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COURT REJECTS CHALLENGE TO DECISION BLOCKING WATER TANKS IN ARIZONA DESERT

(Ambros-Marcial v. United States)

A federal district court in Arizona yesterday rejected efforts by immigrants-rights groups to undermine border security measures, dismissing their suit against the federal government for failing to establish water stations in the Arizona desert.

The decision was a victory for the Washington Legal Foundation (WLF), which had filed a brief urging dismissal of the suit, *Ambros-Marcial v. United States*. WLF argued that although 100 or more aliens die in the Arizona desert from dehydration every year while attempting to cross the border illegally, making such crossings easier by establishing water stations would serve only to encourage more illegal immigration.

The district court held that the lawsuit, a claim for damages filed by relatives of Mexicans who died in the Arizona desert, failed to state a valid legal claim. The court agreed with WLF that the Federal Tort Claims Act (FTCA) does not grant the federal courts jurisdiction over tort claims based on "discretionary functions" of the federal government -- such as a decision whether to install water stations.

"If the plaintiffs had recovered damages in this suit, the federal government from a practical standpoint would have been required to install water stations," said WLF Chief Counsel Richard Samp after reviewing the court's decision. "Because the vast desert wilderness is too large to patrol closely, only the harsh desert conditions serve to deter aliens from attempting the trek. If water stations are added, that deterrent effect will be eliminated," Samp said.

The Plaintiffs were the relatives of 11 aliens who perished in May 2001 in an area within the Arizona desert known as the Cabeza Prieta National Wildlife Refuge. The Refuge is managed by the U.S. Department of Interior. In early 2001, representatives of Humane Borders, a social welfare organization, sought (but were denied) permission from Interior to place water stations in the Refuge. The Plaintiffs alleged that one of the proposed water stations would have been placed near where their relatives died. They alleged that the United States was negligent in refusing to permit installation of the water stations, given that Interior employees were well aware that many illegal aliens were dying from lack of water while attempting to cross the Refuge. Plaintiffs alleged that their relatives would not have died had Humane Borders been permitted to install its proposed water stations.

In its decision, the court noted that although the federal government waived its sovereign immunity to some tort suits when it enacted the FTCA, it specifically exempted any waiver for tort suits challenging a "discretionary function" of the government. A government action (or inaction) constitutes a "discretionary function" when, as here, the action is susceptible to being based upon social, economic, or political policy. Since Interior denied Humane Border's request because it did not want to interfere with border security measures, that denial qualifies as a "discretionary function" that is exempt from FTCA challenge, the court ruled.

WLF also argued that the suit was improper because it threatened to undermine the federal government's ability to secure the southwest border. WLF argued that, particularly in light of the threat that foreign terrorists will use the southwest border to move weapons and personnel into this country, it is vitally important that the courts not second-guess Executive Branch decisions regarding the proper level of border security.

WLF filed its brief on behalf of itself, the Allied Educational Foundation, and Friends of Immigration Law Enforcement. WLF filed with the *pro bono* assistance of David Hardy, a Tucson, Arizona attorney.

WLF is a public interest law and policy center with supporters in all 50 States, including many in Arizona. WLF devotes a significant portion of its resources to efforts to promote national security.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is available on its web site, www.wlf.org.