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

ELOISA GARCIA TAMEZ; IDALIA BENAVIDEZ; JOSE BENAVIDEZ; and EDUARDO BENAVIDEZ, Plaintiffs,	§	
v.	§	Civil Action No. B-08-055
MICHAEL CHERTOFF, Secretary, United States Department of Homeland Security; ROBERT F. JANSON, Acting Executive Director, Asset Management of United States Customs and Border Protection; DONALD DEGABRIELLE, JR., Defendants.	§	

ORDER

I. PROCEDURAL HISTORY

The Court has before it the Plaintiffs' Motion to Certify Class (Docket No. 9) and Motion to Stay the Court's March 25, 2008 Condemnation Orders Pending Decision on Class Certification and Related Appeals (Docket No. 33) as well as the Defendants' Motion to Dismiss the Original Complaint (Docket No. 20); unopposed Motion for Extension of Time for Responding to First Amended Complaint (Docket No. 30); and Motion to Dismiss the Amended Complaint (Docket No. 36). Defendants' Motion for Extension of Time (Docket No. 30) and Plaintiffs' Motion for Leave to File Excess Pages (Docket No. 45) are both hereby **GRANTED**.

The United States sought and acquired a temporary easement on the Plaintiffs' properties to determine whether the properties were necessary in the Government's efforts to secure the United States-Mexico border. The United States acquired an interest in plaintiff Eloisa G. Tamez's property through a condemnation action filed in this Court in which the Government was granted possession

after Tamez raised, and was denied, many of the claims she now brings again as part of this action. *See United States v. 1.04 Acres of Land*, Civil Action No. 1:08-cv-44. The Benavidez plaintiffs signed an agreement giving the United States to access their property.

The Plaintiffs now claim that those easements were unlawfully obtained on the following grounds: (1) the Defendants failed to negotiate with landowners before condemning property as allegedly required by 8 U.S.C. § 1103(b); (2) the Defendants failed to consult with landowners before condemning property as allegedly required by 8 U.S.C. § 1103 note; (3) the Defendants improperly acquired property using the Declaration of Taking Act, 40 U.S.C. § 3114; (4) the Defendants failed to issue and make known rules concerning how negotiation and/or consultation would proceed; and (5) the Defendants' selection of particular properties to survey for use violates the equal protection guarantees of the Fifth Amendment to the United States Constitution.

II. SOVEREIGN IMMUNITY

The Defendants assert that the Plaintiffs cannot demonstrate that the United States has waived sovereign immunity over these claims and that this Court thus lacks subject-matter jurisdiction over this action.[1] Litigants are "barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block v. North Dakota*, 461 U.S. 273, 280 (1983). A suit, such as this action, is against the sovereign because the "judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or . . . the effect of the judgment would be to restrain the government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotation marks and citations omitted).

[1] The Defendants also assert that each claim fails to state a ground on which relief can be granted.

"[A] waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Such waivers must not be enlarged beyond what the language of the waiver requires. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)). The burden rests with the plaintiff to show that the United States has consented to suit, as the plaintiff is the party asserting federal jurisdiction. *Lundeen v. Mineta*, 291 F.3d 300, 304 (5th Cir. 2002).

The Plaintiffs' amended complaint asserts that certain federal statutes (e.g., the federal question statute, the federal eminent domain statute, and the Declaratory Judgment Act) waive sovereign immunity with respect to the entirety of the suit or, in the alternative, other federal statutes and case law waive sovereign immunity with respect to the Plaintiffs' particular claims. This Court will first address the Plaintiffs' general assertions of waiver of sovereign immunity and then turn to the claim-specific waivers of sovereign immunity.

A. General Waivers of Sovereign Immunity

1. *Federal Question Statute, 28 U.S.C. § 1331*

The Plaintiffs contend that 28 U.S.C. § 1331 gives this Court jurisdiction over their claims. The broad provision of federal question jurisdiction in 28 U.S.C. § 1331 does not create a waiver of sovereign immunity. *See Smith v. Booth*,823 F.2d 94, 97 (5th Cir. 1987). A waiver of sovereign immunity must instead "be found in the statute giving rise to the cause of action." *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1988). Therefore, section 1331 does not waive sovereign immunity as to the Plaintiffs' claims.

2. *Eminent Domain Statute, 28 U.S.C. § 1358*

The eminent domain statute, 28 U.S.C. § 1358, provides that "district courts shall have original jurisdiction of all proceeding to condemn real estate for the use of United States or its departments or agencies." This provision a grant of jurisdiction for actions "brought *by the United States* and not of actions that might have an eminent domain nexus brought against the government." *Ledford v. Corps of Eng'rs*, 500 F.2d 26, 28 (6th Cir. 1974) (emphasis added) (citation omitted). The eminent domain statute therefore does not waive sovereign immunity for claims brought *against* the United States in the context of a condemnation proceeding.

3. *Declaratory Judgment Act*

[I]t is well settled that [the Declaratory Judgment Act, 28 U.S.C. § 2201] does not confer subject matter jurisdiction on a federal court where none otherwise exists." *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997). Unless the Plaintiffs can demonstrate that sovereign immunity has been waived in some other manner, the Declaratory Judgment Act does not act of its own accord to waive immunity and create jurisdiction in this action.

B. Waivers of Sovereign Immunity with Respect to Specific Claims

Without a general waiver of sovereign immunity over the Plaintiffs' action, the Plaintiffs must demonstrate that sovereign immunity has been waived with respect to their individual claims. The Plaintiffs contend that sovereign immunity is waived over each claim by: (1) the exception to sovereign immunity recognized by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 620 (1963); (2) the Administrative Procedures Act, 5 U.S.C. § 702; and/or (3) the mandamus statute. The Court will set out the standard for each of these claim-specific waivers and then analyze each individual claim concerning the applicability of the waivers.

1. *Claims Against an Officer of the United States Acting in his or her Individual Capacity*

There are two exceptions to sovereign immunity that permit a lawsuit, such as this action, against officers of the United States sued in their individual capacity.[2] *Dugan v. Rank*, 372 U.S. at 621. A plaintiff may bring suit against an individual officer if: (1) the officer acts beyond his or her statutory powers; or (2) the officer's powers, or the manner in which those powers are exercised, are constitutionally void. *Id.* at 621-22 (citing *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962)). Where either of the above is shown, "the officer's action can be made the basis of a suit for specific relief against the officer as an individual." *Id.* (internal quotation marks omitted). This premise also applies to an officer's actions affecting a plaintiff's property:

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers, or if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949). The Plaintiffs contend that their claims and factual allegations assert actions by the Defendants that go beyond their statutory authority from 8 U.S.C. § 1103 and actions that violate the due process and equal protection guarantees of the United States Constitution.

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[2] The Plaintiffs' complaint is ambiguous as to whether the Defendants are being sued in their individual or official capacities, or both. If the Defendants were sued only in their official capacity, such an action would be a suit against the United States and the exception set out in *Dugan v. Rank* would not apply. *See, e.g., Zapata v. Smith*, 437 F.2d 1024, 1025 (5th Cir. 1971); *United States v. Barcroft*, No. 4:07cv100, 2008 WL 901198, at *3 (E.D. Tex. Mar. 31, 2008). The Plaintiffs could possibly bring such claims under one of the other claim-specific waivers set out herein.

2. *Administrative Procedures Act ("APA")*

As an alternative basis for the waiver of sovereign immunity, the Plaintiffs assert that this suit may proceed under the waiver contained in the APA. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Such an action will not be dismissed merely because the action is brought against the United States. *Id.* An agency action is only reviewable if it is a final agency action for which there is no other adequate remedy in a court, otherwise the court lacks subject-matter jurisdiction to review the action. *See id.* § 704; *see Peoples Nat'l. Bank v. Office of Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir. 2004). "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Beall v. United States*, 3367 F.3d 419, 427 n.9 (5th Cir. 2003) (quoting *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). Plaintiffs must therefore demonstrate that they have no other adequate remedy for their claims for there to be a waiver of sovereign immunity under the APA.

3. *Mandamus Statute, 28 U.S.C. § 1361*

"Mandamus is an extraordinary remedy, available only where government officials clearly have failed to perform nondiscretionary duties." *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997) (citing Pittston Coal Grp. v. Sebben, *488 U.S. 105,* 121 (1988)). The test for jurisdiction is "whether mandamus would be an appropriate means of relief." *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980). Before a mandamus can issue the plaintiff must have a clear right to relief, the defendant must have a clear duty to act, and no other adequate remedy must be available. *Id.* As with the APA standard set out above, the Plaintiffs must

show that no other adequate remedy is available before the mandamus statute would be an appropriate basis for jurisdiction in this action.

C. Applicability of Claim-Specific Waivers of Sovereign Immunity

1. *Declaration of Taking Act*

Plaintiffs assert that by condemning landowners' property pursuant to the Declaration of Taking Act ("DTA"), 40 U.S.C. § 3114, the Defendants have acted beyond the authority granted in 8 U.S.C. § 1103(b)(3) and violated the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution. This Court previously held to the contrary in the condemnation action against Tamez—that the expedited provisions of the DTA are available to the United States for use in takings made pursuant to 8 U.S.C. § 1103(b)(3). *See United States v. 1.04 Acres of Land*, 538 F. Supp. 2d 995, 1008 (S.D. Tex. 2008). Plaintiffs' DTA claim therefore fails to assert that the Defendants have engaged in any action beyond the scope of their statutory authority or that they have used such authority in a way that is unconstitutional. There is thus no waiver of sovereign immunity as to this claim under *Dugan*.

Further, this claim has been adequately addressed as part of condemnation actions filed by the Government, including the condemnation action filed against Tamez. The condemnation actions provided an adequate opportunity to hear and remedy this claim. Therefore, neither the APA nor the mandamus statute waiver sovereign immunity with respect to this claim. Finding no basis for for waiving sovereign immunity as to the Plaintiff's DTA claim, this claim is dismissed for lack of subject-matter jurisdiction. Further, based on this Court's previous holdings, the Plaintiffs' DTA claim also fails to state a claim on which relief can be granted and the claim is dismissed on this ground as well.

2. *Consultation Provision*

Plaintiffs also assert that by condemning landowners' property before complying with the consultation provision of 8 U.S.C. § 1103 note (Section 102(b)(1)(C)), the Defendants are acting beyond the authority granted by that section and violate the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution. The consultation provision provides:

> (i) In general.- -In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and 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.
>
> (ii) Savings provision.- -Nothing in this subparagraph may be construed to- -
>
> > (I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or
> >
> > (II) affect the eminent domain laws of the United States or of any State.

8 U.S.C. § 1103 note (Section 102(b)(1)(C)). This Court previously held, including as part of the condemnation action against Tamez, that this provision does not impact the ability of the United States to proceed in a condemnation action and does not act as a defense to a taking. *See 1.04 Acres of Land*, 538 F. Supp. 2d at 1013-14. Compliance with the consultation provisions instead may be required as part of the terms and conditions of possession the Court could place on the United States's possession of the easement pursuant to 40 U.S.C. § 3114(d)(1) once the taking has been completed. Therefore, the Plaintiffs' consultation claim fails to correctly assert that the Defendants

have engaged in any action beyond the scope of their statutory authority or that the Defendants' use of such authority is unconstitutional. There is no waiver of sovereign immunity over this claim under *Dugan*.

Further, this claim may be adequately addressed as part of condemnation actions filed by the Government, as it was in the condemnation action filed against Tamez. The APA thus does not act to waive sovereign immunity over this claim. Similarly, the use of mandamus as a remedy in this action is inappropriate. Lacking a basis for waiving sovereign immunity over the Plaintiffs' consultation claim, this claim is dismissed for lack of subject-matter jurisdiction. Based on this Court's previous holdings and given the savings provision prohibiting a private cause of action to enforce the consultation clause, the consultation claim also fails to state a claim on which relief can be granted and is dismissed on this ground as well.

3. *Negotiation*

Plaintiffs assert that by condemning landowners' property before complying with the negotiation provisions of 8 U.S.C. § 1103(b), the Defendants act beyond the statutory authority granted in 8 U.S.C. § 1103(b0(3) and violate the due process and equal protection guarantees of the Fifth Amendment to the United States Constitution. This Court previously held, including as part of the condemnation action against Tamez, that the Government may properly file a condemnation action before compliance with the negotiation provisions of 8 U.S.C. § 1103(b), but may not receive possession prior to compliance.

The "issue of whether the Government has satisfied the requirement of negotiating with a property [owner] does not go to the jurisdiction of the court." *United States v. 1.04 Acres of Land*, Civil Action No. 1:08-cv-044, Docket No. 37 (citing *Wilson v. Union Elec. Light & Power Co.*, 59

F.2d 580, 582 (8th Cir. 1932). "Where the Government has filed a complaint in condemnation and declaration of taking and is proceeding pursuant to its powers of eminent domain, the court has general jurisdiction over the subject matter in the case and jurisdiction over the parties." *Id.* Under the appropriate allegations, the parties were before a court authorized to act. *Id.* Therefore, the Defendants do not act beyond their statutory authority when filing a condemnation action pursuant to 8 U.S.C. § 1103(b)(3) prior to compliance with the negotiation requirements of 8 U.S.C. § 1103(b). The Plaintiffs failed to demonstrate that sovereign immunity has been waived over their negotiation claim pursuant to *Dugan.*

Further, as with the other claims stated above, this claim has been adequately addressed as part of condemnation actions filed by the Government, including in the condemnation action Tamez. Neither the APA nor the mandamus statute waive sovereign immunity over this "negotiation" claim. Without a basis for waiving sovereign immunity over this claim, the negotiation claim is dismissed for lack of subject-matter jurisdiction. Further, based on this Court's previous holdings, this claim fails to state a claim on which relief can be granted and the claim is dismissed on this ground as well. *See also St. Louis & S.F.R. Co. v. Southwestern Telephone & Telegraph Co.*, 121 F. 276, 282 (8th Cir. 1903) (the failure to comply with a condition precedent to condemnation does not form the basis of an independent suit in equity).

4. *Issuance of Rules*

The Plaintiffs assert that the Defendants' failure to issue rules regarding how negotiations and consultation should proceed violates the Fifth Amendment's guarantees of equal protection and due process of law. "[E]ffective judicial review . . . 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); *see also Holmes v. New York City Housing Auth.*, 398 F.2d 262, 265 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964). Concerning whether the United States is proceeding without any ascertainable standards, this Court previously held that 8 U.S.C. § 1103 sets out an enforceable standard for both negotiation, 8 U.S.C. § 1103(b)(3), and consultation, 8 U.S.C. § 1103 note (Section 102(b)(1)(C)(ii)(I). This Court has followed the plain language of the phrase "unable to agree" to require the parties to negotiate to the point of reaching an impasse. Only at that point has the Government been permitted to continue with its efforts to condemn the landowners property. Further, the Court has enforced the provisions of the consultation provision within the context of the transfer of possession of a property interest from the landowner to the United States. Plaintiffs do not address these standards or past instances of judicial review over the negotiation and consultation. Given the enforceable standards set out in the statute and the availability of judicial review, the Plaintiffs' fail to set forth a claim that the United States's failure to issue rules concerning negotiation and consultation violates the due process guarantees of the Fifth Amendment. The Plaintiffs' claim as alleged thus fails to assert that the Defendants are acting pursuant to 8 U.S.C. § 1103 in a way that is unconstitutional and sovereign immunity over this claim is not waived under *Dugan*. Further, the condemnation actions provided an adequate opportunity for this claim to be heard and remedied and the APA and the mandamus statute do not therefore waive sovereign immunity with respect to this claim. This Court thus lacks subject-matter jurisdiction over this claim and the claim is dismissed.

5. *Equal Protection*

Plaintiffs assert the Defendants are exercising their condemnation authority under 8 U.S.C. § 1103(b)(3) in a political manner that violates the equal protection guarantee of the Fifth

Amendment to the United States Constitution. In effect, the Plaintiffs ask this Court to review the decisions behind the selection of properties taken for the construction of the border fence. The means of executing a condemnation project are for Congress and/or federal agencies acting by designation to determine, once a public purpose has been established. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (citing *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-30 (1894). "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan" rests in the discretion of the legislative branch or its designee. *See id.* at 35-36. The Fifth Circuit has also stated that courts lack judicial review over agency decisions as to the necessity of a particular taking as such matters are "within the discretion of the legislature or of administrative bodies." *See United States v. 162.20 Acres of Land*, 638 F.2d 299, 303-04 (5th Cir. 1981) (citations omitted).

This Court previously addressed the issue of whether a public purpose or use existed in this condemnation project. The role of a Court in reviewing a legislature's judgment of what constitutes a public use is "extremely narrow." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (quoting *Berman*, 348 U.S. at 32). A court should not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 240 (quoting *United States v. Gettsburg Elec. Ry. Co.*, 160 U.S. 668 (1896)). "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. As the purpose of the temporary easements sought by the Government is to help secure the United States-Mexico border, this Court held that "[s]ecuring the border is obviously a 'conceivable public purpose' and the Government's exercise of its eminent domain power to

investigate and acquire property to secure the border is certainly rationally related to that purpose." *United States v. 131.99 Acres of Land*, Civil Action No. 7:08-cv-052, Docket No. 15. Having found that a Government is proceeding pursuant to a proper public purpose, this Court lacks the ability to review the necessity of any particular taking. This Court therefore has no jurisdiction to rule as to whether the taking of specific properties violates the equal protection guarantees of the Fifth Amendment and the Plaintiffs' equal protection claim are dismissed for lack of jurisdiction and for failure to state a claim on which relief can be granted.

III. CONCLUSION

The Plaintiffs' complaint fails to set forth claims over which the United States has waived sovereign immunity and thus this Court lacks subject-matter jurisdiction over the claims. Further, the Plaintiffs' claims also fail to state a claim on which relief can be granted. This Court therefore **GRANTS** the Defendants' Motion to Dismiss the Amended Complaint (Docket No. 36). The Plaintiffs have no claims remaining, therefore the Court **DENIES** Plaintiffs' Motion to Certify Class (Docket No. 9) and Motion to Stay (Docket No. 33). Having granted the Defendants' Motion to Dismiss the Amended Complaint, the Court hereby **DENIES** the Defendants' Motion to Dismiss the Original Complaint (Docket No. 20) as moot.

Signed, this the 27th day of January, 2009.

Andrew S. Hanen
United States District Judge