

United States District Court
Southern District of Texas
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

APR 16 2009

Michael N. Miller, Clerk of Court
By Deputy Clerk 

THE UNITED STATES OF AMERICA,
Plaintiff,

§
§
§
§
§
§
§
§
§

v.

CIVIL ACTION NO. B-08-351

0.26 ACRES OF LAND, more or less, situated
in CAMERON COUNTY, STATE OF
TEXAS; and ELOISA G. TAMEZ, ET AL.,
Defendants.

ORDER

I. PROCEDURAL HISTORY AND NATURE OF THE OBJECTIONS

Plaintiff, United States of America (the "United States"), filed an amended complaint in condemnation and a declaration of taking against Defendant Eloisa G. Tamez ("Defendant") and her property under the authority granted by 8 U.S.C. § 1103(b)(3) and 40 U.S.C. § 3113. (Docket Nos. 19, 20). The United States seeks a fee simple in a tract of the Defendant's land to construct, install, operate, and maintain roads, fencing, vehicle barriers, security lighting, and related structures designed to help secure the United States-Mexico border within the State of Texas. (Docket No. 20 at Schedules B, E).

The United States filed a Motion for Order of Possession of the subject property interests on February 25, 2009. (Docket No. 24). The Defendant filed objections to the Government's possession on September 5, 2008 and on March 31, 2009. (Docket Nos. 9, 22). The Court has previously resolved the majority of the Defendant's objections against landowners in other land condemnation cases and hereby overrules those objections. The Court will discuss the remaining four objections below.

II. DISCUSSION

A. Description of Access

The Defendant objects to the Government's description of how and where the Defendant will be able to access any severed property. As part of the scheduling order in this action, the Court ordered the United States to provide the Defendant with:

a description of how and where the Defendants will be able to access any portion of the severed parent tract located on the side of the fencing closest to the Rio Grande River, including, to the extent possible, a description what will be necessary for the Defendants to pass through the gate or infrastructure located at the access point(s) as well as a map identifying the location of the access point(s)

(Docket No. 9). The United States provided the Defendant with the Rio Grande Valley Sector Tactical Infrastructure Information Brochure about the construction of the border fence and access gates. (Docket No. 10, Ex. 4). In the brochure, the United States informed the Defendant that the United States would facilitate a workable solution to landowners' needs of access to any severed portion of their property and that the parties would establish an access agreement with individual landowners to that effect. (*Id.*) The United States stated that 24/7 access through the gates would generally be available and that the Government would work with landowners on the best hours of operation for the access gates. (*Id.*) Landowners were directed to contact a designated individual at the local Border Patrol station who would address their concerns about the gates at any time of day during any day of the week. (*Id.*)

The brochure also informed the Defendant that the United States will use two types of gates for access to severed tracts when constructing the border fence. (*Id.*) The first type of gate will be for vehicular traffic and will have a twenty (20) foot opening. (*Id.*) The second type of gate will be for farm equipment and will have a 40 ft to 50 ft opening, depending on the needs of the landowners. (*Id.*) Both types of gates will be constructed of materials similar to the border fence

and use an overhead sliding rail system. (*Id.*) The gates will provide a minimum of 18 feet of overhead clearance. (*Id.*) Most gates will be motorized and have a manual override system accessible on both sides of the fence. (*Id.*) The gates will have a keypad entry system on each side of the gate for the landowners to use. (*Id.*) The Border Patrol, law enforcement and emergency personnel will also be able to open the gates using an encrypted radio control system. (*Id.*)

The United States also provided the Defendant with a map of the locations of the nearby gates from which the Defendant will be able to access the severed portion of her property. (*Id.* at Ex. 3). Defendant will have access to two farm gates on either side of her property both within approximately a half-mile of her property. (*See id.*) Given this information, the Government has adequately described where and how the Defendant will be able to access the severed portion of her property for the purpose of adequate negotiations and the Defendant's objection to the description of access is denied.

B. Description of Infrastructure

The Defendant also objects to the Government's description of the infrastructure that will be placed on the subject taking. This Court's scheduling order directed the United States to provide the Defendant with "a description, diagram and/or pictures of the fencing and all related infrastructure that will be built on the property taken from the Defendant[]" The Tactical Infrastructure Information Brochure informed the Defendant that a bollard and picket style fencing will be constructed on her property due to the Border Patrol's operational requirements. (*Id.* at Ex. 4). The fence will range from 15 to 18 feet high based on the assessed operational needs of the area. (*Id.*) Further, the brochure provided both a picture of the fencing to be built as well as a diagram of the fencing to be built. (*Id.*) Given the description, diagram and picture of the fencing infrastructure, the United States complied with the scheduling order in this case. The Defendant's

further objections, essentially requesting the Government to guess as to whether any future or additional infrastructure will ever be constructed on the property are overruled as requirements for pre-possession negotiation.

C. Adequate Breakdown of Compensation

Lastly, the Defendant objects to the Government's breakdown of its offer of just compensation for the taking because she alleges that the Government's offer does not take into consideration the diminution in value to the Defendant arising from the taking. The scheduling order in this action required the United States to provide the Defendant with "a breakdown, by general category, of the Plaintiff's pre-suit offer of compensation to the Defendant[] (*e.g.*, compensation for the taking of property for the construction of the fence and/or compensation for diminution in value, if any, to the parent tract)." The United States provided the Defendant with a general breakdown of its offer of compensation into \$8,500 for the value of the part taken as well as \$5,000 for the diminution in value to the parent tract. (*Id.* at Ex. 6). For the purpose of pre-possession negotiations, the United States is entitled its determination of the diminution in value to the remainder of the Defendant's property. During negotiations, the Defendant is entitled to take a contrary position. This issue, if still in dispute, may be resolved at trial, but it does not constitute a basis for asserting a lack of adequate negotiations. The United States complied with the scheduling order and the Defendant's objection is overruled.

III. ORDER ON POSSESSION

Each of Defendant's objections to the Government's possession of the subject taking has been overruled. Now, having considered Plaintiff's complaint, declaration of taking, the deposit of estimated compensation and the overruling and/or waiver of objections by the Defendants, this Court finds the following support for Plaintiff's motion:

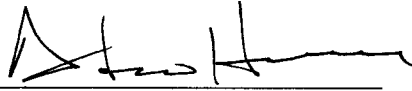
Plaintiff filed a proper amended complaint in this action for the condemnation (and for a taking) of the defendants' property in fee simple and a temporary work easement and declaration of taking of that property in accordance with 40 U.S.C. § 3114. Plaintiff deposited the sum of \$13,500.00 as the estimated just compensation into the Registry of this Court on July 7, 2008.

This Court, therefore, **ORDERS** that the Defendant and all persons who own or claim ownership, possession and/or control of the property described in the attachment to this order must grant Plaintiff an estate in fee simple subject to the reservations and exceptions as set out in Schedules C, D and E of the Plaintiff's declaration of taking. Since Plaintiff has already made a deposit in this action, Plaintiff's right to possession of the estate will begin as of the date of this order.

Plaintiff is hereby **ORDERED** to consult with the landowners and/or occupiers of the property in question prior to the exercising the rights given in this order and, if needed, during the exercise of these rights, to resolve: (1) when and how the United States will take possession of the property; (2) the steps Plaintiff will take to minimize the impact on the environment, culture, commerce and quality of life for the Defendant; and (3) all duties owed by the Government to the Defendant arising as a result of the taking of a fee simple estate under applicable federal and state laws, including, but not limited to, the Uniform Relocation Assistance and Real Property Acquisition Act, if applicable. This court will make itself available, if needed, for the resolution of any disputes, but it expects all parties to act cooperatively and with due concern for the rights and needs of the other parties in the implementation of this order.

It is further **ORDERED** that a copy of this order shall be served by the Plaintiff upon all owners, all persons claiming ownership, and all persons in possession or control of the properties to the extent these are known.

Signed, this the 16th day of April, 2009.

A handwritten signature in black ink, appearing to read "Andrew S. Hanen", written over a horizontal line.

Andrew S. Hanen
United States District Judge