UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, v. 233.0 ACRES OF LAND, MORE OR LESS SITUATED IN MAVERICK COUNTY, STATE OF TEXAS; and CITY OF EAGLE PASS, TEXAS, ET AL, Defendants.	)	Civil Action No. DR-08-CV-003-AML

INTERVENORS' REPLY TO PLAINTIFF'S SUPPLEMENTAL RESPONSE

I.
INTRODUCTION

The Government's contention that the present controversy should be denied as moot makes a farce of the American judicial system. The Government's supplemental response baldly tells the court that because the U.S. Government has already failed to meet its legal obligations as set out by Congress and the President in Consolidated Appropriations Act of 2008, those wronged by its failures have no remedy. The Government argues that because its temporary easement has expired, the issue of a consultation violation is moot. However, the present issue may still be adjudicated under the "capable of repetition, yet evading review" doctrine. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Further, granting the relief will have an effect on the property rights in the subject land held by Ana Maria Herrera, the Rio Bravo Nature Center, and Reymundo Lopez, III. The Secretary of Homeland Security should be required to respect the rights Congress has carved out for individuals situated like Ms. Herrera, the Nature Center, Mr. Lopez, and other members of the communities directly impacted by the potential border fence.

II.
MOOTNESS

Ms. Herrera's, the Nature Center's, and Mr. Lopez's interest in the location and remedy in the present case, while technically rendered moot by the expiration of the Government's temporary condemnation, may still be adjudicated on its merits under the "capable of repetition, yet evading review" doctrine. *Weinstein* at 149. The doctrine creates an exception to mootness where (1) the duration of a challenged action is too short to be fully litigated prior to expiration of the action, and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. *Id*. The present issue meets both of the requirements of the mootness exception.

First, as the temporary easement lasted 180 days (Pl.'s Resp. to Mot. to Intervene at 1.), adjudication of the issue could not have been completed prior to the expiration of the temporary easement. Second, there is a reasonable expectation that Ms. Herrera, the Nature Center, and Mr. Lopez will be subject to the same action again. *See Weinstein* at 149; *Murphy v. Hunt*, 455 U.S. 478, 482-83. While the temporary easement expired on July 13th, there is still an obligation to consult regarding fencing that "is to be constructed." The Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 564, 121 Stat. 1844, 2090-91 (2007). As the Government has already offered to purchase an undisclosed tract of land without consulting with any members of the Eagle Pass community (*See* Aff. of Rolando Salinas at ¶¶ 1-16), there is a reasonable expectation that the Intervenors will be subject to the same action: a condemnation without consultation. Thus, the present issue falls squarely into the mootness exception and should not be dismissed.

Unlike in *Bayou Liberty Ass'n, Inc v. U.S. Army Corps of Engineers*, construction on the subject property has not commenced, much less been substantially completed. 217 F.3d 393,

396 (5th Cir. 2000). The Government asserts that the Intervenors "simply speculate that at some time in the future the United States may condemn an interest in the property." (Pl.'s Supplemental Resp. to Intervention Application Advising Court the Controversy at 2.) However, on July 15, 2008, representatives from the Army Corps of Engineers appeared at the Eagle Pass City Council Meeting and offered $85,400 to purchase land. (*See* Salinas Aff. at ¶ 5.) The representatives could not or would not disclose what land exactly they were proposing to purchase or condemn or whether access to the river would remain intact. (See Salinas Aff. at ¶ 11.) The Consolidated Appropriations Act of 2008 requires the Government to consult prior to construction of the border fence. The Consolidated Appropriations Act of 2008 at 2090-91. The Government has not consulted with any member of the Eagle Pass community about condemning property in Shelby Park, much less with the Intervenors, who have appropriately claimed an interest in the condemned property as required by Rule 71.1(e)(2) of the Federal Rules of Civil Procedure. According to the Government's supplemental response, it has no intention of ever consulting: "Even if the Court were to find that consultation [. . .] was required before taking the easement, the easement has expired, leaving nothing to consult about." (Pl.'s Supplemental Resp. at 4.)

III.
PROPERTY INTEREST

The Government next argues in its supplemental response that granting relief would have no effect. Intervenors are real parties in interest to the property in this lawsuit. Ms. Herrera is, as the Government admits, a real party in interest. The Nature Center's and Mr. Lopez's assertions that they are real parties in interest are laid out in the original motion to intervene and the reply to the Government's response to the motion. The Nature Center and Mr. Lopez have a real property interest in ingress and egress through Shelby Park to the Rio Grande River.

(Intervenors' Reply to Pl.'s Resp. to Mot. to Intervene at 3-5.) Mr. Lopez additionally has a real interest in the operation of his brisket stand in Shelby Park. (Intervenors' Reply at 7-9.) When the Government permanently takes property across Shelby Park, all the Intervenors must be justly compensated. U.S. Const. amend. IV; *see City of Waco v. Texland Corp*. 446 S.W.2d 1, 2 (Tex. 1969) ("[D]iminishment in the value of property resulting from a loss of access constitutes damage."); *see also Panhandle E. Pipe Line Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613 (1935) (finding the owner of right of way for a pipeline is entitled to just compensation for cost of improvements to pipelines imposed by the State Highway Commission in locations where Commission took land for construction of a public road); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

If the Government constructs the border wall without consultation, Intervenors will also have the right to recover damages for the violation of their right to consultation. Case law concerning condemnations tends to be highly deferential to the needs of the Government to take private property for public use. However, through the Consolidated Appropriations Act of 2008, Congress carved out a right to consultation "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." The Consolidated Appropriations Act of 2008 at 2090-91. In *Marbury v. Madison*, Chief Justice Marshall inculcated the rule of law in this country with the words:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. 137, 163 (1803). While the right to consultation is a statutory right, and not a vested right like the Intervenors' property interests, there must be a remedy for as long as the statute remains in effect. *Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). By arguing that granting relief to the Intervenors would have no effect in its supplemental response, the Government is arguing that Intervenors have no remedy for a violation of their rights. Granting relief at this juncture would not only have an effect, it would have an effect more beneficial to all involved parties, including the Government, than simply awarding damages after the fact. Granting relief would require the Government not to begin construction of the fence until it has actually consulted with the Intervenors and the City, rather than combatively refusing to listen to the concerns voiced by members of the local community that could positively influence the Government's decision-making process.

IV.
CONCLUSION

The court should not deem moot the motion to intervene. The present issue is an exception to mootness under the "capable of repetition, yet evading review" doctrine. Denying the motion to intervene through deeming the motion moot will only further enable the Intervenors rights to be violated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2008, I electronically filed the foregoing Intervenors' Motion for Leave to File Reply to Plaintiff's Response to Motion to Intervene In Excess of Ten Pages with proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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