

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
MCALLEN DIVISION**

UNITED STATES OF AMERICA	§	
	§	
<i>Plaintiff,</i>	§	
v.	§	CASE NO. 7:18-cv-303
	§	
26.000 ACRES OF LAND, MORE OR	§	
LESS SITUATE IN HIDALGO COUNTY,	§	
STATE OF TEXAS; AND THE PHARR	§	
ORATORY OF ST. PHILIP NERI OF	§	
PONTIFICAL RITE, A TEXAS	§	
NON PROFIT CORPORATION,	§	
	§	
<i>Defendants.</i>	§	

**OPPOSED MOTION BY THE UNITED STATES OF AMERICA  
FOR ORDER OF IMMEDIATE POSSESSION**

The United States moves for an Order requiring all Defendants to this action and all persons in possession or control of the property described in the Complaint (Dkt. No. 1) and Declaration of Taking (Dkt. No. 2) to immediately surrender possession of the condemned estate to the United States.

**I. INTRODUCTION**

The United States requests an Order granting immediate possession of the condemned estate. Acquiring this property is a necessary step in implementing the congressional directive, set forth in the Complaint and Declaration of Taking, to secure the border between the United States and Mexico. Congress provided funding for primary pedestrian levee fencing along the southwest border in the Rio Grande Valley Sector. Per the appropriation, the United States plans to construct 25 miles that Congress specifically designated to be constructed in Hidalgo County, Texas, and the identified tract listed in the style above is a part of the 25-mile designation. Time is of the

essence. Accordingly, the United States respectfully requests this Court to enter an Order of Immediate Possession on an expedited basis.

## **II. BACKGROUND FACTS**

Pursuant to the Declaration of Taking Act, 40 U.S.C. § 3114, and Federal Rule of Civil Procedure 71.1 (formerly Rule 71A), the United States filed a Complaint and a Declaration of Taking and deposited \$100.00 as estimated just compensation in the Registry of the Court to acquire a temporary easement in the subject property. The United States will use the temporary easement to conduct surveying, testing, and other investigatory work needed to plan the proposed construction of roads, fencing, vehicle barriers, security lighting, and/or related structures to help secure the United States-Mexico border within the State of Texas. *See* Dkt. No. 2, Schedules “B” and “D”. Section 230(a) of the Fiscal Year 2018 Department of Homeland Security Appropriations Act appropriated funding to acquire the interest sought in this action. *See* Dkt. No. 2, Schedule “A”; *see* Consolidated Appropriations Act, 2018, Pub. L. 115-141, div. F, tit. II, 132 Stat. 348 (2018) (appropriating funds).

## **III. ARGUMENT AND AUTHORITIES**

- A. *The United States is entitled to immediate possession because the easement was acquired under the Declaration of Taking Act.*

The United States initiated this case by filing a Complaint and Declaration of Taking. Subsequently, the United States deposited \$100.00 as estimated just compensation into the registry of the Court, as required by the Declaration of Taking Act (“Act”), 40 U.S.C. § 3114 (formerly 40 U.S.C. § 258a). The filing and deposit immediately vest title to the acquired property in the United States. *See* 40 U.S.C. § 3114(b)(1). The Act specifically provides that upon the filing of the declaration of taking, “the court may fix the time within which, and the terms on which, the parties in possession shall be required to surrender possession to the petitioner . . .”. 40 U.S.C. §

3114(d)(1). The purpose of the Declaration of Taking Act is to give the Government immediate possession of the property and give the owner immediate compensation, in the form of estimated compensation, in return for title to the land. *United States v. Miller*, 317 U.S. 369 (1943). The Court explained,

[t]he purpose of the statute is twofold. First, *to give the Government immediate possession of the property* and to relieve it of the burden of interest . . . . Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property.

*Id.* at 381 (emphasis added). The transfer of title is immediate upon the filing of the declaration and deposit of estimated just compensation. *See, e.g., Catlin v. United States*, 324 U.S. 229, 238 (1945) (holding that a landowner may not delay or prevent the vesting of title by an interlocutory appeal).

The Supreme Court reaffirmed that the Declaration of Taking Act immediately confers to the United States title and a right to possession in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984). There, the Court reviewed the methods by which the United States may appropriate property, primarily comparing use of a declaration of taking with a “straight-condemnation” proceeding. *Id.* at 3-5. In a “straight condemnation,” the United States only files a complaint in condemnation and only acquires title after the determination and payment of just compensation. *Id.* at 4. In contrast, the Court noted that the Declaration of Taking Act is “[a] more expeditious procedure . . . .” *Id.* The Court held that upon the filing of a declaration of taking and deposit of estimated just compensation, “[t]itle and right to possession thereupon vest immediately in the United States.” *Id.* at 5. Further distinguishing a “straight-condemnation” case from one brought under 40 U.S.C. § 3114, the Court explained that the adoption of the Declaration of Taking Act was “for the purpose of affording the Government the option of peremptorily appropriating

land prior to final judgment, thereby permitting immediate occupancy . . . ”. *Id.* at 12. Finally, as stated in *Narramore v. United States*, Congress enacted the Declaration of Taking Act “[t]o give the Federal Government immediate possession of condemned property and to avoid delays in federal construction projects...”. 960 F.2d 1048, 1050 (Fed. Cir. 1992).

Accordingly, because the United States has acquired the property at issue under the Declaration of Taking Act, the United States is entitled to immediate possession of the property. *See Miller*, 317 U.S. at 381; *Kirby Forest Indus.*, 467 U.S. at 5, 12.

B. *The United States needs immediate possession in order to meet the congressional directive to construct fencing in the Rio Grande Valley Sector.*

Congress has mandated that the Department of Homeland Security (“DHS”) achieve and maintain operational control of the international land border. The Secure Fence Act of 2006, Pub. L. 109-367, § 2, 120 Stat. 2638 (Oct. 26, 2006). As part of achieving operational control of the border, the President’s Executive Order on *Border Security and Immigration Enforcement Improvements* directs the Secretary of DHS (the “Secretary”) to take all appropriate steps to plan, design, and construct a wall along the southern border. Executive Order 13767, § 4(a). Consistent with Congress’ mandate that DHS achieve and maintain operational control of the border and the President’s Executive Order, Congress has directed DHS to construct fencing and related infrastructure along the United States-Mexico border, specifically in the Rio Grande Valley Sector. *See* Consol. Appropriations Act, 2018, Pub. L. 115-141, 132 Stat. 348, div. F, Title II. The United States needs immediate possession of the subject property in order to meet this congressional directive. The Secretary has identified 25 miles in Hidalgo County, Texas, for the construction of tactical infrastructure in order to improve security along the United States-Mexico border. The United States needs to acquire the subject property in order to begin surveying, testing, and other investigatory work needed to finalize the construction and design plans for fencing, roads, security

lighting, and/or related structures in Hidalgo County, Texas. *See* Exhibit 1, Affidavit in Support of Motion for Order of Immediate Possession; *see* Consol. Appropriations Act, 2018, Pub. L. 115-141, 132 Stat. 348, div. F, Title II (appropriating funds for the current taking). As a result, acquiring immediate possession of the subject property for the United States is a necessary step toward meeting the Congressional directive that DHS construct fencing and related infrastructure along the United States-Mexico border, specifically in the Rio Grande Valley Sector. This Court should grant immediate possession of the easement sought based on the United States' demonstrated need for immediate access.

#### **IV. CERTIFICATE OF CONFERENCE**

Individuals from the United States Customs and Border Protection and United States Army Corps of Engineers met with a representative of The Pharr Oratory of St. Philip Neri of Pontifical Rite on May 25, 2018, and explained the temporary estate sought, the surveying/testing process, any potential impacts to the subject property, and answered any questions posed by the representative. On June 28, 2018, AUSA John Smith and Attorney David Garza, met at the property for a site visit. On July 11, 2018, AUSA John Smith provided Attorney David Garza with a revised Right of Entry based on negotiations with the landowner; however, on July 11, 2018, Attorney David Garza, on behalf of The Pharr Oratory of St. Philip Neri of Pontifical Rite declined to sign the proposed Right of Entry.

#### IV. CONCLUSION

Based on the foregoing, the United States submits that it is entitled to the entry of an order of immediate possession and requests this Court grant its motion and enter an order of possession giving the United States immediate possession of the temporary estate described in Schedule E of the Declaration of Taking (Dkt. No. 2).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing OPPOSED MOTION OF THE UNITED STATES OF AMERICA FOR ORDER OF IMMEDIATE POSSESSION was served via certified mail, return receipt requested on this November 20, 2018, to all parties listed in Schedule G of the Declaration of Taking (Dkt. No. 2).

By: *s/ John A. Smith, III*  
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Assistant United States Attorney