Case No. B-08-40585

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ELOISA G. TAMEZ,
Defendant-Appellant

On Appeal from the United States District Court
for the Southern District of Texas, Brownsville Division
Civil Action No. B-08-cv-0044

BRIEF OF APPELLANT ELOISA G. TAMEZ

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APPEAL NO. 08-40585

ELOISA G. TAMEZ

Defendant-Appellant.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

A. Parties: Eloisa G. Tamez
United States of America

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		Carlos Holguin

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.3, Defendant-Appellant hereby sets forth her statement regarding oral argument. Defendant-Appellant believes that the importance and novelty of the issues presented qualify this appeal for oral argument under Fed. R. App. P. 34(a)(2). Defendant-Appellant believes that oral argument may assist the Court, and respectfully requests that any argument scheduled be held as promptly as possible.

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JURISDICTIONAL STATEMENT

The Government asserted jurisdiction in the district court pursuant to 28 U.S.C. § 1358. USCA5 9.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 1292(a)(1). The Court may also treat this appeal as an application for a writ of mandamus.

The basis for jurisdiction over this appeal is argued in detail in part I of the section entitled Argument, *infra* pp. 20-25.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether jurisdiction lies in this Court to review the Government's compliance with 8 U.S.C. § 1103(b), including whether the Government may rely upon the Declaration of Taking Act in condemnation actions brought pursuant to § 1103(b)?

2. Whether § 1103(b) grants the Government authority to proceed against defendant's property under the Declaration of Taking Act?

3. Whether the Government violated § 1103(b) by failing to adhere to any ascertainable standards in its pre-condemnation negotiations with landowners and in discharging its duty of consultation?

4. Whether the Government violated § 1103 by failing to either define the interest it sought or engage in good faith negotiations to arrive at a reasonable price for the interest sought?

STATEMENT OF THE CASE

On January 29, 2008, the United States (hereinafter "plaintiff" or the "Government") filed the underlying condemnation complaint against defendant Dr. Eloisa Tamez ("defendant" or "defendant Tamez"). USCA5 9 - 23. Pursuant to the Declaration of Taking Act, the Government also filed an *ex parte* motion for immediate possession of a six-month easement in Dr. Tamez's property. USCA5 58 – 75.

On January 31, 2008 the district court denied the *ex parte* motion. USCA5 77. On February 5, 2008, defendant filed an opposition to the condemnation action. USCA5 86 – 152. In her opposition, and throughout the litigation, defendant raised, among other defenses, four substantive arguments:

1. The Government violated the terms of 8 U.S.C. § 1103(b), [1] its

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[1] The statute provides:

> (1) The Attorney General may contract for or buy any interest in land, including temporary use rights, adjacent to or in the vicinity of an international land border when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States against any violation of this Act.
>
> (2) The Attorney General may contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be reasonable.
>
> (3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings pursuant to § 3113 of title 40.

8 U.S.C. § 1103(b) (emphasis added).

authority for the condemnation, by improperly seeking condemnation under the Declaration of Taking Act, enacted in 1931 as Pub.L. 71-736, 46 Stat. 1421, and codified at 40 U.S.C. § 3114 ("DTA"). Defendant argued that § 1103(b) requires the Government to proceed under the General Condemnation Act of 1888, 40 U.S.C. § 3113. USCA5 91 – 92.

2. The Government failed to engage in negotiations with Dr. Tamez to arrive at a reasonable price for the interest sought as required by 8 § 1103(b). USCA5 264.

3. The Government failed to adequately define the scope of the interest it sought making negotiation for a reasonable price for the interest virtually impossible. *See e.g.* USCA5 409 – 410.

4. The Government failed to issue any standards for negotiations over a reasonable price and had not engaged in any negotiations over a reasonable price. *See e.g.* USCA5 408 – 409. [2]

On March 7, 2008, the district court held that "the provisions of the DTA are available whenever an officer of the United States is authorized to bring a condemnation action in Federal Court pursuant to the GCA, 40 U.S.C. § 3113. The right to use the provisions of the DTA is inherent and incidental in all condemnation actions brought under the GCA; thus, this Court finds that Congress does not need to expressly authorize the use of

[2] Defendant Tamez also raised these and other defenses in her timely filed Answer. USCA5 263 – 266.

the provisions of the DTA when it otherwise gives the United States authority to proceed under the GCA." *United States v. 1.04 Acres of Land*, 538 F.Supp. 995 (S.D. Tx. 2008), USCA5 295 ("*Tamez I*").

The district court also held that "8 U.S.C. § 1103(b)(3) clearly contemplates that some attempt has been made to reach an agreement prior to the Attorney General exercising the authority to pursue eminent domain remedies." USCA5 299. "[I]n the absence of any evidence to the contrary from the Government, this Court holds that, at least in Dr. Tamez's case, the United States has either not complied with the requirements of 8 U.S.C. § 1103(b) or has not provided this Court with sufficient proof that it complied." USCA5 304. The Court allowed the Government two weeks to supplement its proof or engage in good faith negotiations with defendant. *Id*.

The parties thereafter engaged in discussions that proved fruitless because the Government refused to define the scope of the interest sought, refused to issue or explain any standards to be applied in the process, and refused to offer any more than $100 in every related border-wall condemnation case.

Defendant Tamez filed a Motion to Dismiss, reiterating her objections to the statutory basis and process of the condemnation action. USCA5 448 to 466. Both parties submitted briefing on their discussions. *See e.g*. USCA5 376 – 399 (Plaintiffs' submission, March 24, 2008); USCA5 400 – 446

(Defendant's submission, March 24, 2008).

On April 10, 2008, the district court issued three orders, two relevant here. The court granted the Government the easement it sought in defendant Tamez's property:

> The Government is hereby granted the right to survey, make borings, and conduct other related investigations on [Dr. Tamez's property]… Additionally, the United States is granted the right to trim or remove any vegetative or structural obstacles on the property that interfere with the aforementioned purpose and work.

Order Granting Government's Motion for Possession. Case No. B-08-044, (S.D. Tex., Brownsville Div.) (*Tamez II*) USCA5 496 – 497.

In a separate Order the court held that the Government had engaged in a "bona fide effort to negotiate with Dr. Tamez." Order Denying Defendant's Motion to Dismiss, Case No. B-08-044 (S.D. Tex., Brownsville Div.) (*Tamez III*), USCA5 513.[3]

Dr. Tamez timely appealed those orders. USCA5 519 – 521.

STATEMENT OF THE FACTS

Defendant's claim to the property in question is older than the life-span of the plaintiff Government. USCA5 113. Dr. Tamez inherited legal title to her property pursuant to the San Pedro de Carricitos Land Grant, of the Nuevo Santander region of South Texas, established by Spain in 1743.

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[3] The third Order issued on April 10, 2008 distributed the $100.00 deposited with the complaint to the defendant. USCA5 501.

USCA5 113.[4]

In August of 2007, agents from the United States Customs and Border Protection ("CBP") called defendant Tamez to discuss the Government's acquisition of a right of entry onto her property. USCA5 502. Defendant requested a meeting in person. USCA5 502 – 503. On November 26, 2007, agents of the United States Corps of Engineers and CBP met with Dr. Tamez. USCA5 503.

During that meeting, the agents stated that the Government wanted a six-month easement to survey her land and would reimburse her for any damage caused by Government agents during the survey. USCA5 503. The agents did not inform defendant Tamez of her right to negotiate, nor did they define the interest sought in her property with any specificity (for example, how much of her land the Government intended to bore holes in, how many holes it intended to bore, how large the holes would be, how much if any vegetation it intended to remove, the extent to which it intended to move structures on the land, how much equipment it intended to store on the property, how many days it intended to be present on her property, etc.). Despite this visit, defendant Tamez later declared: "The government has not offered or attempted to negotiate with me about the

[4] Prior to the establishment of the Spanish empire, the lands in question were shared among numerous indigenous people, and Tamez is a descendant of the Chiricahua and Lipan Nde' (Apache) and Basque peoples. USCA5 113. Her family has held title to the property for at least 265 years. *Id*.

terms of any taking of any temporary right, including but not limited to reasonable price, notice before entry, and alternatives to destruction of property." USCA5 113; USCA5 503 – 510.

On December 7, 2008, the U. S. Army Corps of Engineers sent defendant Tamez a letter stating that if she did not grant the Government the easement it sought in one month, the Government would file a condemnation action against her property. USCA5 at 504

The Government then filed this action. USCA5 9.

On March 7, 2008, the District Court held that, based on the record before it, "the United States either has not complied with requirements of 8 U.S.C. § 1103(b) or has not provided this Court with sufficient proof that it complied." *Tamez I* at 1012, USCA5 304. The Court gave the Government two weeks to supplement the record *or* "conduct good faith negotiations with Dr. Tamez … and supplement its pleadings." *Id*.

Attorneys for defendant Tamez and the Government then engaged in discussions to implement § 1103(b)'s requirement that the parties engage in good faith negotiations to arrive at a reasonable price for the interest sought.

However, the Government refused to specify the interest that it sought in defendant Tamez's property or limit its scope or potential impact. USCA5 415 – 417; USCA5 434 – 436; USCA5 442 – 443. The Government also refused to offer defendant any more than a standard $100

offered all property owners for the interest sought, regardless of the size of the easement sought, or the scope of its use, both of which are clearly relevant to a reasonable price for the interest sought. USCA5 446 ("[The] deposit in all of the actions to condemn rights of entry is the nominal $100.")

As noted in the Statement of the Case *supra*, on April 10, 2008, the district court granted the Government's motion for immediate possession of Dr. Tamez's property.

SUMMARY OF THE ARGUMENT

I. Jurisdiction lies in this court to review the availability of the Declaration Of Taking Act in condemnation actions brought pursuant to 8 U.S.C. § 1103(b).

The Court has jurisdiction over this appeal because the district court's holding that the Declaration of Taking Act (DTA) is available in this and any other condemnation action, *Tamez I, supra at* 1007, USCA5 295, is "a final decision[] of the district court[]," *id*., and in any event "finally determine[s] claims of right separable from, and collateral to, rights asserted in the [condemnation] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541, 546 (1949); *cf Catlin v. United States*, 324 U.S. 229, 233 (1945) (generally decisions only reviewable "upon

an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property").

However, as this and other Circuits clearly recognize, interlocutory orders in condemnation actions *are* immediately appealable if they satisfy three areas of inquiry: (1) the substance of the order must be "independent and easily separable" from the substance of other claims, (2) the need to secure prompt review in order to protect important interests of a party, and (3) finality is examined in the light of "practical, rather than narrowly technical, considerations." *United States v. 101.88 Acres of Land, etc.*, 616 F.2d 762, 765 (5th Cir. 1980) (*quoting In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1094-95 (5th Cir. 1977).

Applying this three-part test, this Court should take jurisdiction of this appeal under *Cohen*. The district court's holding that § 1103(b) permits the Government to condemn land under the DTA is "independent and easily separable from the substance of other claims," including just compensation which is what the condemnation statute addresses through a trial. The issues presented regarding application of the DTA will fundamentally alter the future proceedings in this case, but have nothing to do with the issue of just compensation for whatever interest the Government may be permitted to take. As in *United States v. 101.88 Acres of Land, etc.*, this claim "raises a distinct question that can be decided without

affecting the determination of compensation for the lands described in the declaration." *Id*.

Second, this Court's exercising jurisdiction is essential "to protect important interests of [a] party." Prompt review allows both the final determination of the general availability of the DTA in § 1103(b) condemnation proceedings, and the protection of defendant's interest in retaining title and possession of her property during the pendency of those proceedings.

Finally, this appeal should be allowed in light of pragmatic rather than technical concerns. The Orders finally determine defendant's right to retain title and possession of her property pending conclusion of condemnation proceedings. Because the district court held in a published opinion that the DTA *is* available in all condemnation proceedings whatsoever, it resolves an important question affecting the rights of hundreds of individual landowners along the U.S.-Mexico border. This question does not turn on the facts of any individual case, but is of broad and general significance.

This Court's recent decision in *United States v. Muniz*, No.s 08-40372 & 08-40373, 2008 U.S. App. LEXIS 17081 (5th Cir. 2008), does not counsel a contrary result. In *Muniz*, landowners objected to a temporary taking solely on the ground that the United States had failed to negotiate with them to purchase the right of entry *prior* to initiating condemnation proceedings, in

violation of 8 U.S.C. § 1103(b)(2) and (3). 2008 U.S. App. LEXIS 17081, 2. The district court concluded that after the commencement of suit, the Government made a bona fide attempt to negotiate with the landowners. *Id*. at 3. Landowners appealed.

This Court held that it lacked jurisdiction because the effect of the Government's failure to negotiate *prior* to initiating condemnation proceedings could be reviewed upon appeal from a "'final judgment disposing of the whole case and adjudicating all rights, including ownership and just compensation *as well as the right to take property*.'" *Id*. at 5 (*quoting Catlin v. United States*, supra, 324 U.S. at 243) (emphasis added).

Here, defendant's challenge to the use of the DTA does not go to the Government's right to take property or amount of just compensation, but rather involves its dispossessing landowners prior to prevailing in condemnation *regardless of whether it ultimately has a right to take that property*.

This definitional impact is indistinguishable from that addressed in *United States v. 101.88 Acres of Land, etc.*: *i.e.*, whether the Government in fact sought to condemn more land "than it had described in the condemnation declaration…" 616 F.2d at 764. Defendant's invoking jurisdiction here is more compelling than was the case in *101.88 Acres of Land*. Whether the DTA applies or not is of fundamental importance to the

course of the case and yet is independent of any issues relating to just compensation for whatever interest may be taken, if any.

This Court should accordingly exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and *Cohen v. Beneficial Industrial Loan Corp.*

II. Plaintiffs are without authority to proceed against defendant's property under the Declaration of Taking Act.

Congress has enacted two condemnation procedures. The common "straight" procedure is established by the General Condemnation Act of 1888, Act of August 1, 1888, ch. 728, § 1, 25 Stat. 357, now codified at 40 U.S.C. § 3113 (GCA).

Under the GCA, condemnation proceedings begin with the filing in federal district court of a complaint identifying the property and the interest sought, followed by a trial of the question of how much compensation is due the owner of the land. *See* Rule 71.1, Fed.R.Civ.Proc.

In contrast, the Declaration of Taking Act, enacted in 1931 as Pub.L. 71-736, 46 Stat. 1421, and codified at 40 U.S.C. § 3114 (DTA), sets out an expedited condemnation procedure. Under the DTA, the Government may file "a declaration of taking signed by the authority empowered by law to acquire the lands, declaring that said lands are thereby taken for the use of

the United States." *See generally Kirby Forest Indus. v. United States*, 467 U.S. 1, 4 (1984).[5]

Neither the GCA nor the DTA vests the government with *substantive* authority to condemn land. That authority must derive from an independent statute vesting an officer with the specific power of eminent domain. *Id.*, at 3 n.1; *United States v. Dow*, 357 U.S. 17, 23 (1958). Here, the sole authority to condemn is 8 U.S.C. § 1103(b), which states in plain words: "When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, *the Attorney General may commence condemnation proceedings pursuant to the Act of August 1, 1888* (Chapter 728; 25 Stat. 357)." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-55 (1996), § 102 ("IIRIRA"), 8 U.S.C. § 1103(b) (emphasis added).

In this case, over defendant's objection, plaintiff proceeded against defendant's land pursuant to the DTA in violation of § 1103(b) and the district court held that plaintiffs may employ the "quick-take" DTA procedure to condemn land notwithstanding that § 1103(b)(3) confers only

[5] The quick-take authority was enacted to enable the United States "peremptorily to appropriate property on which public buildings were to be constructed, making it possible for the Government to begin improving the land, thereby stimulating employment during the Great Depression." *Id.*, at 4-5, fns. 1-3 (*citing* H. R. Rep. No. 2086, 71st Cong., 3d Sess. (1930)).

authority to take land pursuant to the GCA. *United States v. 1.04 Acres of Land*, 538 F.Supp. 995, 1004-08 (S.D. Tx. 2008).

Despite Congress's obvious awareness of both the GCA and the DTA, it specifically declared that plaintiffs should condemn property pursuant to "the Act of August 1, 1888 ..." In fact, when Congress decides to authorize expedited takings, it does so explicitly. *E.g.,* 22 U.S.C. § 287; 25 U.S.C. § 500a; 42 U.S.C. § 1594a; *United States v. 40.75 Acres of Land*, 76 F. Supp. 239, 242 (N.D. Ill. 1948; *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312, 1319 & n.15 (4th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983).

The paramount rule of statutory construction is that the meaning of a statute is discerned where possible from the words of the statute alone. *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994). Here, Congress expressly provided that the Government should proceed under the 1888 statute, and its resort to the 1931 quick-take statute is nowhere authorized in the text of § 1103(b) itself.

This application of the plain meaning rule is buttressed by secondary tools of statutory construction, including the canon of *expressio unius est exclusio alterius:* "[W]hen a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (internal quotations omitted).

Further, the meaning of a statute should not be determined in isolation, but in context. Here, as discussed in detail below, Congress' limiting plaintiffs to the more deliberate straight condemnation procedure is wholly consistent with its intent and related statutory provisions that strike a *balance* between the rights of private landowners and the Government's interest in securing the U.S.-Mexico border. § 1103(b)(2) (Congress vested landowners with the right to fix an initial price for the interest the United States seeks); § 1103(b)(3) (Congress authorized plaintiffs to initiate condemnation proceedings only if they and the landowner are unable to agree on terms for the purchase of that interest); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564(b)(1)(C)(I), 121 Stat. 1844, (plaintiffs "shall consult with … property owners in the United States 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.")

Reading § 1103(b)(3) as authorizing quick-take condemnation *sub silentio* is inconsistent with the plain words of the statute and inconsistent with these multiple expressions of Congress's solicitude for the rights of landowners.

III. The Government must adhere to some ascertainable standards in its pre-condemnation negotiations with landowners and in discharging its duty of consultation

The Government must apply minimally coherent standards in evaluating the reasonableness of prices landowners fix for the sale of their interests and in subsequent, pre-condemnation negotiations with property owners, as are required under 8 U.S.C. § 1103(b)(2) and (3).

Action of an administrative agency that is arbitrary, capricious, or in bad faith cannot stand. 5 U.S.C. § 706(2)(A); *see also Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis ..."); *Barnes v. Merritt*, 428 F.2d 284, 288 (5th Cir. 1970) (defendant must develop "'ascertainable standards … by which an applicant can intelligently seek to qualify for a [liquor] license…'").

The Government in this case followed no standards known to the defendant or the district court in discharging its § 1103(b) obligations to negotiate over a reasonable price for the purchase of real property interests prior to resorting to condemnation. Nor does the Government have any ascertainable standards guiding consultation with landowners as Congress required in § 564(b)(1)(C)(I) of the Consolidated Appropriations Act, 2008.

Without some ascertainable standards, plaintiff's pre-condemnation statutory obligations toward landowners are empty formalities. The law requires the Government to operate in accordance with articulable

standards. Its failure to adhere to *any* standards whatsoever in discharging its duties of evaluation, negotiation, and consultation violates defendant's due process rights and rights under § 1103(b).

IV. The Government failed to either clearly define the interest it sought or engage in good faith negotiations to arrive at a reasonable price for the interest sought

Compounding the Government's failure to issue any standards to implement its statutory obligations, it failed to clearly define the interest that it sought, making good faith negotiations difficult to impossible, and then failed to negotiate for a "reasonable" price, instead arbitrarily offering virtually every property owner $100, regardless of the size of the taking sought, or the use to which the taking would be put (which would clearly impact on a reasonable price). The Government's actions violate § 1103(b) which provides authority to purchase land by sale if a "reasonable" price is agreed upon, or proceed with condemnation if the parties are "unable to agree upon a reasonable price …" *Id*.

As discussed in detail below, the Government entirely failed to explain the scope of the interest sought, making good faith negotiations virtually impossible. The Government did not explain how many holes it intended to bore on defendant's property, how large they would be, what their location would be, how much equipment it planned to store on the property, what vegetation and structures it intended to remove, how many days it would be present on the property, etc., all rights it sought in the

condemnation action. However, the Government refused to first evaluate properties so that it could be relatively precise in its description of the interest sought, thereby allowing for good faith negotiations to arrive at a reasonable price for the interest sought.

Furthermore, the Government failed to negotiate a reasonable price even for the ill-defined interest it sought in defendant's property. Instead, it offered all property owners $100, despite obvious differences in the parcels of land and circumstances of each case. At the very least, this uniformity in offers raises serious questions as to whether there is compliance with the statute. Apparently, it is the government's interpretation that a "fixed price" under the statute need not bear any rational relationship to the actual value of the interest condemned. Defendant does not believe that was Congress's intent.

In short, the $100 price was never open for negotiation, and can hardly be considered as rationally related to any assessment of the reasonable value of the individualized easement sought in each border property, regardless of the size of the easement sought or its intended use.

8 U.S.C. §1103(b) on its face contemplates an effort to arrive at "a reasonable price" for the interest sought, not an arbitrary price the source of which the government refuses to disclose. Congress did not intend that Government officials "game" section 1103(b), as they have done in this case.

STANDARD OF REVIEW

The issues raised on this appeal involve questions of law, including whether the Government is statutorily authorized to seek condemnation under the Declaration of Taking Act, and whether the Government complied with 8 U.S.C. § 1103(b), which are reviewed *de novo* on appeal. *See, e.g.*, *Trans-Serve, Inc. v. United States*, 521 F.3d 462, 468 (5th Cir. 2008); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1021 (5th Cir. 1990).

ARGUMENT

The "Congress of the United States [exercises] the right of eminent domain," and may delegate this authority to federal agencies by statute. *Chappell v. U.S.*, 160 U.S. 499, 509-510 (1895); *see also T.V.A. v. Welch*, 327 U.S. 546, 551-52 (1946) ("it is the function of Congress to decide what type of taking is for a public use and ... the agency authorized to do the taking may do so *to the full extent of its statutory authority*") (emphasis added). Many federal statutes, like 8 U.S.C. § 1103(b), place enforceable limits upon the federal government's authority to take land. *See, e.g., U.S. v. 16.03 Acres of Land,* 26 F.3d 349, 357 (2d Cir. 1994) (under 16 U.S.C. § 1246(g), "[t]he Secretary is simply not free to invoke his eminent domain authority without first attempting to purchase the land in question."); *Wilson*, 59 F.2d at 581 (discussing 16 U.S.C. § 814); *Cascade*, 163 F.Supp. at 525 (discussing 42 U.S.C. § 1594a).

The Government must state "the authority for [each] taking" that it seeks to accomplish by court order. FED. R. CIV. P. 71.1(c)(2)(A). The *only* authority claimed by the Government for the takings at issue here is 8 U.S.C. § 1103(b).[6]

I. Jurisdiction lies in this Court to review the availability of the DTA in condemnation actions brought pursuant to 8 U.S.C. § 1103(B).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the district court's holding that the Declaration of Taking Act (DTA) is available in *all* condemnation actions, *Tamez I*, *supra at* 1007, USCA5 295, is "a final decision[] of the district court[]," *id*., and in any event "finally determine[s] claims of right separable from, and collateral to, rights asserted in the [condemnation] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

Generally, of course, interlocutory orders in condemnation actions are reviewable "only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property." *Catlin v. United*

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[6] The Government also lists 40 U.S.C. §§ 3113 and 3114. USCA5 13. These two statutes only specify *procedures* for taking land, not independent authority to take land. *See Bishop v. U.S.*, 288 F.2d 525, 527-528 (5th Cir. 1961) ("The Declaration of Taking Act does

States, 324 U.S. 229, 233 (1945). SHORTEN CITE. However, an interlocutory order in condemnation actions is immediately appealable if it satisfies the following three tests:

> "(1) the substance of (the order) must be independent and easily separable from the substance of other claims, (2) at least part of the question of collateralness is determined by the need to secure prompt review in order to protect important interests of any party, and (3) the finality issue is to be examined in the light of practical, rather than narrowly technical, considerations."

United States v. 101.88 Acres of Land, etc., 616 F.2d 762, 765 (5th Cir. 1980) (*quoting In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1094-95 (5th Cir. 1977).

Applying this three-part test, this Court should take jurisdiction of this appeal under *Cohen*.

First the district court's holding is "independent and easily separable from the substance of other claims." Defendants' core contention is that the DTA is not available in condemnation proceedings brought under 8 U.S.C. § 1103(b). This is essentially a procedural objection to the conduct of the case, which will clearly differ fundamentally depending on whether the expedited DTA procedure is or is not available.

In straight condemnation, "[d]uring pendency of the proceedings, the private owner retains title to and possession of the property." *Narramore v. United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992). Under the DTA, in

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not bestow independent authority to condemn lands for public lands. On the contrary, it provides a proceeding ancillary or incidental to suits brought under other statutes.").

contrast, "[t]itle and right to possession thereupon vest immediately in the United States." *Kirby Forest Indus., supra,* 467 U.S. at 4.

In effect, the DTA fundamentally contracts the rights of landowners *for howsoever long condemnation proceedings may require* and profoundly expands the substantive right of the United States to seize property during this same period. This realignment of pre-judgment right to title and possession is, after all, the DTA's *raison d'être*. *Kirby Forest Indus. v. United States*, *supra*, 467 U.S. at 4-5, fns. 1-3 (*citing* H. R. Rep. No. 2086, 71st Cong., 3d Sess. (1930)). Thus, deferring review of defendant's instant objection until after condemnation proceedings have been completed would have the practical effect of mooting their challenge to the application of the DTA in proceedings brought under 8 U.S.C. § 1103(b).

This issue "is not a claim on the merits," *United States v. 101.88 Acres of Land, etc.*, *supra*, 616 F.2d at 765, but rather a claim about how and when title and possession transfer between the filing of a condemnation action and the entry of judgment on the merits. As in *United States v. 101.88 Acres of Land, etc.*, this claim "raises a distinct question that can be decided without affecting the determination of compensation for the lands described in the declaration." *Id*.

Second, this Court's exercising jurisdiction is essential "to protect important interests of [a] party." Prompt review allows both the final determination of the general availability of the DTA in § 1103(b)

condemnation proceedings, and the protection of defendant's interest in retaining title and possession of her property during the pendency of those proceedings. Defendant will have the right to title and possession during the condemnation proceeding if the DTA is unavailable to the Government; she will have neither if the DTA is available to the Government under § 1103(b).

Third, the instant appeal should be allowed in light of pragmatic rather than technical concerns. The order here finally determines defendant's right to retain title and possession of her property pending conclusion of condemnation proceedings. Because the district court categorically held in a published opinion that the DTA *is* available in all condemnation proceedings whatsoever, it resolves an important question affecting the procedural rights of at least hundreds of individual landowners along the U.S.-Mexico border from Brownsville to Laredo and beyond. This question does not turn on the facts of any individual case, but is of broad and general significance. Moreover, hearing this appeal now would serve judicial economy by providing guidance for the conduct of many dozens or even hundreds of condemnation actions the Government is bringing in the course of the border fence construction program.

Nor does this Court's decision in *United States v. Muniz*, No.s 08-40372 & 08-40373, 2008 U.S. App. LEXIS 17081 (5th Cir. 2008), counsel a contrary result. In *Muniz*, this Court considered whether it had jurisdiction

over an interlocutory appeal from an order of possession granting the United States a temporary right of entry to conduct surveys and other investigatory work in connection with construction of a planned border fence. The landowners objected to this temporary taking solely on the ground that the United States had failed to negotiate with them to purchase the right of entry *prior* to initiating condemnation proceedings, in violation of 8 U.S.C. § 1103(b)(2) and (3). 2008 U.S. App. LEXIS 17081, 2. In an interlocutory order, the district court overruled the objection, concluding that the Government had made a bona fide attempt to negotiate with the landowners, albeit after it had initiated condemnation proceedings. *Id*. at 3. The landowners thereupon appealed.

This Court held that it lacked jurisdiction over the landowners' appeal because the effect of the Government's failure to negotiate prior to initiating condemnation proceedings could be reviewed upon appeal from a "'final judgment disposing of the whole case and adjudicating all rights, including ownership and just compensation *as well as the right to take property*.'" *Id*. at 5 (*quoting Catlin v. United States*, 324 U.S. 229, 243 (1945)) (emphasis added).

The Court distinguished *United States v. 101.88 Acres of Land, etc.*, *supra*, on the grounds that in *101.88 Acres of Land* the ruling was subject to interlocutory appeal because it "'define[d] the content of the case, deciding whether compensation for the land above water and the submerged land

will be measured in the original proceeding.'" 2008 U.S. App. LEXIS 17081, 9 (*quoting United States v. 101.88 Acres of Land, etc.*, *supra*, 616 F.2d at 766-67).

Here, of course, defendant's challenge to the use of the DTA does not go to the Government's right to take property or amount of just compensation, but rather involves its dispossessing landowners prior to prevailing in condemnation *regardless of whether it ultimately has a right to take that property*. Further, the district court's published opinion "defines the content" of this and many other cases, deciding that the DTA is available in all § 1103(b) condemnation proceedings.

This definitional impact is indistinguishable from that reviewed in *United States v. 101.88 Acres of Land, etc.*: *i.e.*, whether the Government in truth and fact sought to condemn more land "than it had described in the condemnation declaration…" 616 F.2d at 764. If anything, defendant's invoking jurisdiction here is more compelling than was the case in *101.88 Acres of Land* because, after all, the amount of land taken would be reviewed in conjunction with an appeal from a final judgment awarding the landowner less compensation than she believed just.

This Court should accordingly exercise jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and *Cohen v. Beneficial Industrial Loan Corp.*

II. Plaintiffs are without authority to proceed against defendant's property under the Declaration of Taking Act.

Procedurally, the United States generally employs one of two methods to appropriate private land for a public purpose. The more

common is the "straight" procedure established by the General Condemnation Act of 1888, Act of August 1, 1888, ch. 728, § 1, 25 Stat. 357, and now codified at 40 U.S.C. § 3113 (GCA).[7]

Under the GCA, an "officer of the Government" who is "authorized to procure real estate for the erection of a public building or for other public uses" makes an application to the Attorney General who, within 30 days, must initiate condemnation proceedings. Condemnation proceedings begin with the filing in federal district court of a complaint in condemnation, identifying the property and the interest therein that the United States wishes to take, followed by a trial of the question of how much compensation is due the owner of the land. *See* Rule 71.1, Fed.R.Civ.Proc. In effect, a final judgment in straight condemnation gives the Government an option to buy the property at the adjudicated price. *Danforth v. United States*, 308 U.S. 271, 284 (1939). If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States. *Id*.

In contrast, the Declaration of Taking Act, enacted in 1931 as Pub.L. 71-736, 46 Stat. 1421, and codified at 40 U.S.C. § 3114 (DTA),[8] sets out an

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[7] An officer of the Federal Government authorized to acquire real estate for the erection of a public building or for other public uses may acquire the real estate for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so. The Attorney General, on application of the officer, shall have condemnation proceedings begun within 30 days from receipt of the application at the Department of Justice.

expedited condemnation procedure. Under the DTA, the Government may file "a declaration of taking signed by the authority empowered by law to acquire the lands, declaring that said lands are thereby taken for the use of the United States." *See generally Kirby Forest Indus. v. United States*, 467 U.S. 1, 4 (1984).[9]

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[8] The DTA provides in pertinent part:

> (a) Filing and content. In any proceeding in any court of the United States outside of the District of Columbia brought by and in the name of the United States and under the authority of the Federal Government to acquire land, or an easement or right of way in land, for the public use, the petitioner may file, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the land described in the petition, declaring that the land is taken for the use of the Government. The declaration of taking shall contain or have annexed to it—
>
> > (1) a statement of the authority under which, and the public use for which, the land is taken;
> >
> > (2) a description of the land taken that is sufficient to identify the land;
> >
> > (3) a statement of the estate or interest in the land taken for public use;
> >
> > (4) a plan showing the land taken; and
> >
> > (5) a statement of the amount of money estimated by the acquiring authority to be just compensation for the land taken.
>
> (b) Vesting of title. On filing the declaration of taking and depositing in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration--
>
> > (1) title to the estate or interest specified in the declaration vests in the Government;
> >
> > (2) the land is condemned and taken for the use of the Government; and
> >
> > (3) the right to just compensation for the land vests in the persons entitled to the compensation.

[9] The quick-take authority was enacted to enable the United States "peremptorily to appropriate property on which public buildings were to be constructed, making it possible for the Government to begin improving the land, thereby stimulating

The Government is obliged, at the time it files the declaration, to deposit in the court funds equal to the estimated amount of just compensation. *Id*. Title and right to possession thereupon vest immediately in the United States. The actual value of the land is determined later, and the owner is awarded the difference between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference. *Id*.

Neither the GCA nor the DTA, however, vests government officials with *substantive* authority to condemn land. The quality and quantity of such authority derives from an independent statute vesting the officer with the specific power of eminent domain. *Id.*, at 3 n.1; *United States v. Dow*, 357 U.S. 17, 23 (1958). Here, plaintiffs' authority to condemn land is prescribed solely in 8 U.S.C. § 1103(b).

Enacted by § 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-55 (1996) ("IIRIRA"), 8 U.S.C. § 1103(b) provides as follows:

> (3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings *pursuant to the Act of August 1, 1888* (Chapter 728; 25 Stat. 357).

(Emphasis added.)

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employment during the Great Depression." *Id.*, at 4-5, fns. 1-3 (*citing* H. R. Rep. No. 2086, 71st Cong., 3d Sess. (1930)).

In this case, plaintiff proceeded against defendant's land under the authority of § 1103(b) and pursuant to the procedures set out in GCA *and* the DTA. USCA5 9 and 13. Defendant timely objected to plaintiff's proceeding under the DTA, arguing that § 1103(b) authorizes plaintiff to condemn land under the GCA only, and that the DTA procedure is therefore unavailable. USCA5 91 and 264.

The district court, however, held that plaintifs may employ the "quick-take" DTA procedure to condemn land notwithstanding that § 1103(b)(3) confers only authority to take land pursuant to the GCA. *United States v. 1.04 Acres of Land*, 538 F.Supp. 995, 1004-08 (S.D. Tx. 2008). This Court should reverse.

Both the GCA and the DTA have been law for a very long time indeed, and Congress was clearly aware of both mechanisms when it enacted the IIRIRA, yet it specifically declared that plaintiffs should condemn property pursuant to "the Act of August 1, 1888 ..." The DTA, of course, would not be enacted until 1931.

When Congress has intended to authorize expedited takings, it has done so explicitly. *E.g.*, 22 U.S.C. § 287 note (authorizing condemnation of land for United Nations headquarters district "in accordance with the Act of August 1, 1888 (25 Stat. 357), as amended, *and the Act of February 26, 1931* (46 Stat. 1421), as amended." (brackets omitted; emphasis supplied)); 25 U.S.C. § 500a (authorizing condemnation of reindeer property through "the

procedure provided for the condemnation of real estate by the Act of August 1, 1888 (Chapter 728), *or … that provided by the Act of February 26, 1931*…" (emphasis added)); 42 U.S.C. § 1594a (condemnation proceedings for military housing "shall be conducted in accordance with the provisions of the Act of August 1, 1888 (25 Stat. 357; 40 U. S. C. 257), as amended, *or any other applicable Federal statute*." (emphasis added)); *United States v. 40.75 Acres of Land*, 76 F. Supp. 239, 242 (N.D. Ill. 1948) (where Congress grants "power to acquire property by condemnation, under the general condemnation statute … *and 'any other applicable Federal statute'* …[t]he latter phrase includes the Declaration of Taking Act…" (emphasis added)); *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, 706 F.2d 1312, 1319 & n.15 (4th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983) ("We think that by including WMATA's right to proceed under 'any other applicable Act' in addition to 40 U.S.C. § 257, Congress intended to delegate quick-take powers to WMATA. This is so because ... the quick-take provision, is the other principal procedural mechanism for federal condemnations.").

Had Congress intended to confer quick-take authority, there is no reason it would not have done so explicitly here. The district court nevertheless held that § 1103(b) *implicitly* authorizes plaintiff to use the quick-take DTA procedure. With deference, defendant submits that in so holding the district court erred.

The paramount rule of statutory construction is that the meaning of a statute must be discerned if possible from the words of the enactment alone. *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994). Courts "presume that the ordinary meaning of the words chosen by Congress accurately express its legislative intent." *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). Here, Congress expressly provided that the Government should proceed under the 1888 statute, and its resort to the 1931 quick-take statute is nowhere authorized in the text of § 1103(b) itself. In effect, the Government and the district court re-write § 1103 as follows:

> (3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings pursuant to the Act of August 1, 1888 (Chapter 728; 25 Stat. 357) *and/or the Act of 1931, Pub.L. 71-736, 46 Stat. 1421*.

This straightforward application of the plain meaning rule is buttressed by familiar secondary tools of statutory construction. The canon of *expressio unius est exclusio alterius,* for example, holds that "when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (internal quotations omitted). Here, application of this canon supports a conclusion that Congress's authorizing plaintiffs to proceed under the 1888 GCA implicitly *excludes* authority under the 1931 DTA, precisely the opposite of what the district court held implicit in the text of § 1103(b).

It is equally well established that the meaning of a statute should be determined not in isolation, but in context. *Deal v. United States*, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."). Here, Congress's limiting plaintiffs' to the more deliberate straight condemnation procedure is wholly consistent with its intent to strike a *balance* between the rights of private landowners and the Government's interest in securing the U.S.-Mexico border. Congress's concern for landowners is apparent in multiple provisions of the IIRAIRA and in subsequent legislation.

First, in § 1103(b)(2), Congress vested landowners with the right to fix an initial price for the interest the United States seeks.

Second, in § 1103(b)(3) Congress authorized plaintiffs to initiate condemnation proceedings only if they and the landowner are unable to agree on terms for the purchase of that interest.

Third, in the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564(b)(1)(C)(I), 121 Stat. 1844, Congress again made clear its intent that plaintiffs exercise due regard for the rights of property owners, declaring that in proceeding with the border fence project plaintiffs "shall consult with … property owners in the United States 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."

Reading § 1103(b)(3) as authorizing quick-take condemnation *sub silentio* would be consistent with none of these multiple expressions of Congress's solicitude for the rights of landowners.

The district court nevertheless held that the quick-take procedure is *always* available in *any* straight condemnation action. *Tamez I, supra* 538 F. Supp. at 1007, USCA5 295 ("The right to use the provisions of the DTA is inherent and incidental in *all* condemnation actions brought under the GCA ..." (Emphasis added)).

Acknowledging that no case has ever before actually so held, *Tamez I, supra*, 538 F. Supp. at 1006, the trial court reasoned that the GCA nowhere refers explicitly to Rule 71.1, Fed.R.Civ.Proc.— the federal rule of civil procedure regulating condemnation proceedings—either. The trial court held that because it would be absurd to hold Rule 71.1 unavailable unless specifically authorized, so, too, must the DTA be available in all condemnation actions. 538 F.Supp. at 1005-06 (although "the GCA does not mention Rule 71.1, yet the use of Rule 71.1 in a condemnation action is simply understood to be available in any case brought under [the GCA].").

However sensible the district court's reasoning regarding Rule 71.1, it clearly does not follow that quick-take authority should likewise be implicit in all grants of condemnation authority.

First, as the trial court acknowledges, absent Rule 71.1 there would be *no* procedure by which condemnation cases could be prosecuted in the

federal courts. *Tamez, supra,* 538 F.Supp. at 1005-06. The ability of the Government to pursue condemnation under the GCA, in contrast, is wholly *independent* of the DTA. Assuming that an *essential* procedural rule is available in a straight condemnation action is qualitatively different from assuming that the wholly *optional* DTA authority, not enacted until 1933, is incorporated *sub silentio* in a deliberate and limited grant of authority "under the Act of 1888."

Second, Rule 71.1 is purely a rule of procedure regulating how a condemnation is to be managed by a federal court. The rule nowhere expands or contracts the substantive rights of either the United States or of private landowners.

In contrast, as stated above, there are major difference in the rights of both landowners and the United States depending on whether the expedited DTA procedure is available. In straight condemnation, "[d]uring pendency of the proceedings, the private owner retains title to and possession of the property." *Narramore v. United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992). Under the DTA, "[t]itle and right to possession thereupon vest immediately in the United States." *Kirby Forest Indus., supra,* 467 U.S. at 4. The DTA is clearly far more than a mere rule of procedure: It *contracts* the rights of landowners for howsoever long condemnation proceedings may require and *expands* the right of the United States to seize property during this same period. *Kirby Forest Indus. v. United States*, *supra*, 467 U.S.

at 4-5, fns. 1-3 (*citing* H. R. Rep. No. 2086, 71st Cong., 3d Sess. (1930)). The district court's analogy, therefore, does not withstand scrutiny.

Defendant submits that whether the United States may resort to the DTA is a matter of legislative intent to be determined in accordance with well-established tools of statutory construction, not flawed analogy. As has been seen, when Congress has intended to authorize resort to the DTA, it does so explicitly. *See, e.g.*, 22 U.S.C. § 287 note, *supra*; 42 U.S.C. § 1594a, *supra*; 25 U.S.C. § 500a, *supra*. Defendant is aware of no reason Congress would suddenly and inexplicably abandon this practice in favor of authorizing quick-takes *sub silentio*.[10]

In sum, plaintiff's resort to quick-take condemnation exceeds the authority § 1103(b)(3) confers.[11]

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[10] Although the district court mentions the point only in passing, 538 F.Supp. at 1005, the Government can be expected to argue that the DTA declares itself available in all condemnation proceedings brought pursuant to 8 U.S.C. § 1103. Defendant disagrees.

Although the 1933 DTA declares itself available "[i]n any proceeding in any court of the United States outside of the District of Columbia brought ... under the authority of the Federal Government to acquire land...," it is clear that Congress, in granting specific condemnation authority many decades later, may allow or disallow quick-takes. *See, e.g., In the matter of Economy Act application to condemnation proceedings,* 57 Comp. Gen. 591 (1978) (DTA unavailable where condemnation award would exceed statute limiting Government leases where annual rent exceeds 15 percent of the fair market value of the property); *see also Busic v. United States*, 446 U.S. 398, 406 (1980) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973) ("a more specific statute will be given precedence over a more general one...").

[11] The Government may not proceed with a condemnation action if it does not have statutory authority to do so. *United States v. 162.20 Acres of Land, et al*, 639 F.2d 299, 303 (5th Cir. 1981).

III. The Government must adhere to some ascertainable standards in its pre-condemnation negotiations with landowners and in discharging its duty of consultation

The Government must apply minimally coherent standards in evaluating the reasonableness of prices landowners fix for the sale of their interests and in subsequent, pre-condemnation negotiations with property owners, as are required under 8 U.S.C. § 1103(b)(2) and (3). It must also adhere to some ascertainable standards in discharging its duty of consultation under § 564(b)(1)(C)(I), Consolidated Appropriations Act, 2008, *supra*.

It is axiomatic that action of an administrative agency that is arbitrary, capricious, or in bad faith cannot stand. 5 U.S.C. § 706(2)(A) (directing reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…");[12] *see also Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("No matter how rational or consistent with

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[12] This provision of the Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be pursued pursuant to stated procedures so as to avoid the inherently arbitrary nature of unarticulated *ad hoc* determinations. *See generally* S. Rep. No. 752, 79th Cong., 1st Sess., 12-13 (1945); H. R. Rep. No. 1980, 79th Cong., 2d Sess., 21-23 (1946).

In review under § 706, courts inquire (1) whether the action was within the scope of the agency's authority, (2) whether the agency conformed to procedural requirements, and (3) whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Texas v. EPA*, 499 F.2d 289, 296 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1976). The third inquiry requires that the Court consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis ...").

A corollary of this bar against arbitrary action is that an administrative agency must conduct its activities in accordance with some ascertainable standards. This requirement flows not only from the APA, but from constitutional principles of due process as well:

> It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. *See Hornsby v. Allen*, 326 F.2d 605, 609-610 (5th Cir. 1964). For this reason alone due process requires that selections among applicants be made in accordance with "ascertainable standards," *id*. at 612 …

Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); *accord*, *Barnes v. Merritt*, 428 F.2d 284, 288 (5th Cir. 1970) (defendant must develop "'ascertainable standards … by which an applicant can intelligently seek to qualify for a [liquor] license…'"); *White v. Roughton*, 530 F.2d 750, 753-54 (7th Cir.1976) ("Defendant … has responsibility to administer [welfare] program to ensure the fair and consistent application of eligibility requirements. Fair and consistent application of such requirements requires … written standards and regulations. … staff determin[ing] eligibility based upon their own unwritten personal standards … is clearly violative of due process."); *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243, 1261 (N.D. Cal. 1976), *rev'd in part on other grounds,* 572 F.2d 660 (9th Cir.), *cert. denied* 439 U.S. 859 (1978) ("due process

means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules"); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976) (due process "requires that we be ruled by law and not by fiat.").[13]

In *Hornsby v. Allen*, *supra*, an unsuccessful applicant for a liquor license sued to set aside the denial as arbitrary and violative of due process because the defendants had no ascertainable standards regulating the issuance of such licenses. 326 F.2d at 607, 610. The district court dismissed the claim on the grounds that issuing a license was within the defendants' discretion and the plaintiff therefore alleged only a political question and not a denial of due process. *Id*. at 608. This Circuit reversed:

> If it develops that *no ascertainable standards* have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field.

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[13] Nor is there any question that defendant's right to the quiet enjoyment of her real property is a protected property interest. *See, e.g., Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 852 (E.D. Va. 1981) (interference with real property rights short of taking but which "do place substantial restrictions on plaintiffs' property interest … require satisfaction of procedural due process…").

Nor is there any question that defendant's property rights are impaired by the Government's targeting her land for pre-condemnation procedures under 8 U.S.C. § 1103(b). Defendant's ability to develop, alienate, or otherwise do as she will with her property is obviously clouded by the Government's singling out her land for condemnation. *Id*. (declaring property as historically significant impairs property rights).

Id. at 612.[14]

As in *Hornsby*, the Government followed no standards known to the defendant or the district court in discharging its § 1103(b) obligations to negotiate over a reasonable price for the purchase of real property interests prior to resorting to condemnation. Nor does the Government have any ascertainable standards guiding consultation with landowners as Congress required in § 564(b)(1)(C)(I) of the Consolidated Appropriations Act, 2008.

In sum, to allow the Government to meet its obligations of evaluation, negotiation, and consultation using no known standards would sanction rule by decree and not by law. Without some ascertainable standards, plaintiff's pre-condemnation statutory obligations toward landowners are empty formalities. The law, however, requires the Government to operate in accordance with articulable standards. Its failure to adhere to *any* standards whatsoever in discharging its duties of evaluation, negotiation, and consultation violates defendant's due process rights.[15]

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[14] Indeed, effective judicial review itself depends on their being some ascertainable standards against which to judge administrative action. *Jensen v. Admin. of the FAA*, 641 F.2d 797, 799 (9th Cir. 1981) ("Due process requires that for a meaningful review of an agency decision, the agency must have articulated standards governing its determinations. *See Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 857 n. 11 (D.C.Cir.1978).").

[15] Such standards are, of course, readily available, *see, e.g.*, 49 C.F.R. § 24.102 (uniform standards for property assessments by federal agencies), and there is no reason the Government could not apply these or any other coherent standards it might reasonably prefer.

IV. The Government failed to either clearly define the interest it sought or engage in good faith negotiations to arrive at a reasonable price for the interest sought

Compounding the Government's failure to issue or abide by any standards to implement its statutory obligations, it also failed to clearly define the interest that it sought, making good faith negotiations difficult to impossible, and then failed to negotiate for a "reasonable" price, instead arbitrarily offering virtually every property owner $100, regardless of the size of the taking sought, or the use to which the taking would be put (which would clearly impact on a reasonable price). The Government's actions violate § 1103(b) which provides:

> (b) Land acquisition authority.
>
> (1) The Attorney General may contract for or buy any interest in land, including temporary use rights, adjacent to or in the vicinity of an international land border when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States against any violation of this Act.
>
> (2) The Attorney General may contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be *reasonable*.
>
> (3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a *reasonable* price, the Attorney General may commence condemnation proceedings pursuant to the Act of August 1, 1888 (Chapter 728; 25 Stat. 357) [40 USCS § 3113].

8 U.S.C. § 1103(b) (emphasis added).

The district court concluded that "8 U.S.C. § 1103(b)(3) clearly contemplates that some attempt has been made to reach an agreement

prior to the [DHS Secretary] exercising the authority to pursue eminent domain remedies … Congress clearly intended there to be some level of negotiation between the Government and the owner of a property interest prior to the institution of eminent domain procedures pursuant to 8 U.S.C. § 1103(b)(3).” *Tamez I, supra* at 1009-1010

Nevertheless, shortly after issuing its Order in *Tamez I*, the district court concluded that the Government had complied with § 1103 and permitted the taking to proceed. ("Having considered all of the briefs, affidavits, and evidence submitted by both parties and upon consideration of the temporary nature of the easement sought by the Government, the Court finds that there is more than sufficient evidence of the Government's bona fide effort to negotiate with Dr. Tamez." *Tamez III,* USCA5 513); Tamez II (""The Government is hereby granted the right to survey, make borings, and conduct other related investigations …. Additionally, the United States is granted the right to trim or remove any vegetative or structural obstacles on the property that interfere with the aforementioned purpose and work …” *Tamez II,* USCA5 496-497)

In fact, the Government entirely failed to explain the scope of the interest sought, making good faith negotiations virtually impossible.

Defendant repeatedly requested that the Government specify the interest it sought in her property. In response to the district court’s March 7, 2008 order, defendant through counsel informed the Government

that "[t]o intelligently assess the value of [the] right [of entry sought], Dr. Tamez must be provided more details about the anticipated scope of the government's entry." USCA5 332. The Government had yet to explain how many holes it intended to bore on defendant's property, how large they would be, what their location would be, how much equipment it planned to store on the property, what vegetation and structures it intended to remove, how many days it would be present on the property, etc., all rights it sought in the condemnation action

The Government responded that "[t]he activities will be those associated with surveying, testing the geophysical suitability of her property as a potential fence or other infrastructure site, conducting an environmental audit, and doing any testing associated with … applicable environmental statutes. *I cannot be more precise because the standard for testing requires a graduated approach.*" USCA5 336. (emphasis added).

Defendant responded as follows:

> The government fails to explain what it contemplates by way of a "survey [ ]," what "testing the geophysical suitability" of the property likely will involve, what is meant by an "environmental audit," and what "testing" associated with "applicable environmental statutes" is likely necessary …
>
> Your letter states that you "cannot be more precise" about the interest now sought by the government because "the standards for such testing requires a graduated approach," or a "phased approach." For example, you state that the government requires "an initial physical inspection of [the] property," or "an initial site inspection," before it can decide the scope of the interest it seeks in Dr. Tamez's property.
>
> However, instead of seeking the right to enter border properties to

> conduct "initial physical inspection[s]" so that the government may determine the scope of the interest it actually needs in order to conduct the planned survey, the government demanded a six month right of entry including the right to bore as many holes as necessary, to store as much equipment on private property as it believed necessary, the right to remove structures, gardens, and vegetation, the right to enter as often and for as long as it wished, etc.
>
> … [T]he negotiations required by 8 U.S.C. § 1103 should focus on the "initial physical inspection[s]" that must be conducted before the government … can articulate the scope of the interest it seeks to conduct its planned survey … Then a property owner such as Dr. Tamez can make an intelligent offer or respond to a government offer regarding a reasonable fixed price for the "initial physical inspection" you agree is necessary, and thereafter the parties can attempt to reach a fixed price for the interest the government seeks to conduct its full survey and whatever environmental audit may be necessary. For now, as your letter concedes, the government "cannot delineate … what activities will occur on Dr. Tamez's property."

USCA5 343 (emphasis added). Obviously, the "activities [that] will occur" on the property impacts the value of the easement sought, and without this information, it is difficult to understand how either of the parties could engage in good faith negotiations to arrive at a "reasonable" price for the interest sought.

Defendant through counsel again wrote to the Government stating in part:

> … [T]he government continues to refuse to provide any information that allows us to rationally assess the value of the interest it is seeking. For example, the government has not detailed the types of equipment that will be brought onto the property or the number or size of vehicles or equipment it wishes to store on the land, the number of holes it intends to bore or size of the holes, the length of occupation of the property, etc. The government claims that it is unable to better define the interest that it seeks until it performs an initial site visit.

USCA5 362 – 363.[16]

Furthermore, the Government failed to negotiate a reasonable price even for the ill-defined interest it sought in defendant's property:

> We continue to [request] … the guidelines that the government has relied on in arriving at the $100 offer for the easement sought in this case. Your previous letter referenced "data" on which the government relies to set a fixed price for the interest it seeks. We earlier requested and again request that we be provided with this data. We find it untenable that we are expected to negotiate for a price but have not been provided with the standards, directives, guidelines, or rules to be applied in the effort to arrive at a fixed price for the interest sought.
>
> We find it remarkable that the government has offered $100 across the board in these condemnation lawsuits despite obvious differences in the parcels of land and circumstances of each case. At the very least, this uniformity in offers raises serious questions as to whether there is compliance with the statute. Apparently, it is the government's interpretation that a "fixed price" under the statute need not bear any rational relationship to the actual value of the interest condemned. We don't believe that was Congress's intent.

USCA5 362.

The Government responded on March 21, 2008, stating that the $100

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[16] The government supplied a declaration signed by Hyle J. Head as evidence of its bona fide attempts to negotiate with defendant about a reasonable fixed price for the interest it sought prior to commencing suit. USCA5 369–371. However, according to this declaration the only topics about which the Government attempted to negotiate involved: "[A] voluntary right of entry onto her property to conduct preliminary investigatory work …" (*Id*. at ¶2); "a proposed right of entry agreement..." (*Id*. at ¶ 4); "a voluntary right of entry agreement …" (*Id*. at ¶ 5); "the right of entry agreement…" (*Id*. at ¶ 6); "the proposed right of entry agreement" (*Id*. at ¶ 7); and "the United States' need to acquire temporary access to Dr. Tamez's property and stating that if she would not agree to a voluntary right of entry, the United States intended to obtain access by filing a condemnation action ..." (*Id*. at ¶ 8). Nowhere does this declaration indicate that the Government ever explained the scope of the interest sought, or attempted to negotiate a reasonable price for the interest sought.

was a "nominal" offer, and the true offer was to pay damages, sometime later: "Based on these considerations, the government believes the offer to pay actual damages, if any, is reasonable … Thus, given that the government believes true compensation is reflected in the promise to pay actual damages, the deposit in all of the actions to condemn rights of entry is the nominal $100." USCA5 366.[17]

In short, the $100 price was never open for negotiation, and can hardly be considered as rationally related to any assessment of the reasonable value of the individualized easement sought in each border property, regardless of the size of the easement sought or its intended use.[18]

In *United States v. 16.03 Acres of Land, Nelson*, 26 F.3d 349, 357 (2d Cir. 1994), the court reviewed compliance with 16 U.S.C. § 1246(g)'s requirement that "[t]he appropriate Secretary may utilize condemnation proceedings without the consent of the owner … only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed . . . " *Id*. The Court held:

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[17] *See also* USCA5 38 ("[t]he sum estimated as just compensation for the land being taken is ONE HUNDRED DOLLARS AND NO/100 ($100.00) . . . and an additional sum determined at the conclusion of the temporary estate . . . to constitute actual damages, if any.")

[18] The government's "offer" to pay actual damages adds nothing of value to the government's alleged negotiation under § 1103 since under any circumstances the government will be liable for damages it causes on private property, with or without an assurance that it will pay for damages caused. Congress obviously did not have in mind such a vacuous offer when it required that the government and property owners

> The Secretary is simply not free to invoke his eminent domain authority without first attempting to purchase the land in question. The fact that the statute gives the Secretary discretion in deciding when "all reasonable efforts to acquire . . . lands or interests therein by negotiation have failed" does not alter the statute's mandate that the Secretary enter into land acquisition negotiations before exercising his eminent domain powers … Despite [the Secretary's] discretion, a court could properly conclude the Secretary acted without authority if the evidence presented demonstrated the Secretary either never attempted to negotiate with a landowner or negotiated in such bad faith that he effectively failed to satisfy the negotiation condition before condemning the property.

Id. at 357.

The Government in this case simply insisted that defendant acquiesce in its wishes to grant it access to her property with no serious attempt to define the scope of the interest sought or a reasonable price for that interest. *See, e.g*. USCA5 111 – 114 ¶¶4, 6, 7,13-14 (defendant's declaration) ("I have only been informed of what the government intended to do, with or without my consent … [T]he government has not offered or attempted to negotiate with me about the terms of any taking of any temporary right, including but not limited to reasonable price, notice before entry, and alternatives to destruction of property, plants or trees").

When evaluating whether a condemnor engaged in good faith negotiations, "the central question is: 'Did the condemnor make a "good faith" attempt to acquire the property or rights by conventional agreement

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negotiate in an effort to arrive at a reasonable fixed price for the interest sought by the government.

before the expropriation suit was filed?'" *Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (D.C. La. 1990). "Conventional agreement" means, of course, by purchase at some reasonable, conventional price. As the district court recognized, a "mere perfunctory attempt to purchase an interest" does not comply with § 1103(b). *Tamez, supra* at 1011; *see also In re Rogers*, 243 Mich. 517, 524 (Mich. Sup. Ct, 1928) ("In order to satisfy the statutory requirement, there must be a *bona fide* attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it. An attempt which is merely formal or colorable is insufficient").

8 U.S.C. §1103(b) on its face contemplates an effort to arrive at "a reasonable price" for the interest sought, not an arbitrary price the source of which the government refuses to disclose, and that this be done before "the commencement" of any condemnation proceeding.

Under the government's approach, it could just as well offer every property owner $10, or $1--regardless of the interest sought in their property. In short, the statute can be "gamed" and easily circumvented by making an offer bearing no rational relationship to the reasonable value of the interest sought. There is no reason to believe that Congress sought such an absurd result.

/ / /

CONCLUSION

This Court should vacate the district court's possession orders and remand for further proceedings consistent with 8 U.S.C. § 1103(b)(3).

Dated: August 20, 2008

Respectfully submitted,

Center for Human Rights and Constitutional Law

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By _____
Peter Schey

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5th Cir. R. 32(a)(7)(B)(iii), this brief contains 13304 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes. This brief was written using Microsoft Word software.

3. The undersigned counsel has provided an electronic version of this brief and/or a copy of the work printout to the Court.

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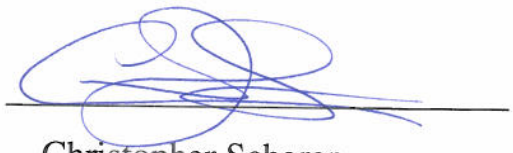
Peter Schey (cs)

Peter Schey

CERTIFICATE OF SERVICE

I certify that I caused a true and complete copy of the foregoing document to be sent to John E. Arbab and Aaron P. Avila, counsel for Plaintiff-Appellee on August 20, 2008 via FedEx overnight delivery to US Department of Justice, ENRD, Appellate Section, PHB Mail Room 2121, 601 D Street, N.W., Washington D.C. 20004.



Christopher Scherer