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and Friends of the U.S.-Mexico Border Environment

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6
7 UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF COLUMBIA
9

10 SAVE OUR HERITAGE ORGANISATION)
(address: 2476 San Diego Avenue, San Diego, CA)
11 92110) and FRIENDS OF THE U.S.-MEXICO)
BORDER ENVIRONMENT (address: 5663 Balboa)
12 Avenue, No. 376, San Diego, CA 92111-2705),)

13 Plaintiffs,)

14 vs.)

15 ALBERTO R. GONZALEZ, in his official capacity)
as Attorney General of the United States; U.S.)
16 DEPARTMENT OF JUSTICE; MICHAEL)
CHERTOFF, in his official capacity as Secretary of)
17 the U.S. DEPARTMENT OF HOMELAND)
SECURITY; U.S. DEPARTMENT OF)
18 HOMELAND SECURITY; W. RALPH BASHAM,)
in his official capacity as Commissioner of the U.S.)
19 CUSTOMS AND BORDER PROTECTION; U.S.)
CUSTOMS AND BORDER PROTECTION; JULIE)
20 L. MYERS, in her official capacity as Assistant)
Secretary of Homeland Security for the U.S.)
21 IMMIGRATION AND CUSTOMS)
ENFORCEMENT; U.S. IMMIGRATION AND)
22 CUSTOMS ENFORCEMENT; EMILIO T.)
GONZALES, in his official capacity as Director of)
23 the U.S. CITIZENSHIP AND IMMIGRATION)
SERVICES; and U.S. CITIZENSHIP AND)
24 IMMIGRATION SERVICES,)

25 Defendants.)
26

CASE NO. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF FOR
VIOLATIONS OF FEDERAL LAW**

27 Plaintiffs SAVE OUR HERITAGE ORGANISATION and FRIENDS OF THE U.S.-MEXICO
28 BORDER ENVIRONMENT ("Plaintiffs") allege as follows:

1 **Introductory Statement**

2 1. Plaintiffs bring this action in order to protect the natural, cultural, and historic resources
3 along the U.S.-Mexico border from imminent destruction at the hands of the federal government.
4 Facing destruction are resources near San Diego, California, and Yuma, Arizona--in each case because
5 of the illegal construction of a fence along the border.

6 2. With respect to San Diego:

7 A. San Diego's border region is home to natural treasures like the Tijuana River and
8 the Tijuana Estuary, as well as culturally and historically important places like Border Field State Park
9 (part of the Tijuana River National Estuarine Research Reserve) and Smuggler's Gulch. An essential
10 breeding, feeding, and nesting ground and rest stop for more than 370 migratory and native bird species
11 (six being endangered), the Tijuana Estuary is one of southern California's last remaining wetlands
12 ecosystems. The Tijuana River and its surroundings are also home to a number of other species on the
13 brink of extinction, including the San Diego fairy shrimp, the San Diego button celery, the least Bell's
14 vireo, the light-footed clapper rail, the California least tern, the California brown pelican, the Quino
15 checkerspot butterfly, and the California gnatcatcher. At the southwestern-most point of the U.S.,
16 Border Field State Park treats equestrians and other visitors to spectacular vistas of the Tijuana Estuary,
17 sunsets over the ocean, and cultural sites on both sides of the border, while nearby Smuggler's Gulch
18 is reported to be one of the many camp sites of Father Junipero Serro, the founder of many of
19 California's first missions. Unfortunately, the federal government's Border Infrastructure System
20 ("BIS") threatens all of this and more.

21 B. The BIS calls for the construction of a 14-mile triple fence--that is, two new
22 fences in addition to the existing fence--along the U.S.-Mexico border. Defendants (identified below)
23 have failed to comply with numerous federal laws in planning and building the triple fence. For
24 instance, they have failed to comply with the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*;
25 the Federal Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C. § 1251 *et seq.*;
26 the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; the Migratory Bird Treat Act, 16 U.S.C.
27 § 703 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; and the Administrative Procedure Act, 5
28 U.S.C. § 551 *et seq.*

1 C. In addition to Plaintiffs, several public agencies at the federal, state, regional, and
2 local level have expressed criticism over the BIS. Among them are the U.S. Department of the Interior,
3 the National Oceanic and Atmospheric Administration, the City of Imperial Beach, the City of San
4 Diego, the County of San Diego, the San Diego Association of Governments, the California Coastal
5 Commission, the California Department of Fish and Game, the California Resources Agency, the
6 California Department of Parks and Recreation, and the California Coastal Conservancy.

7 3. With respect to Yuma:

8 A. Situated in southwestern Arizona, the Yuma region is home to what many
9 consider to be the finest part of the Sonoran Desert, including the Yuma Desert. Yuma's largest
10 neighbor to the east is the Barry M. Goldwater Range, a military installation encompassing the
11 recreation- and resource-rich Saucedo Mountains to the northeast and Copper Mountains to the
12 southwest. To the west of the Range is the Cocopah Indian Reservation; just beyond that, the Colorado
13 River. The Range's southern neighbor is the Cabeza Prieta National Wildlife Refuge. The Range's
14 southern-most border runs almost 40 miles along the U.S.-Mexico border, between the Colorado River
15 and the Cabeza Prieta National Wildlife Refuge. The flat-tailed horned lizard--federally listed as a
16 "threatened" species under the Endangered Species Act--migrates between the U.S. and Mexico in the
17 vicinity of the Range. The federal government's Secure Border Initiative ("SBI") puts these resources
18 at risk.

19 B. As part of the SBI, Defendants are poised to build a 37-mile fence along the U.S.-
20 Mexico border in southwestern Arizona. The fence will begin roughly five miles west of the Barry M.
21 Goldwater Range and continue eastward 32 miles into the Range. Defendants have failed to comply
22 with numerous federal laws in planning and building the 37-mile fence. For instance, they have failed
23 to comply with the Federal Water Pollution Control Act (also known as the Clean Water Act), 33
24 U.S.C. § 1251 *et seq.*; the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; the National Historic Preservation
25 Act, 16 U.S.C. § 470 *et seq.*; the National Wildlife Refuge System Administration Act, 16 U.S.C.
26 668dd-668ee; the Military Lands Withdrawal Act of 1999, 113 Stat. 885 (Oct. 5, 1999); the Sikes Act,
27 16 U.S.C. § 670 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

1 C. In addition to Plaintiffs, at least one member of Congress and the Center for
2 Biological Diversity have expressed criticism over the 37-mile fence.

3 4. Defendants failure to comply with the federal laws identified above (and elsewhere in
4 this pleading) is based on the erroneous belief that the laws no longer apply to the construction of the
5 fences because those laws were waived by the Secretary of Homeland Security. The Secretary waived
6 those laws as they relate to the San Diego fence on or about September 13, 2005 (*see* 70 Fed. Reg.
7 55622 (Sept. 22, 2005)), and to the Yuma fence on or about January 12, 2007 (*see* 72 Fed. Reg. 2535
8 (Jan. 19, 2007)). However, the legislation purporting to authorize the Secretary to waive those laws is
9 unconstitutional and therefore invalid and without any force or effect.

10
11 **Parties**

12 5. Plaintiff SAVE OUR HERITAGE ORGANISATION (“SOHO”) is a non-profit, public-
13 benefit organization formed and operating under the laws of the State of California. SOHO’s members
14 reside in or near the City of San Diego, California, and have an interest in the protection of the region’s
15 natural, cultural, and historic resources. Plaintiff FRIENDS OF THE U.S.-MEXICO BORDER
16 ENVIRONMENT (“FUMBE”) is a non-profit, public-interest organization formed and operating under
17 the laws of the State of California. FUMBE’s members reside in the southwestern region of the U.S.
18 and have an interest in the protection of the region’s natural, cultural, and historic resources. Plaintiffs
19 bring this action on behalf of themselves, their members, and other members of the public, all of whom
20 have suffered and will continue to suffer irreparable harm as a result of Defendants’ violations of federal
21 law, as alleged in this pleading.

22 6. Defendant U.S. DEPARTMENT OF JUSTICE is an agency or instrumentality of the
23 United States, and its Attorney General is believed to be Defendant ALBERTO R. GONZALEZ.
24 Defendant U.S. DEPARTMENT OF HOMELAND SECURITY is an agency or instrumentality of the
25 United States, and its Secretary is believed to be Defendant MICHAEL CHERTOFF. Defendant U.S.
26 CUSTOMS AND BORDER PROTECTION is an agency or instrumentality of the United States, and
27 its Commissioner is believed to be Defendant W. RALPH BASHAM. Defendant U.S. IMMIGRATION
28 AND CUSTOMS ENFORCEMENT is an agency or instrumentality of the United States, and its

1 Assistant Secretary of Homeland Security is believed to be Defendant JULIE L. MYERS. Defendant
2 U.S. CITIZENSHIP AND IMMIGRATION SERVICES is an agency or instrumentality of the United
3 States, and its Director is believed to be Defendant EMILIO T. GONZALEZ.

4 7. Plaintiffs are informed and believe and on that basis allege that, at all times stated in this
5 pleading, each Defendant was the agent, servant, or employee of each other Defendant and was, in doing
6 the things alleged herein, acting within the scope of said agency, servitude, or employment and with the
7 full knowledge or subsequent ratification of his or its principals, masters, and employers. Alternatively,
8 in doing the things alleged herein, each Defendant was acting alone and solely to further his, her, or its
9 own interests.

10
11 **Jurisdiction, Venue, and Exhaustion of Remedies**

12 8. The Court has jurisdiction over this proceeding pursuant to Sections 1331 and 1361 of
13 Title 28 of the U.S. Code, because this pleading alleges violations of federal law and seeks to compel
14 Defendants to perform duties owed to Plaintiffs, their members, and other members of the public. The
15 Court also has jurisdiction over this proceeding pursuant to Section 701 *et seq.* of Title 5 of the U.S.
16 Code, because the pleading seeks judicial review of action taken by one or more agencies of the United
17 States.

18 9. Venue is proper in this Court under Section 1391(e) of Title 28 of the U.S. Code,
19 because (i) Defendants are either officers, employees, or agencies of the United States and (ii) a
20 substantial part of the events or omissions giving rise to this proceeding were committed in this judicial
21 district.

22 10. Plaintiffs have satisfied each and every exhaustion-of-remedies requirement that must
23 be satisfied in order to maintain this proceeding. Alternatively, no exhaustion-of-remedies requirement
24 may be applied to Plaintiffs.

25 11. Plaintiffs have no plain, speedy, adequate remedy in the ordinary course of law, since
26 they, their members, and other members of the public will suffer irreparable harm as a result of
27 Defendants' violations of federal law, as alleged in this pleading. Defendants have also failed to satisfy
28 a clear, present, ministerial duty to act in accordance with all applicable laws. Even when Defendants

1 are permitted or required by law to exercise their discretion in taking action under those laws, they
2 remain under a clear, present, ministerial duty to exercise their discretion within the limits of and in a
3 manner consistent with those laws. Defendants have had and continue to have the capacity and ability
4 to take action within the limits of and in a manner consistent with those laws, but Defendants have
5 failed and refuse to do so and have exercised their discretion beyond the limits of and in a manner that
6 is not consistent with those laws.

7 12. Plaintiffs have a beneficial right and interest in Defendants’ full compliance with all
8 applicable laws.

9
10 **FIRST CLAIM:**
11 **Failure to Comply with Coastal Zone Management Act for San Diego Fence**
12 **(Against All Defendants)**

13 13. Paragraphs 1 through 12 are fully incorporated into this paragraph.

14 13. Defendants are required to comply with all applicable provisions of the Coastal Zone
15 Management Act (“CZMA”) in planning, designing, constructing, and operating and maintaining the
16 San Diego fence. By way of example and not limitation, Defendants are required (*i*) to ensure that the
17 San Diego fence is consistent to the maximum extent practicable with California’s coastal management
18 program; and (*ii*) to obtain the California Coastal Commission’s approval of the fence as being
19 consistent with the management plan. Defendants have failed to comply with these provisions (and
20 perhaps other provisions) of the CZMA.

21 14. Defendants’ failure to comply with the CZMA was illegal, arbitrary and capricious under
22 the Administrative Procedure Act (“APA”), a prejudicial abuse of discretion, and not supported by
23 sufficient evidence.

24 15. Plaintiffs, their members, and other members of the public have been harmed as a result
25 of Defendants’ violations of the CZMA and the APA because they have been denied the benefits and
26 protections provided by compliance with those laws.

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1 **SECOND CLAIM:**

2 **Failure to Comply with National Historic Preservation Act for San Diego Fence**

3 **(Against All Defendants)**

4 16. Paragraphs 1 through 15 are fully incorporated into this paragraph.

5 17. Defendants are required to comply with all applicable provisions of the National Historic
6 Preservation Act (“NHPA”) in planning, designing, constructing, and operating and maintaining the San
7 Diego fence. By way of example and not limitation, Defendants are required to consider the effect of
8 the San Diego fence on any historic site that is included or eligible for inclusion in the National Register
9 of Historic Places. Defendants have failed to comply with these provisions (and perhaps other
10 provisions) of the NHPA.

11 18. Defendants’ failure to comply with the NHPA was illegal, arbitrary and capricious under
12 the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

13 19. Plaintiffs, their members, and other members of the public have been harmed as a result
14 of Defendants’ violations of the NHPA and the APA because they have been denied the benefits and
15 protections provided by compliance with those laws.

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17 **THIRD CLAIM:**

18 **Failure to Comply with Migratory Bird Treaty Act for San Diego Fence**

19 **(Against All Defendants)**

20 20. Paragraphs 1 through 19 are fully incorporated into this paragraph.

21 21. Defendants are required to comply with all applicable provisions of the Migratory Bird
22 Treaty Act (“MBTA”) in planning, designing, constructing, and operating and maintaining the San
23 Diego fence. By way of example and not limitation, Defendants must at all times refrain from pursuing,
24 hunting, taking, capturing, killing, or attempting to pursue, hunt, take, capture, or kill any migratory bird
25 or part, nest, or egg of any such bird. Defendants have failed to comply with these provisions (and
26 perhaps other provisions) of the MBTA.

27 22. Defendants’ failure to comply with the MBTA was illegal, arbitrary and capricious under
28 the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

1 that is included or eligible for inclusion in the National Register of Historic Places. Defendants have
2 failed to comply with these provisions (and perhaps other provisions) of the NHPA.

3 30. Defendants' failure to comply with the NHPA was illegal, arbitrary and capricious under
4 the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

5 31. Plaintiffs, their members, and other members of the public have been harmed as a result
6 of Defendants' violations of the NHPA and the APA because they have been denied the benefits and
7 protections provided by compliance with those laws.

8

9 **SIXTH CLAIM:**
10 **Failure to Comply with National Wildlife Refuge System Administration Act for Yuma Fence**
11 **(Against All Defendants)**

12 32. Paragraphs 1 through 31 are fully incorporated into this paragraph.

13 33. Defendants are required to comply with all applicable provisions of the National Wildlife
14 Refuge System Administration Act ("NWRSA") in planning, designing, constructing, and operating
15 and maintaining the Yuma fence. By way of example and not limitation, Defendants must at all times
16 refrain from (i) disturbing, injuring, cutting, burning, removing, destroying, or possessing any real or
17 personal property of the United States, including natural growth, in any area of the National Wildlife
18 Refuge System; (ii) taking or possessing any fish, bird, mammal, or other wild vertebrate or invertebrate
19 animal or part, nest, or egg thereof within any such area; or (iii) entering, using, or otherwise occupying
20 any such area for any purpose. Defendants have failed to comply with these provisions (and perhaps
21 other provisions) of the NWRSA.

22 34. Defendants' failure to comply with the NWRSA was illegal, arbitrary and capricious
23 under the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

24 35. Plaintiffs, their members, and other members of the public have been harmed as a result
25 of Defendants' violations of the NWRSA and the APA because they have been denied the benefits
26 and protections provided by compliance with those laws.

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1 **SEVENTH CLAIM:**

2 **Failure to Comply with Military Lands Withdrawal Act for Yuma Fence**

3 **(Against All Defendants)**

4 36. Paragraphs 1 through 35 are fully incorporated into this paragraph.

5 37. Defendants are required to comply with all applicable provisions of the Military Lands
6 Withdrawal Act (“MLWA”) in planning, designing, constructing, and operating and maintaining the
7 Yuma fence on the land of the Barry M. Goldwater Range. By way of example and without limitation,
8 Defendants have no jurisdiction over the land--exclusive jurisdiction is vested in the Secretary of the
9 Air Force and the Secretary of the Navy--and the land may be used solely for the military purposes
10 identified in the MLWA. Defendants have failed to comply with these provisions (and perhaps other
11 provisions) of the MLWA.

12 38. Defendants’ failure to comply with the MLWA was illegal, arbitrary and capricious
13 under the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

14 39. Plaintiffs, their members, and other members of the public have been harmed as a result
15 of Defendants’ violations of the MLWA and the APA because they have been denied the benefits and
16 protections provided by compliance with those laws.

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18 **EIGHTH CLAIM:**

19 **Failure to Comply with Sikes Act for Yuma Fence**

20 **(Against All Defendants)**

21 40. Paragraphs 1 through 39 are fully incorporated into this paragraph.

22 41. Defendants are required to comply with all applicable provisions of the Sikes Act in
23 planning, designing, constructing, and operating and maintaining the Yuma fence. By way of example
24 and not limitation, all military installations shall be managed in a way that provides for (i) the
25 conservation and rehabilitation of natural resources on military installations; (ii) the sustainable
26 multipurpose use of the resources, which shall include hunting, fishing, trapping, and non-consumptive
27 uses; and (iii) public access to military installations to facilitate such uses. Defendants have failed to
28 comply with these provisions (and perhaps other provisions) of the Sikes Act.

1 42. Defendants' failure to comply with the Sikes Act was illegal, arbitrary and capricious
2 under the APA, a prejudicial abuse of discretion, and not supported by sufficient evidence.

3 43. Plaintiffs, their members, and other members of the public have been harmed as a result
4 of Defendants' violations of the Sikes Act and the APA because they have been denied the benefits and
5 protections provided by compliance with those laws.

6
7 **Prayer**

8 FOR ALL THESE REASONS, Plaintiffs respectfully pray for the following relief against
9 Defendants (and any and all other parties who may oppose Plaintiffs in this proceeding):

10 A. A judgment determining or declaring that Defendants' waiver of the CZMA, the NHPA,
11 the MBTA, the Wilderness Act, the NWRSA, the MLWA, the Sikes Act, and the APA as those laws
12 relate to the San Diego fence and the Yuma fence is unconstitutional and therefore invalid and without
13 any force or effect;

14 B. A judgment determining or declaring that Defendants failed to fully comply with the
15 CZMA, the NHPA, the MBTA, the Wilderness Act, the NWRSA, the MLWA, the Sikes Act, and the
16 APA as those laws relate to the San Diego fence and the Yuma fence;

17 C. A judgment determining or declaring that Defendants must fully comply with the
18 CZMA, the NHPA, the MBTA, the Wilderness Act, the NWRSA, the MLWA, the Sikes Act, and the
19 APA as those laws relate to the San Diego fence and the Yuma fence;

20 D. Injunctive relief prohibiting Defendants (and any and all persons acting at the request
21 of, in concert with, for the benefit of, in privity with, or under one or more of them) from taking any
22 action on any aspect of, in furtherance of, or otherwise based on the planning, design, construction, or
23 operation and maintenance of the San Diego fence and the Yuma fence unless and until this Court has
24 determined that Defendants have fully complied with all applicable provisions of the CZMA, the
25 NHPA, the MBTA, the Wilderness Act, the NWRSA, the MLWA, the Sikes Act, and the APA;

26 E. Any and all other relief that may be authorized by the CZMA, the NHPA, the MBTA,
27 the Wilderness Act, the NWRSA, the MLWA, the Sikes Act, or the APA but not explicitly or
28 specifically requested elsewhere in this Prayer;

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F. All legal fees and other expenses incurred in connection with this proceeding, including but not limited to reasonable attorney fees as authorized by law; and

G. Any and all further relief that this Court may deem appropriate.

Date: February 8, 2007.

Respectfully submitted,
BRIGGS LAW CORPORATION

By: Cory J. Briggs
Cory J. Briggs

Attorneys for Plaintiffs Save Our Heritage
Organisation and Friends of the U.S.-Mexico
Border Environment