used to construct the wall could be used for other purposes. "Will this stop or slow illegal immigration? No. Long experience has shown that billions of barricade-building dollars will simply shift some of the flow to more remote parts of the 2,000-mile [3200-km] southern border," said the newspaper. "And no amount of border fence will keep out the 40% of illegal immigrants who enter legally then stay too long."

**Government suspends project on "virtual wall"**

In addition to the physical wall, the DHS has experimented with what it called a "virtual fence," consisting of nine electronic-surveillance towers along a 28-mile (45-km) section of border southwest of Tucson. The agency hired Boeing Company to create a prototype for the US$20.6 million Project 28, launched at the end of 2007. The project has had some success, resulting in about 3,000 detentions of undocumented immigrants since December, said Greg Giddens, executive director of the Secure Border Initiative program office in Washington. That number of apprehensions, however, was not sufficient to justify the cost of the project. Furthermore, the project was doomed by a report from the Government Accountability Office (GAO), which conducts investigations for Congress, giving a long list of inefficiencies.

Among the problems, said critics, is that the project's radar-detection system may not work well in terrain that is not flat. "The radar doesn't give you depth perception, and the same can be said of the cameras especially at night," said T.J. Bonner, president of the National Border Patrol Council, which represents more than 12,000 Border Patrol agents. Others chided the administration for failing to do appropriate research on the system. "Project 28 was supposed to be an example of how we could use technology to secure the border. The lesson is we can't secure 28 miles of our border for US$20 million," Rep. Bill Pascrell (D-NY) said at a hearing in late February. "After so many years of promises and tests and millions of dollars spent, we are no closer to a technological solution to securing the border. This is unacceptable." "The reality is that Project 28 was rushed into implementation to bolster the Bush administration's claim that it was serious about border control," said professor Wayne Cornelius, director of the Center for Comparative Immigration Studies at the University of California San Diego.

In late April, the DHS announced plans to scrap the project, which some considered a defeat for the department. "Chertoff is heavily invested in the project, aware that most Americans don't trust the administration to do much about illegal immigration," said the Los Angeles Times.
"Winning respect for his agency is a recurring theme for Chertoff, who took over a Homeland Security Department that was the butt of duct-tape jokes in late-night comedy skits." President Calderon urges US to ease immigration restrictions Mexican officials have frequently criticized the US decision to construct the wall, with President Felipe Calderon once calling the proposal "deplorable" (SourceMex, October 10, 2007).

There was talk that the Mexican president would revisit this concern at a summit with Bush and Canadian Prime Minister Harper in New Orleans in late April. The three leaders discussed trade, security issues, drug trafficking, and immigration, but none of the public statements suggested that the wall was a prominent subject of discussion. Still, Calderon made several references to the key role of Mexican immigrants in the US economy. He pointed out that Mexican laborers continue to play an important part in the reconstruction of New Orleans in the aftermath of Hurricane Katrina (SourceMex, September 14, 2005).

Calderon asked US authorities to reduce barriers and open its economy further to Mexico, including easing immigration restrictions. "The US and Mexican economies complement one another, with the US being capital intensive and the Mexican labor intensive," said Calderon. "And that explains immigration, an economic phenomenon between two neighboring economies. And for that reason we need to create an integral vision on the issue of migration one that will permit us to jointly construct a more prosperous and secure North America."

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