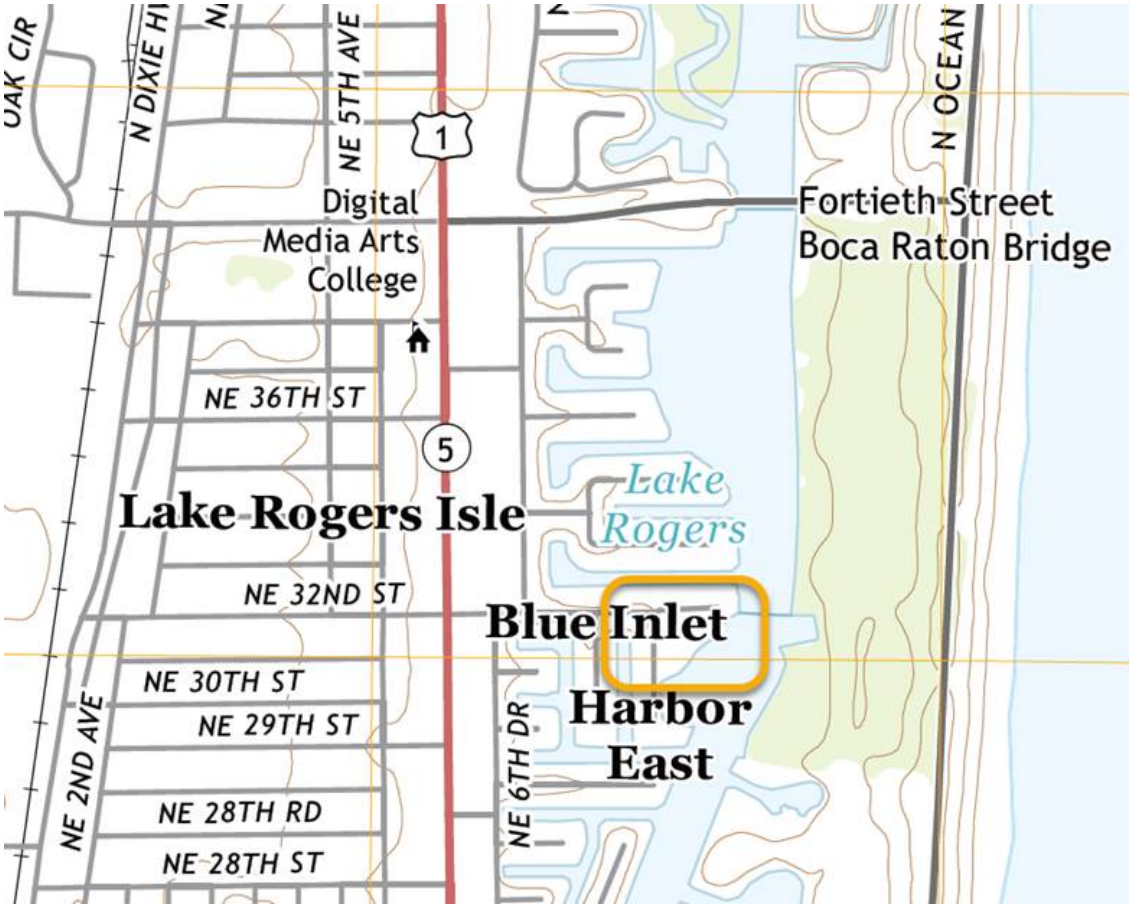
The Federal Land Rights Series Edition 15

Understanding the operation of the federal Quiet Title Act

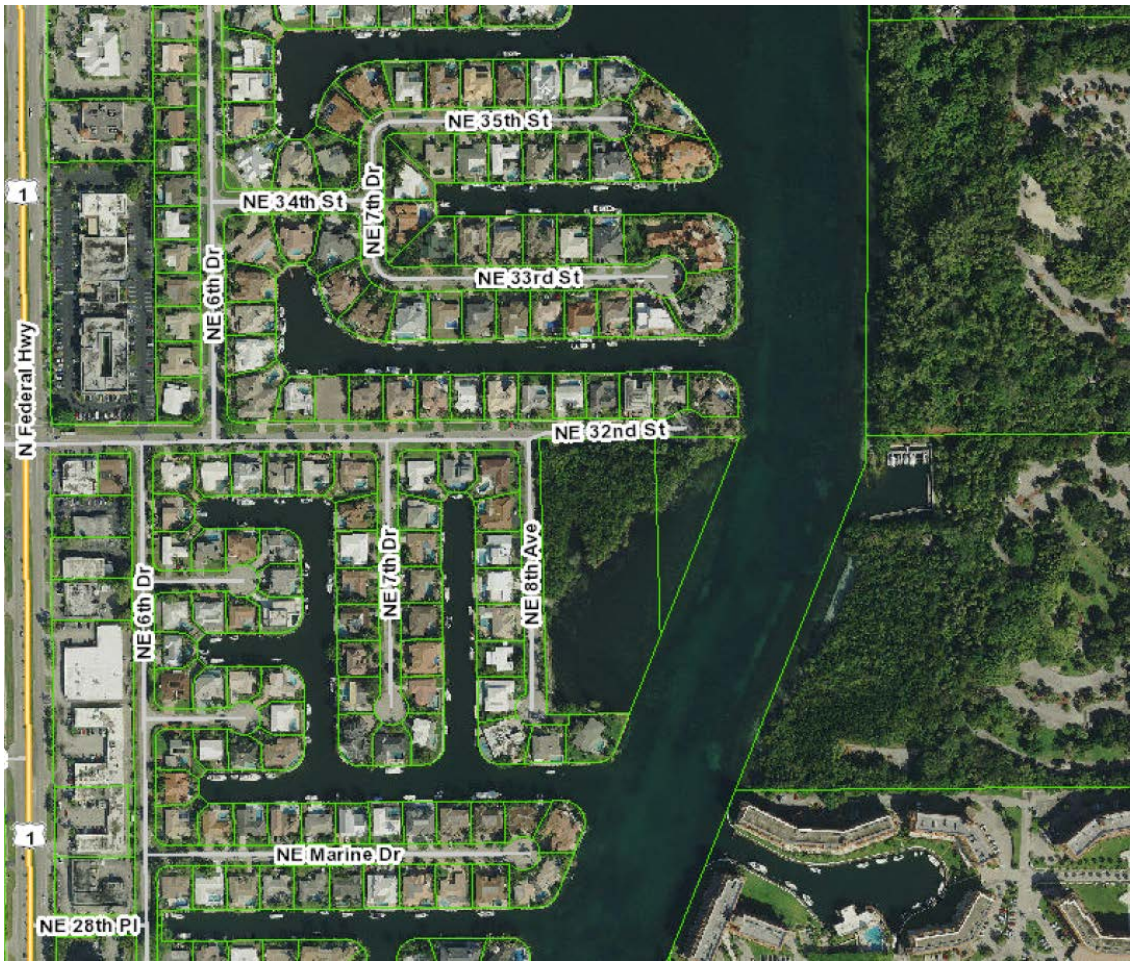
How important is the definition of adversity to the adjudication of land rights issues at the federal level?

In our modern society, land is very often required to accommodate multiple masters, who need or want to put the same land to differing uses, and the easement concept provides a legal mechanism which, at least in theory, makes secure, properly organized and properly prioritized use of the same land by different parties for multiple purposes possible. Once land ownership is established, and boundaries have been created, limiting each distinct land unit, the use that is made of each portion of the subdivided and conveyed real estate is obviously governed primarily by the wishes and preferences of each land owner, within generally reasonable limits established by basic laws and rules that apply to all privately held land, preventing nefarious uses thereof. But rare indeed is private land which is truly subject only to use that accords with the desires of its owner, the holder of fee title thereto, because easements of virtually infinite variety and scope, both documented and undocumented, exist practically everywhere, either facilitating land use by others, or just as frequently, limiting the land uses that can be made by the fee title holder in some manner. As all land surveyors understand, boundaries of fee title created through any land division process define unique properties or estates, and being purely locative in nature, fee property boundaries have no inherent or implicit relationship or association with any particular land use, so although land use can certainly become a factor in boundary adjudication, issues that develop in the boundary context typically arise from only one source, which is controversy over the location of any given boundary. In short, boundary issues are necessarily locational in origin, because boundaries serve no purpose aside from limiting the physical extent of title or jurisdiction, and are therefore fundamentally locational in nature. Easements however, because they exist not only to define locational limits, but to foster or protect particular uses of land, have not just 1 but 3 major sources of dispute, those being first the easement's validity or existence, second the easement's location, and third the easement's scope or capacity to support varying land uses. Therefore, its not at all surprising that conflicts over easements are far more common than boundary disputes, in fact for every boundary dispute that requires resolution through litigation, even if matters involving adverse possession and encroachments are regarded as boundary issues, at least 5 to 10 instances of easement litigation occur, making controversy over easements a primary driver of the immense and endless real property caseload borne by our judicial systems, both state and federal, at any given point in time. In past editions of this series, we have explored how easement issues arise and are handled in the federal context, focusing on recent cases that demonstrate how federal law both facilitates and limits the resolution of easement issues of various kinds, whenever some form of federal involvement is present, and once again here we will watch as a property owner learns some very important lessons about the manner in which easement law functions in the federal judicial arena, under the auspices of the federal Quiet Title Act (QTA) (FN 1).



Whenever the subject of easements is mentioned, roads, streets, alleys, driveways and other common paths of travel typically come first to mind, perhaps along with the dense network of utilities serving typical urban areas, because these forms of land use represent implementation of the easement concept in its most readily observable form, but literally countless easements exist to support other uses of land, of every imaginable kind, and our featured case, NE 32nd St LLC (NE 32) v United States, illustrates just how problematic easements arising in the aquatic context and impacting riparian properties can become. As early as 1802, federal creation of a sheltered navigable channel, providing vessels with an alternative to exposure along the volatile and infamously treacherous coastline of the Atlantic Ocean, was envisioned and debated by national leaders, but it was not until 1826 that the initial federal survey work on the Atlantic Intracoastal Waterway (AIW) supported by congressional funding, commenced. Although hampered by relatively primitive technology among other things, substantial progress was made toward bringing the AIW to fruition during the latter part of the Nineteenth Century, and in 1909 congressional authorization for the expansion of that project, to include the entire length of the Atlantic and Gulf coastline from Massachusetts to Texas, was put in place, but certain stretches of the AIW in the Gulf region were destined to be abandoned and never completed. During the early Twentieth Century, as Florida was rapidly growing and becoming a major economic contributor, the US Army Corps of Engineers (USACE) was duly authorized to engage in extensive efforts, supporting use of our nation's waterways and harbors, both inland and coastal, as avenues of navigation, with results that have proven to be highly beneficial to our

national economy. But of course that work had a significant physical and legal impact upon many thousands of private properties, and it was recognized that a vast number of easements had to be created, to enable federal personnel to complete the work, to insure that the results thereof could be maintained going forward in time, and to prevent the impacted parties or their successors from undoing or otherwise disturbing the watercourses that had been widened, deepened or otherwise reconfigured by USACE, while also protecting federally created or enhanced embankments. Thus it came to pass that in 1938 USACE engaged in the acquisition of easements in southern Florida, from owners of land in the Boca Raton area among others, whose properties fronted upon the portion of the AIW known as Lake Rogers. These easements facilitated the removal of muck from the submerged bedland and the deposition of that material, known as dredge spoils, by federal employees or contractors upon many of the privately owned lands along the banks of the AIW, and those land owners who granted such federal easements were naturally paid for doing so, thereby meeting the constitutional requirement mandating governmental compensation to those whose properties shoulder such federally imposed burdens. For unknown reasons, one location in which such an easement was created, on the west side of the AIW, evidently remained partially undeveloped over the ensuing decades, even as NE 32nd Street was paved up to its location, extending eastward from Highway 1 to the lake, and the other land along that street and along the waterfront was subdivided and put to typical residential use (FN 2).



In 2013, presumably having just recently acquired fee title to the 5 acre undeveloped area lying at the east end of NE 32nd Street, consisting of the last remnant of a once far larger Mangrove swamp, NE 32 decided to explore the possibility of erecting a waterfront structure in that attractive location, which would undoubtedly provide a magnificent sunrise view across the lake. In our modern world however, the substantial engineering challenges associated with construction upon riparian properties are not the only obstacles to be overcome by those who acquire such land, legal hurdles must also be surmounted, and evidently aware of the need to address the rights to the subject property that had been created to meet the needs of USACE in 1938, NE 32 stepped boldly into the daunting arena of federal land rights. Apparently NE 32 was advised, either by USACE or perhaps by others, that a permit from USACE, among other things, would be needed before any development of the NE 32 property could be approved, so the members of the NE 32 development team proceeded to examine the situation, which evidently included a review of the legal encumbrances upon this lakefront tract, leading to recognition by that team of the significance of the 1938 easement and its federal status. It appears that when the NE 32 team submitted their permit application to USACE they expected, or at least hoped, that obtaining a USACE permit would effectively nullify that easement, making its presence inconsequential from a construction standpoint, but as is so often the case, the response they got from the federal personnel who were tasked with handling their application was not as simplistic as they may have hoped or imagined. USACE apparently informed NE 32, in response to this request for federal authorization of the proposed construction, that such a permit could be issued, but only upon the fulfillment of certain stipulations set forth by USACE, which most notably included the creation of a conservation easement upon the subject property. Since there is no indication that any land trust personnel or other non-federal members of the environmental preservation community were ever involved in this scenario in any manner, it appears that the conservation easement which was envisioned by USACE personnel was purely federal in nature, and was obtained directly by USACE, bringing permanent federally controlled protection to the land in question, much like the many easements of a comparable nature that are held by other federal agencies in a wide variety of locations all around the country. Thus USACE conditioned the bestowal of the requested construction permit upon agreement by NE 32 that the portion of the construction site which was not to be covered by the planned structure would remain undeveloped, in its natural condition, for perpetuity, strongly suggesting that USACE viewed the land in question as being worthy of preservation, and wanted assurance that the remaining swampland within the construction site would be undisturbed, once the planned structure was complete. However, this response from USACE to the NE 32 construction proposal evidently made no reference whatsoever to the 1938 easement, and the interpretation by the NE 32 team of the absence of any reference to that easement would prove to be fateful, leading them directly into the deep waters of federal litigation (FN 3).

Not surprisingly, the NE 32 team was evidently very gratified to learn that USACE was willing to allow the proposed construction to take place, and they elected to accept the terms set forth by USACE without question, so the requested permit was composed, presumably employing language crafted by USACE, and it was then duly signed by representatives of both sides. Thus NE 32 achieved their basic objective of creating an opportunity to proceed with their proposed construction project as planned, yet that accomplishment was not without cost, because title to the 5 acre swamp was now burdened with 2 federally acquired and documented easements, rather than just 1, and this realization apparently caused some consternation among the members of the NE 32 team. Noting the fact that these 2 federal easements appeared to be

targeted at achieving very different objectives, and seemed to support directly opposing federal goals, some unspecified member of the NE 32 legal team evidently analyzed the situation and observed that a legal conflict existed between the 1938 easement and the conservation easement, concluding that any use of the 1938 easement would violate the conservation easement. Apparently without seeking any clarification from USACE regarding the status of the 1938 easement, NE 32 determined that it had been federally abandoned and was no longer in effect, based upon the fact that USACE had taken formal steps to protect the land in question from any form of disturbance, such as dumping waste material upon the subject property. In the view of NE 32, the protective measures put in place by USACE in 2013, through the creation of the conservation easement, which were in perfect accord with modern federal land use policy, established by the Federal Land Policy and Management Act of 1976, represented a de facto federal abandonment of the 1938 easement, making any further legal use of the site as a dumping ground impossible. This view was certainly not without some justification, given the absence of any steps on the part of USACE to communicate any desire to preserve or perpetuate the federal interest embodied in the 1938 easement to NE 32, along with the apparent absence of any actual use of that easement by anyone, either in recent years, or even in any of the several bygone decades since its creation. Undoubtedly the NE 32 personnel were well aware that federal land use policy has undergone a dramatic shift since 1938, away from development oriented policy and toward preservation oriented policy, so they may quite logically have assumed that the current USACE personnel simply saw no value or legal significance in the 1938 easement and elected to treat it dismissively for that reason, in effect rejecting obsolete federal policy in favor of current federal policy. Thus the NE 32 team appears to have entered the QTA arena with high confidence that they would be able to readily obtain judicial confirmation that the 1938 easement had ceased to exist in 2013, which would free the subject property of that legal burden, thereby insuring that the proposed waterfront structure they had designed could never be splattered with muck or otherwise damaged as a consequence of any USACE dredging activity that might occur in the relevant area. To accomplish that objective, NE 32 filed a QTA action against USACE, seeking a judicial declaration that the 1938 easement deed had become a legal nullity, and therefore constituted a cloud upon the title held by NE 32, which was subject to judicial elimination.

If the NE 32 legal team expected USACE to simply concede that the 1938 easement no longer existed, and relinquish those federal land rights without any resistance, they must have been disappointed when they learned in 2016 that USACE took the position that the old dredge spoil dumping easement was still in full effect, despite the presence of the 2013 conservation easement providing federal protection from damage to the very same land. Nonetheless, apparently quite confident that the federal position was plainly untenable and could not withstand judicial scrutiny, NE 32 placed their position outlined above before federal judge Robin Rosenberg, and USACE promptly responded by asking the judge to dismiss the NE 32 action, on the grounds that it was barred by the passage of a time period exceeding 12 years since 1938, making use of the QTA unavailable to NE 32, which would obviate any need to discuss, examine or explain any relevant federal decisions or activities for purposes of adjudication. This position set forth by USACE represented a typical procedural step, requesting dismissal upon jurisdictional grounds through summary judgment, regardless of the nature of the legal challenge presented, which is taken by federal defendants in virtually all QTA cases, whenever the point of origin for any given controversy lies more than 12 years in the past, invoking the power of the QTA bar noted in FN 1 below. As numerous federal cases decided in recent years have revealed however, a high level of

judicial uncertainty and disparity exists nationwide regarding proper determination of the point of accrual which governs the operation of the QTA bar, as federal judges in certain parts of the country have proven to be either more inclined or less inclined to leverage the QTA bar than others. Although federal courts typically show a high degree of deference to both decisions made, and positions set forth, by federal agencies, typically leading to acceptance of federal requests for dismissal of private real property actions upon summary judgment, thereby preventing meritless accusations from monopolizing precious time on the federal judicial calendar, while producing immediate federal triumph in the great majority of QTA cases, this case proved to be an exception to that rule. The NE 32 legal team evidently did an impressive job of convincing Judge Rosenberg that the conservation easement of 2013, the veracity of which was not disputed by any of the parties, made any use of the 1938 easement legally impossible, asserting that the fact that the 2013 easement was created by the holder of the 1938 easement signified a clear intention on the part of USACE, as the holder of both of those opposing rights, to abandon all of the dredge spoil disposal rights with which the subject property had been saddled in 1938. As explained by Judge Rosenberg on this occasion, the mere fact that the spoil disposal easement had undisputedly existed since 1938, obviously far beyond the statutorily required 12 years, did not support the position taken by the federal legal team and held no benefit for USACE, because that easement's applicability to the land at issue had never been contested in any manner, or even questioned until 2013, when federal personnel took voluntary action potentially ending its usefulness, by imposing an easement with an opposing purpose upon the same private property:

> *"in 2013 ... the Army Corps of Engineers, issued plaintiff a permit ... the permit required that a conservation easement be placed on the land ... that conservation easement conflicts with the US spoil easement ... defendant* (USACE) *argues that the statute of limitations* (the QTA 12 year bar) *accrued in 1938 ... plaintiff* (NE 32) *argues that the statute of limitations did not accrue until 2013* (opening the 12 year QTA window) *... the court agrees with plaintiff ... an adverse interest is necessary to trigger the limitation period ... adverse government action is required ... the statute of limitations is not triggered by just any government interest ... but rather by a claimed interest that is inconsistent ... accrual* (of the 12 year period) *does not begin unless adverse interests are in play ... these interests were not adverse in 1938 ... the two* (public and private) *could and did peacefully co-exist ... defendant argues that ... a dominant easement ... is adverse to a fee simple interest by definition ... this court disagrees ... the 12 year statute of limitations did not begin to run until conditions began changing ... the permit changed the nature of the* (federal) *interest by introducing the conservation easement ... before the permit ... the two interests were not adverse* (to each other) *... that conservation easement conflicts directly with defendant's dredge spoil easement ... defendants motion to dismiss ... is denied."* (FN 4)

Thus NE 32 initially prevailed, as in 2016 Judge Rosenberg accepted the premise, which was implicit in the position taken by NE 32, that the 2 federally created easements in question stood in hopeless conflict with one another, so the adversity requirement of the QTA was not met until 2013, while rejecting the federal assertion that the QTA window had both opened and closed in the distant past, long before either NE 32 or the QTA itself existed, on that basis. Deeming the crucial element of genuine adversity between federally held land rights and privately held land rights to be absent from this scenario, until an effort to preserve the existing conditions upon the NE 32 property was federally initiated in 2013, without any apparent regard for the federal land rights that had been created 75 years earlier in the same location, Judge

Rosenberg found in 2016 that nothing sufficient to open the 12 year QTA window had occurred prior to 2013, so the litigation opportunity sought by NE 32 did not terminate in 1950, 12 years after the muck disposal easement was created, as USACE suggested, therefore the QTA window was open for NE 32. But of course the federal legal team was prepared to modify or expand its initial default position if necessary, and after learning how the judge viewed the pivotal element of adversity, focusing upon its absence rather than its presence, USACE successfully requested judicial reconsideration of that initial ruling. Mindful of the fact that a closure of the 12 year QTA window is not the only way in which actions launched by QTA claimants, such as NE 32, can be effectively negated, the federal team evidently introduced an alternative concept, accommodating and emphasizing the lack of any demonstrably adversarial relationship between either the litigants themselves or the land rights that had been created upon the subject property, not only prior to 2013, but during and after 2013 as well, which proved to be influential enough to motivate Judge Rosenberg to revisit the matter. Thus the judge was reminded that success in any action under the QTA requires the non-federal party, who is asserting that a real property dispute centered upon federal land rights exists, as did NE 32, to prove that some event or sequence of events sufficient to open the QTA window transpired at a specific time, so a QTA action can proceed only where adversarial conditions relevant to title are actually present. Observing that the original federal assertion that adverse conditions had been in place upon the subject property at all times since 1938 had justifiably fallen flat, the federal team effectively broadened the scope of the defense, successfully leading Judge Rosenberg to entertain doubts about whether or not the QTA window had ever actually opened, and this broadened federal position was wisely taken, because in reality nothing truly adverse in nature had ever taken place, in 2013 or at any other point in time. Apparently recognizing that NE 32 had freely agreed to all of the terms which had been stipulated by USACE in the 2013 permit, and had successfully obtained that permit as requested, while registering no protest regarding its terms until after it was finalized, producing the conservation easement, Judge Rosenberg decided upon reconsideration in 2017 that NE 32 had failed to provide clear evidence that USACE had victimized NE 32 in any respect, and had failed to prove the existence of any genuine friction, either between the parties themselves, or between the divergent easement rights that existed upon the land owned by NE 32, swinging to a position of concurrence with the federal perspective:

> "*the issue once again before the court is when the statute of limitations* (the QTA bar) *accrued ... plaintiff's predecessors in interest granted defendant a spoil easement ... plaintiff argues that ... defendant's easement was not an interest adverse to plaintiff's predecessors ... the court ... credited plaintiff's argument* (in the 2016 ruling) *... the court reasoned that plaintiff's interest and defendant's interest were not adverse in 1938 ... that was error ... a government claim of ownership may be entirely consistent with a plaintiff's claim ... an adverse interest is required to trigger the statute of limitations ... however ... the court concludes that adverse interests in this case were present in 1938 ... the permit* (which) *gave plaintiff incentive to file suit is not a magic bullet.*" (FN 5)

Understandably reluctant to completely reject the presence of adversity of any kind between the litigants, in view of the originally stated federal position of record, insistent upon the presence of adversity at all times, yet aware that any such adversity was really artificial, the judge on this occasion opted instead to focus upon the futility of the reliance, as a means of bringing QTA jurisdiction into play, that had been placed upon the 2013 permit by NE 32, as indicated by the

concluding words of the 2017 ruling quoted above. Undoubtedly cognizant that issues arising from federal permits must be adjudicated under the federal Administrative Procedures Act (APA) rather than under the QTA, Judge Rosenberg was presumably aware that the action launched by NE 32 was actually subject to judicial negation upon multiple grounds, but chose to silence NE 32 at this point by derisively viewing the NE 32 decision to emphasize and magnify the legal implications of the events of 2013 as a "magic bullet", equivalent to a reset button for QTA purposes. In reversing her own initial ruling, the judge had no need to retract or otherwise modify any of the numerous correct statements of principle regarding the QTA that had been set forth therein, this reversal simply represented judicial acknowledgement that no genuine adversity, sufficient to bring the QTA into play, was presented by the events of 2013, since USACE had never attempted to either utilize or enforce either of the 2 federal easements in question at any time, and no clarifications or explanatory statements of any kind, regarding the status of either of those easements, had ever been made by USACE, or been sought from USACE by NE 32, leaving NE 32 with no clearly valid grounds upon which to conclude that a state of truly irreconcilable title conflict existed in the subject location. In 2016, observant of the successful co-existence of federal and private land rights upon the subject property for several decades, entirely free of any acrimony or hostility until a private land use proposal finally arose, Judge Rosenberg accurately stated the law with respect to the legal consequences of a lack of collision between federal and non-federal land rights in the QTA context, noting that "the statute of limitations is not triggered by just any government interest" in private land, and quite logically so, since countless properties nationwide which are privately held in fee bear such federal interests. The QTA bar does not engage until federal and non-federal land rights which are in actual conflict are shown to exist, mere divergence of opinion between federal agencies and non-federal holders of land rights that are impacted by federal interests, even when open disagreement over the status of any such land rights occurs, does not trigger the QTA period, moreover any disagreement over the scope or purpose of an easement represents only a land use conflict, which does not equate to a title conflict, so no such dispute is capable of setting the QTA bar in motion. Thus Judge Rosenberg was correct in 2016 about the need for genuine adversity to exist to open the QTA window, because the QTA statutorily makes adversity the essence of all conflict resolution pertaining to title issues in the federal judicial system, by mandating that a valid basis for a genuine dispute must exist, without which the QTA window never opens. In addition, the QTA plaintiff always bears the burden of proving that actual and demonstrable conflict exists, rather than a mere hint or suggestion of potential conflict, in order to enable any QTA action to proceed beyond the initial review stage.

The key mistake made by Judge Rosenberg in 2016, which she most admirably recognized and rectified in 2017, was her initial decision to accept the proposition, placed before the court by NE 32 in the hope of thereby paving a path to QTA success, that the federal easement rights created in 2013 were in direct legal conflict with those which had been created more than 7 decades before, when in fact the developments of 2013 produced no conflict whatsoever from a title perspective, because both federal easements had been legitimately created, and NE 32 presented no definitive evidence suggesting otherwise. The mere fact that the 2 easements in contention occupied the same land created no conflicting or adverse conditions, even though they resulted from distinctly different federal land use policies and therefore put land use restrictions of a fundamentally divergent nature in place, because the conservation easement created in 2013 was created only for the purpose of limiting any non-federal uses of the land at issue to those which result in no substantial or enduring land disturbance, while the easement of

1938 was created simply to facilitate a specific federal use of the subject property. Thus the 2 federal easements did not stand in opposition to one another, because no intent to eliminate the federal rights which had been created by the first easement was expressed during the creation of the second easement, nor did either of these easements unjustifiably burden the estate held by NE 32, or render it useless, or produce a title cloud which made any use of the land by NE 32 either impossible or problematic, and the issuance of the USACE permit served as open federal confirmation that the land could in fact be legitimately put to the use proposed by NE 32. Both federal easements certainly had restrictive effects upon the servient property, of a different nature, but neither of them presented any threat to the validity of the fee title held by NE 32, and both of them had been created collaboratively, through agreement between federal and non-federal parties, rather than through any adverse usage of the relevant riparian land. USACE personnel presumably understood all of this when they crafted the 2013 easement language, Judge Rosenberg evidently came to realize, and presumably they were aware that their decision not to make any reference to the 1938 easement in the 2013 easement documentation operated to legally insulate and protect the 1938 easement, because the mere creation of a second easement upon any given property, physically overlapping an existing easement for a different purpose, has no legal effect at all upon any rights established by the existing easement, unless the language employed in the creation of the second easement clearly indicates an intention to vacate, extinguish or otherwise relinquish any existing easement rights held by the same party or entity, and all relevant parties expressly confirm their agreement to such a reduction or extinction of those existing easement rights. As can be seen, when viewed in proper legal context, the derisive tone taken by the judge upon reconsideration of the merit of the NE 32 position was not without justification, because NE 32 had unwisely proceeded upon the basis of assumptions or misperceptions regarding federal intent, apparently accompanied by inadequate knowledge of easement law, rather than simply insisting upon written clarification of that intent from USACE, which in all likelihood, if effectively communicated, would have satisfied the concerns of NE 32, making any litigation unnecessary.

Errors of judgment and other mistakes made in the arena of land rights, by those dealing either with actual title issues, or with developments which they believe adversely impact the land within their property boundaries, sometimes result simply from an absence of genuinely thorough consideration of the matter at hand, but they also very often stem from fundamental ignorance regarding at least one important aspect of land rights law, typically accompanied either by a failure to recognize one or more of the major components of the law that comprise controlling factors in land rights adjudication, or by a failure to properly perceive the way in which those components legally interact. Perhaps the most critical error in judgment made by NE 32 stemmed from their apparent misperception of federal authority, which was obviously essential to the validity of each of the federally created easements that NE 32 personnel evidently viewed as being mutually contradictory and therefore legally problematic. As NE 32 viewed this scenario, focused of course upon their own capacity to safely engage in land development, the divergence in the nature of the federal easement rights, which existed after the creation of the conservation easement in 2013, presented an opportunity to eliminate federal land rights that had been in place and stood unchallenged for three quarters of a century, but in order to successfully do so NE 32 had to prove that some aspect of the federal easement creation process was unjustifiable or otherwise substantially defective, producing the alleged cloud upon the title held by NE 32. The apparent absence of any reference to the 1938 easement in the conservation easement language created 75 years later was evidently key to the emergence of this controversy,

because the NE 32 team naturally chose to construe that absence in the manner most favorable to their own interests, viewing it as a suggestion that the 1938 easement must have simply evaporated and vanished. That assumption was baseless however, because federal employees have no authority to relinquish or destroy any existing federally held land rights without diligent adherence to federally mandated disposal procedures, so the USACE personnel who composed the 2013 conservation easement had no legal capacity to terminate, abandon or otherwise destroy the 1938 easement simply by creating an additional easement, even if they actually intended to do so. Thus the apparent federal failure to address the existence of the 1938 easement in 2013 did not constitute a federal abandonment of anything, Judge Rosenberg clearly realized, and NE 32 had no right to assume that any abandonment of federal rights was intended, instead the NE 32 personnel had a duty to seek a formal release by USACE of the federal easement rights established in 1938, which they were free to do if they so desired. As can readily be seen, its essential for those in the private sector who deal with federal land rights to be mindful of the limitations under which federal land rights personnel operate, and to recognize that federal personnel cannot unilaterally or independently decide to reject or eliminate existing federal land rights based upon shifting or evolving federal policy, because such rights that were authoritatively created under any relevant policy which was in place at the time of their creation remain legally valid, even if the historical policy which motivated the creation of those rights has long been discarded.

After learning of their reversal of fortune, at the hands of Judge Rosenberg in 2017, who had decided that the QTA case presented by NE 32 was unworthy of adjudication because it failed to conform to the statutory standards which are determinative of the presence of QTA jurisdiction, the NE 32 team evidently either remained convinced that their position was correct and that the conclusion ultimately reached by the court regarding this scenario was erroneous, or perhaps they simply felt that they might receive more favorable treatment from the Court of Appeals for the Eleventh Circuit (COA) so they elected to seek review the 2017 ruling, elevating this matter to the appellate level. Before proceeding to examine the 2018 COA decision to uphold Judge Rosenberg's ruling against NE 32, its worthwhile to take notice of some of the basic parameters of judicial review, which apply to every appellate court, at both the federal and state levels. First and foremost, no appellate court is free to utterly disregard the prior treatment of the controversy at hand in the lower court, where the arguments brought forth by the litigants were initially heard and judicially considered. Every appellate court is bound to respect the authority of the trial judge to serve as a finder of fact, which is an elementary judicial function that is to be executed and completed during the trial, and appellate courts are also required to limit their review to those arguments which were actually raised by the parties, so no new assertions or positions can be introduced by the litigants upon appeal, and any factual findings which were made at the trial court level are to be regarded by the appellate panel as being presumptively accurate. In short, an appeal is not a new trial and does not represent a fresh or independent approach to the resolution of the contention between the litigants, it is an examination of the manner in which the trial was conducted, and that examination is limited to specific issues which have been previously brought forth, along with any accusations or protests made by the litigants suggesting that the trial judge erred, in either some procedural manner, or in reaching legal conclusions based upon the particular factual evidence that was presented during the trial. In many cases however, such as the NE 32 case, the trial judge decides to deny the plaintiff's request for a full trial and produces a ruling upon summary judgment, which represents a legitimate and appropriate judicial option, that is utilized with great frequency in QTA cases,

whenever the QTA plaintiff, such as NE 32, fails to overcome the statutory bar that is embedded in the QTA, requiring the trial judge to find an absence of jurisdiction. In addition, appellate courts are free to approve and sustain any lower court ruling on an alternative basis, even if certain conclusions drawn by the trial judge were erroneous, thus even flawed lower court rulings are very often upheld on appeal, because all that ultimately matters for purposes of justice is achieving a correct result, which can be justified upon any basis. In this instance, the COA clearly recognized that NE 32 was victimized, if at all, only by plain ignorance of easement law, and not by any federal abuse of the title held by NE 32, and thus elected to uphold the 2017 summary judgment ruling in favor of USACE, denying NE 32 the opportunity to engage in full adjudication against the US, without necessarily agreeing with the trial judge upon the specific grounds for the dismissal of the case that had been presented by NE 32:

> *"This appeal requires us to decide whether a conservation restriction ... restarted the 12 year statute of limitations of the Quiet Title Act ... a spoilage easement allows the government to deposit dredged material on the property, and in 2013 the government* (USACE) *granted the trust* (NE 32) *a building permit that imposes strict conservation requirements ... the permit requires the trust to maintain relevant areas in their natural state in perpetuity ... NE 32nd ... argued that the 2013 permit restarted the statute of limitations ... and requested entry of a judgment cancelling the 1938 easement and releasing the property from all burdens and obligations* (created in 1938) *... NE 32nd argued that tension between the 1938 easement and the 2013 permit required the district court to extinguish the easement ... the district court ... dismissed the complaint ... the running of the statute of limitations starts on the date the plaintiff or his predecessor in interest knew, or should have known, of the claim of the US. We define this "claim" in terms of a property interest of the US that is actually adverse to the interest asserted by the plaintiff ... if the interests asserted by the parties are capable of peaceful coexistence ... then the clock will not run ... adversity arises if the government asserts a new interest that is fundamentally incompatible with the interest asserted by the plaintiff, or seeks to expand a preexisting claim ... in short* (adversity as defined by the QTA) *arises when the government puts its interest in conflict with that of the plaintiff ... NE 32nd ... asserts that the fee simple interest held by the trust peacefully coexisted with the spoilage easement until 2013 and ... adversity arose only in 2013, when the government issued a conservation permit that is in tension with the 1938 easement ... we disagree ... the 2013 easement did nothing to expand the 1938 easement in a manner adverse to the trust ... any limitations that the permit imposes on the future use of the spoilage easement by the government have no negative impact on the interest held by the trust ... the statute of limitations is triggered by only a claimed* (federal) *interest that is inconsistent with the plaintiff's* (non-federal) *asserted interest ... the inquiry was whether the government expanded its claim ... if anything, the events of 2013 benefitted the trust ... the government is now reluctant to dump spoilage on the property ... the fee simple held by the trust is no more encumbered by the spoilage easement than it was in 1938 ... NE 32nd invokes the legal principle that easement interests and fee simple ownership interests can peacefully coexist ... but whether certain kinds of easements can coexist with certain kinds of fee simples is irrelevant ... the 1938 easement ... necessarily has been adverse ... since the moment that easement was created in 1938, and the 2013 permit did nothing to exacerbate this ... NE 32nd cannot restart the clock, because only an expansion by the government can create the necessary adversity ... plaintiff cannot restart the clock ... indeed, the ability to manufacture adversity through artful pleading would nullify the statute of limitations ... the district court wisely reconsidered its* (initial pro-NE 32) *ruling. We affirm the dismissal of the complaint."* (FN 6)

As accurately stated by both the trial court and the COA, the primary issue confronting NE 32, as a typical QTA claimant, was the question of when, if ever, the 12 year QTA window of opportunity, which NE 32 sought to utilize, had opened, and that issue stood as the only question presented for determination upon appeal, because summary judgment against NE 32 could be overturned only if NE 32 could prove that the QTA window opened in 2013, and never before, as a result of either federal decisions made, or federal actions taken, at that point in time. Very often in the course of litigation, the use of one key word or phrase by an attorney in framing an argument for judicial review proves to be highly instrumental to the outcome, and that was certainly the case on this occasion, as the NE 32 legal team evidently elected to charge that the actions of USACE in 2013 "restarted" the 12 year QTA period. This decision alone, regardless of whether it resulted from ignorance of the law or mere inadvertence, effectively doomed the NE 32 effort, because no federal court has ever held that the QTA window can open and close and then open again, so the notion, implicit in the word "restart", that the QTA period can commence and expire and then commence for a second time, was a non-starter, which made it very clear to the COA that the NE 32 position was not well taken. Neither is any support for the "restart" proposition found in the language of the QTA itself, the COA realized, because all statutorily mandated limitation periods are, by definition, legally conclusive, making the suggestion that any such period can run more than once preposterous, being antithetical to the overarching societal goal of bringing closure, finality and repose to the arena of land rights, which goal represents the foundation of every legislatively crafted limitation period relating to real property rights. Fully understanding the purpose served by the 12 year QTA bar, as well as its titanic power, requires one to look back to the time period prior to the enactment of the QTA, up to which point no opportunity to secure private land rights through legal action against the federal government, or to dispute the veracity of any federal land rights in any legal forum comparable to the QTA, existed, aside from certain narrowly limited federal statutes which were designed to address specific conflicts. Upon its arrival in 1972, the QTA represented the first federal law targeted at creating a broad opportunity for all non-federal parties and entities to engage the federal government in boundary and title litigation, but because the parameters of the QTA were poorly understood it was rarely utilized during the first decade of its existence. Then in 1983 the Supreme Court of the United States formally defined the meaning and the role of the QTA, emphasizing that the limitation period, with which Congress had bracketed and confined its use, must be implemented by all federal courts with the highest degree of strictness and rigidity, as a means of preventing challenges to federal land rights from becoming rampant, thereby keeping federal land rights in a state of perpetual repose, by shielding them from all but the most vigilant and astute assailants. The High Court defined the 12 year congressionally adopted QTA period as a "limited waiver of sovereign immunity" which is jurisdictional in nature, meaning essentially that failure to leverage the QTA promptly, within the 12 year window which exposes otherwise immunized federal land rights to legal attack, conclusively terminates the litigation opportunity provided by the QTA, preventing the QTA claimant from either quieting or unclouding their title to either fee property or any easement (see Block v North Dakota - 461 US 273) (FN 7).

The reason why NE 32 chose to take the untenable and legally unsupportable "restart" position lies in the substantial complexity and inherently problematic nature of all adversity analysis, stemming from the great diversity of adverse or potentially adverse conditions which can impact real property in some respect. In the federal land rights context, an adversarial relationship, founded upon some form of conflict, either real or imagined, can develop in a wide variety of

ways, resulting from misperceptions regarding the true nature and scope of existing documented federal or non-federal land rights, or from actual use of land which exceeds or otherwise violates the scope of either documented or undocumented federal or non-federal land rights, or from the presence of multiple overlapping land rights, which authorize differing uses of the same land, either by different parties or by the same party, or from errors or omissions in the documentation of land rights, which operate to place rights that would otherwise be distinct and entirely harmonious in a state of unintended legal conflict. All of these elements of adversity were either actually, allegedly or potentially present in the NE 32 case, which resulted in the ambivalence and equivocation experienced by Judge Rosenberg, while judicially analyzing this scenario in the QTA context and endeavoring to properly balance the legal implications of this broad array of historical factors. Because the judge had opted to simply adopt the default position set forth by USACE, maintaining that adversity in some unspecified form, produced by the presence of federal land rights, had existed upon the subject property since 1938, in order to dispose of the NE 32 case, the plaintiffs evidently felt compelled to implicitly concede that adversity had been present at all times by characterizing what occurred in 2013 as a "restart" of the QTA clock, even as they openly argued exactly the contrary. Judicial uncertainty over the true nature or definition of those forms of adversity which are sufficient to create an authentic legal conflict or dispute, and therefore hold relevance in the QTA forum, very often creates substantial difficulties of this kind for QTA plaintiffs, which has made successful use of the QTA challenging in the extreme, and has made defeat in the QTA arena, such as that tasted here by NE 32, typical. As the COA observed in response to the self-contradictory allegations made by NE 32, the presence or absence of adversity prior to 2013 was really completely "irrelevant", because if adverse conditions of some kind were in fact present right from the easement's inception, then the NE 32 claim was foreclosed no later than 1950 as USACE insisted, while if adversity was not present throughout the decades, then no real conflict between any federal and non-federal rights was ever present, since as the COA explained, NE 32 had failed to show that any aspect of the 1938 easement had been impacted in any manner by the events of 2013. Thus NE 32 was confronted with a "heads I win, tails you lose" scenario, and was forced to face the realization that they had painted themselves into a corner, by resorting to the fundamentally bogus "restart" argument, which amounted to an acknowledgement, standing in direct contradiction to their own "peaceful coexistence" argument, that some type of adversity had been present even in the distant past. If the QTA litigation window had ever opened it was long closed, and was incapable of ever opening again, but if it had really never opened, due to an absence of any genuine legal conflict even in 2013, which was strongly suggested by the evidence, the COA undoubtedly recognized, then the assertions of NE 32 were equally barred on that alternative grounds.

As can readily be seen, several important principles illustrating the significance of properly visualizing the vital distinction between land rights and land use were on display in this case. No adverse developments resulting from land use alone, independent of land rights, can generate QTA jurisdiction, because other congressionally approved legal pathways exist to resolve issues that are centered upon federal decisions regarding land use, involving either uses of land that are made for federal purposes or federally imposed restrictions upon non-federal land uses. To come within the scope of the QTA, as the COA pointed out, any conflicts or disputes produced by changing land uses, made by either federal or non-federal parties, must clearly indicate the presence of a genuine title conflict or boundary dispute involving a federal interest, as the basis for the new or expanded land use which gave rise to any particular controversy, because the sole

objective of the QTA is to facilitate the resolution of boundary and title issues. As the COA understood, the QTA was never intended to serve as a platform allowing those who disagree with any federal decisions of a regulatory nature, either authorizing or restricting various uses of land, which decisions do not call the validity of any federal fee or easement title into question, to litigate such disagreements. Because NE 32 was unable to prove that any of the federal decisions or actions which resulted in the creation of either of the 2 federal easements encumbering the NE 32 property were fundamentally flawed at the title level, producing a genuine title conflict, or that any federal personnel had ever made any use of that property which adversely expanded the scope of either of those federal easements, NE 32 could not prevail through use of the QTA. As the NE 32 team learned, an authentically adverse relationship between the actual rights held by federal entities and non-federal parties in the same location is required to enable QTA litigation to proceed, and in the absence of clear evidence revealing the existence of such a conflict, promptly presented within the QTA window, even very old and potentially obsolete federal easements, such as those in contention here, remain safeguarded by federal sovereign immunity, even during the QTA era. Neither can the existence of widely divergent federal land rights, situated in the same location, which stand in conflict to one another to some extent, as opposed to conflict between federal and non-federal land rights, support QTA jurisdiction, unless the presence of those federal rights introduces some type of unjustified federal interference with non-federal land rights, because the QTA was not created to enable private parties to demand judicial clarification of the true nature or legal status of all historically established federal land rights, which would obviously be a colossal endeavor, that would radically overburden federal courts. The COA was clearly cognizant that disparity between land rights which were either federally created or federally acquired during different eras, under divergent federal policies, and are applicable to the same land, is commonplace, but such conflict typically creates difficulty only for the federal personnel who are charged with administering those rights, rather than private property owners. Because the NE 32 team was unable to show that the fee title interest held by NE 32 was rendered useless or otherwise illegitimately disrupted by any "tension" that might exist between the relevant federal easements, the true scope of those easements, and the extent to which either one of them might legally negate the other, the COA informed the plaintiffs, were matters that were simply not open to judicial determination in the QTA forum.

Misconceptions regarding land rights can have adverse results, and that is particularly true with regard to the presence of federal land rights upon privately held land. It would appear that those representing NE 32 failed to realize that the mere presence of a federal interest within or upon private land does not mean that any hypothetical problems related to either title or land use, which the owner of that land may imagine or foresee, bring the QTA into play, because the QTA requires proof, supplied by the QTA claimant, that a real and specific title conflict, such as a dispute focusing upon boundaries or easements, has been introduced by a federal interest. For example, if the 2013 conservation easement had been acquired and held by a typical land trust or other non-federal entity, rather than by USACE, a real title conflict might well have been proven to exist, because in that event this scenario could have presented genuine conflict between federal rights, created in 1938, and privately held but federally approved rights created in 2013. Yet even had that been the case, NE 32 could not have prevailed in the QTA arena without partnering for purposes of litigation with the holder of the easement, because only the easement holder could stand in the shoes of a legitimate QTA claimant, as a possessor of non-federal rights which were either actually truncated or potentially jeopardized by the federal rights that

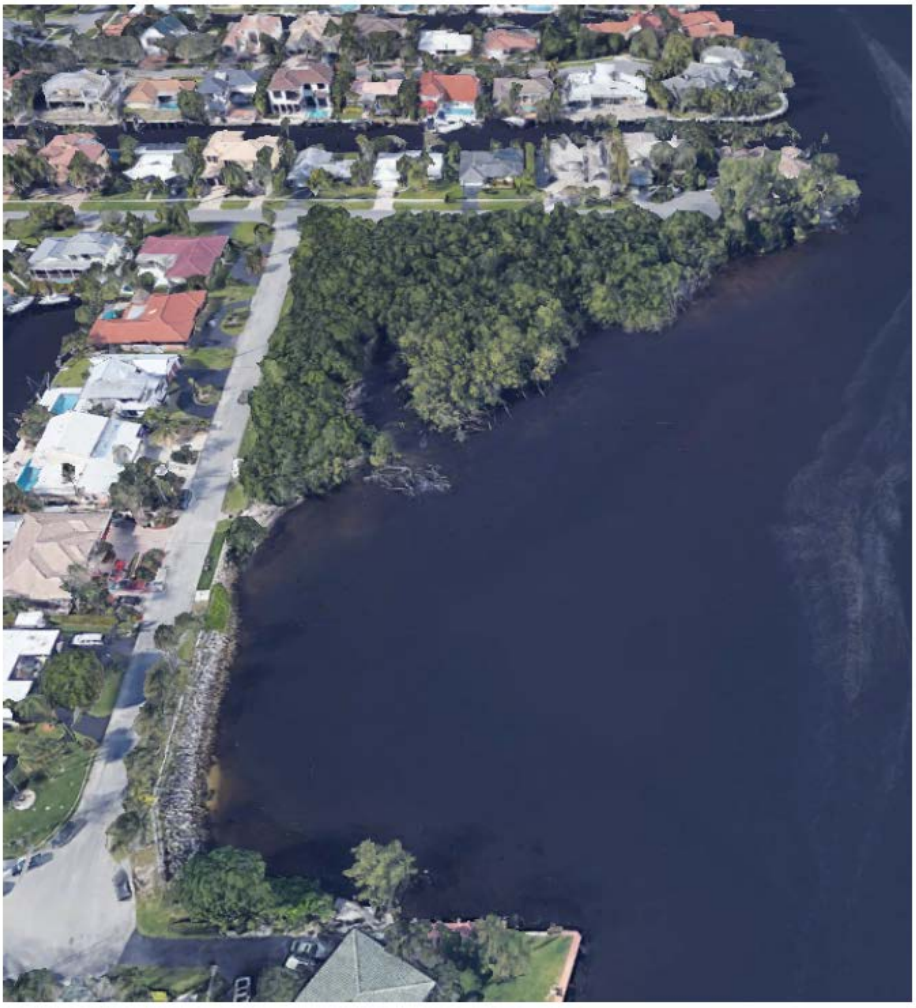
originated in 1938, but in no event was the fee title held by NE 32 harmed or even threatened by either easement. Nonetheless, as we have seen, the COA expressly confirmed that for QTA purposes some degree of adversity had in fact plagued the subject property at all times since 1938, as a means of upholding the lower court dismissal in a manner which dovetailed smoothly with the conclusion of Judge Rosenberg to that same effect. In reality, prior to 2013, adversity stemming from the perpetual nature of the 1938 easement, despite its long disuse, existed only to the extent that all of the owners of the subject property, up to and including NE 32, evidently failed to acknowledge its ongoing existence, and thus mistakenly believed that the subject property was free of any federal easement, presumably because they never saw the "spoilage easement" put to any actual use, leading them to erroneously surmise that it had been conclusively forsaken by USACE. This misconception, regarding the durability of federal land rights, even when they go long unused, effectively produced a state of adversity, which in the eyes of the COA, was legally sufficient to justify appellate support for the outcome that had been reached at the district court level. The predecessors of NE 32 had effectively generated a subjectively adverse condition themselves, the COA observed, through their own ignorance of easement law, combined with their apparent failure to alert themselves to the 1938 easement's continued presence by reviewing title documentation, which would have revealed the encumbered status of their land. Thus quite ironically it was an apparent lack of any actual use of the 1938 easement, rather than excessive use thereof, which formed the basis for the only species of adversity, to the fee title held by the predecessors of NE 32, that ever existed prior to 2013. Although those on the NE 32 side were undoubtedly convinced that the 1938 easement had been abandoned in a de facto manner by USACE long before 2013, and saw the 2013 easement as long overdue official confirmation of its demise, it had never been definitively abandoned, but the fallacious view that the old easement was not permanent, stemming from its long dormancy, the COA found, served as a basis for long standing adversity, which brought the QTA bar down upon NE 32.

Although the concluding statement made by the COA, indicating that the members of the NE 32 team were guilty of attempting to "manufacture" adversity, and to peg the origin of that adversity to a recent date, in order to facilitate their use of the QTA window, suggests bad faith on the part of NE 32, and to that extent may not have been fully justified, since the NE 32 position was not untypical of the numerous misguided positions that have been taken by many other QTA plaintiffs acting in innocent ignorance, that statement nonetheless verifies that the COA clearly agreed with the view of the NE 32 position which was taken by Judge Rosenberg, who poignantly mocked the reliance placed by NE 32 upon the 2013 easement, accusing them of trying to convert it into a "magic bullet". While the NE 32 team was apparently unfamiliar with the QTA adjudication process, and probably did not deserve to be openly ridiculed in this manner, the important lesson to be drawn from such judicial remarks pertains to the way in which all plaintiffs who elect to launch allegations impugning federal land rights are judicially viewed. QTA plaintiffs justifiably bear an especially high burden of proof, and have an essential obligation to bring forth strong evidence of federal abuse or violation of their land rights to have any hope of successfully navigating the narrow and perilous corridor that leads to QTA success. Fee title and easement title that are applicable to the same ground are not inherently or axiomatically in conflict, title issues typically arise only through some kind of mistake, of understanding, or of usage, or of documentation, but under the QTA the mere perception of a conflict is not necessarily indicative of the presence of a real conflict that qualifies for adjudication, and a speculative perception regarding the status of their own fee title was all that

NE 32 had. USACE, as the holder of the 1938 easement, disagreed with NE 32, refusing to accept the suggestion that the old easement had ever been abandoned in any manner, and no legal presumption of easement abandonment exists, so the assertion by NE 32 that the subject property bore no spoilage easement, and was unencumbered land until the conservation easement was created in 2013, could gain no traction in any courtroom, and was therefore not surprisingly judicially viewed as an empty proposition. But of course NE 32 really had no alternative in the QTA context, and had no choice but to insist that adverse conditions arose only in 2013, because only success on that key point would open the QTA window, so having unwisely chosen the QTA litigation pathway, NE 32 was destined to win or lose based upon judicial perception of the events of 2013. Unfortunately for NE 32, as the COA pointed out, the events of 2013 were all successful from a private land use perspective and were favorable to NE 32, as the USACE personnel crafted a solution that met the stated needs of NE 32, allowing the proposed construction project to proceed, which made it impossible, from a judicial perspective, to identify the steps taken by USACE in 2013 as a source of any adversity to NE 32. As accurately noted by the COA, rather than abusing the fee title held by NE 32, by "exacerbating" any existing legal burden borne by the NE 32 property prior to 2013, the protective conditions outlined by USACE in 2013 actually made future use of the federal rights that were created in 1938 less likely, not more likely, so even if the federal easements in question really were in a state of legal conflict with each other, the ultimate result of that conflict was beneficial, rather than detrimental, to NE 32, and therefore simply could not be portrayed as creating any form of adversity which did not already afflict the waterfront land that had been acquired by NE 32.

While it is true, as a principle, that even a properly documented existing easement can legally vanish, when the ability or opportunity to make any use of it whatsoever permanently ceases to exist, and even federally held easements come within the scope of this basic principle of easement law, documented easements are not legally abandoned or otherwise destroyed by plain disuse alone, because the intent of the easement holder is always the central factor in judicial abandonment determination. Since NE 32 was unable to bring forth any definitive evidence clearly showing that USACE intended to abandon the 1938 easement at any specific point in time, it was impossible for NE 32 to liberate their fee title from that documented legal burden by successfully obtaining a judicial decree that it no longer existed, and for that reason, the QTA pathway was not the most appropriate one available to NE 32. It appears that in actuality the plaintiffs believed that the land rights of NE 32 had not been adequately respected or fairly handled by USACE in 2013, during the execution of the federal permitting process which took place at that time, and they felt that the fee title held by NE 32 had been left in an unjustifiably clouded condition by USACE personnel, due to the absence of any verification on the part of USACE that the 1938 easement had ceased to exist. What those representing NE 32 evidently failed to realize however, is that allegations of federal deficiencies or abuses associated with federal permits, and the impact of any federal permitting procedures upon land rights, must be adjudicated under the APA, as administrative errors, and not under the QTA, which is reserved for boundary and title resolution, so the APA pathway of adjudication may well have been a better alternative for NE 32. In addition, Tucker Act litigation represents another frequently viable and appropriate avenue of federal adjudication, which is open to any holders of non-federal land rights who feel that they have been victimized, either intentionally or unintentionally, by any federal activity that can be properly characterized as a taking of land rights, so NE 32 could have opted to file their action under the Tucker Act, charging that the creation of a second federal easement upon their property, without accompanying elimination of

an existing but allegedly obsolete federal easement in the same location, represented compensable damage to their fee title. We will never know whether NE 32 would have succeeded, had they elected to proceed under either the APA or the Tucker Act, rather than the QTA, but they clearly, and quite understandably, chose the QTA forum, because their goal was not to receive any financial compensation, it was to uncloud their fee title, by obtaining judicial confirmation that the 1938 easement was no longer in effect. While that choice may have been superficially logical however, no real chance of complete success for NE 32 ever existed, because USACE, as a federal agency, holds the power of condemnation, so even if NE 32 had prevailed in their QTA action, and the 1938 easement had been judicially extinguished, just as NE 32 desired, USACE could have regained an equivalent easement covering the same land, through use of the condemnation process, in which event NE 32 would have been left with only financial compensation, and land that was still doubly burdened. All QTA plaintiffs should be aware that the US can ultimately prevail, when any allegation is framed in the context of land rights, because our federal government has the power to condemn any existing land or land rights, so even in the QTA arena, any land rights issue inevitably resolves itself into a monetary matter, rather than a contest over the existence or non-existence of federal land rights, provided that the US truly needs to either retain or acquire the rights in question.



Footnotes

1) In several previous editions of this series we have reviewed numerous federal cases from all around the country, which poignantly illustrate the difficulty typically experienced by those who elect to challenge federal land rights, and thus become QTA plaintiffs, thereby taking an especially heavy burden of proof upon their shoulders. Concisely summarizing just a few of the most vital factors that are relevant to use of the legal pathway provided by the QTA, which has governed all adjudication of boundary and easement issues involving federal land rights interests since its enactment in 1972:

- The QTA is available to all non-federal parties and entities who wish to resolve any land rights issues by engaging in litigation against any federal agency, but the QTA has no application to any land use issues, and is applicable only to the resolution of genuine conflicts or disputes over matters of title, including those associated with boundaries and easements.

- The usefulness of the QTA is rigidly limited in terms of time, it provides only a 12 year window of opportunity, the opening and closing of which is controlled by the specific events that are relevant to each case, and each QTA plaintiff must successfully demonstrate that the QTA window has opened, but has not closed, at the moment when they filed their legal action, as a threshold matter, in order to have any opportunity to prevail.

- Ambiguities, anomalies, and even clear errors or mistakes, which can be shown to have been generated during the process of conveying land or land rights, and which therefore afflict title of record in some manner, as a result of any conveyance involving or pertaining to a federal land rights interest, must be brought forward for judicial resolution with promptness, because once the QTA period has elapsed, any adjudication of such issues is statutorily foreclosed.

- Effective use of historical evidence, including both evidence of actual events and documentary evidence, is essential to success in the QTA arena, because judicial determination of the applicability of the QTA to any given controversy is always based upon the legal significance of the factual evidence that has been presented to enlighten the court, which controls the open or closed status of the QTA window.

2) Who owned the subject property between 1938 and 2013, how many times it was conveyed, how it was legally described, how it was utilized, if it was ever privately used at all, when the relevant area was subdivided and platted, and precisely when that property was acquired by NE 32, all represent evidentiary elements which were deemed unnecessary to address during the judicial review of this case, due to the employment of summary judgment, as outlined herein. Nonetheless, its clear that the existence or validity of the easement which was created to allow federal use of that property as a muck disposal site was never previously challenged and was regarded by all parties, public and private, as a non-issue for 75 years, until the NE 32 development proposal came along, which is not surprising, since that easement may very well have gone unused for many decades, and in fact there is no indication that it was ever used at all, by either USACE or any other governmental entity. The extent to which the shoreline of Lake

Rogers may have changed during that time period, potentially either expanding or reducing the acreage of the property at issue, was likewise never made an issue in the subject litigation, which involved no boundary controversy.

3) Whether NE 32 ever directly asked USACE any questions about the 1938 easement, or expressly asked USACE to relinquish that easement, either in the text of the permit application or in some other manner, is unknown, as there is no indication that any communication of that kind ever took place between the parties, either before or after the commencement of their litigation. Although it must be presumed that the federal personnel handling the NE 32 permit knew about the existence of the 1938 easement, its possible that they were unaware of its existence, and that they never addressed its presence for that reason. In addition, its possible that even if the USACE permit team knew that the easement had been created in 1938, they may have concluded that it was either no longer in effect or no longer needed, because the relevant portion of the AIW had been stable for an extended period of time, making any dredging activity in the subject area unnecessary. Nonetheless, this failure on the part of both the public and private parties involved in this development project to clarify both the current legal status and the intended fate of the 1938 easement before proceeding to finalize their agreement became the primary factor leading them into litigation, and false assumptions about that easement, made by the NE 32 team, in the absence of such clarification, were destined to become a major source of regret on their part.

4) See NE 32nd St., LLC v United States - United States District Court for the Southern District of Florida (2016 US Dist Lexis 193483 & 2016 WL 10541035).

5) See NE 32nd St., LLC v United States - United States District Court for the Southern District of Florida (2017 US Dist Lexis 218966 & 2017 WL 5309358).

6) See NE 32nd St., LLC v United States - United States Court of Appeals for the Eleventh Circuit (896 F3d 1240 - 7/23/18).

7) It may well be noted that the QTA is highly analogous in certain respects to adverse possession, and upon observing that expiration of the 12 year QTA period always results in federal triumph, it may be suggested that imposition of the QTA bar equates to adverse possession by the federal government, but that notion is fundamentally mistaken for a variety of reasons. The main distinction between adverse possession and the QTA lies in the fact that, unlike a typical adverse possessor, the US has no need to rely upon any adverse conditions, or prove that any adversity ever existed, in order to prevail, because federal land rights are blanketed with the highly intensive protection that is afforded by sovereign immunity, so an absence of any adversity whatsoever also results in federal victory. The QTA simply provides all non-federal parties who experience some type of adversity linked to the presence of federal land rights with a chance to leverage that adversity for land rights clarification purposes, if they can prove that federally introduced adversity presents a genuinely pernicious obstacle to their utilization of any real property rights which they hold, and they do so within the statutorily established time period. A high degree of irony may be fairly observed however, in the fact that the US actually benefits from any ambiguity regarding adversity that is manifested in any given factual scenario, while any such ambiguity is fatal to any private adverse possessor's chances of success in typical adverse possession litigation, and the case reviewed herein serves as an ideal

demonstration of that irony. In addition, in the 1983 Block case, which was centered upon controversy over the navigability status of the bed of the Little Missouri River, the United States Supreme Court clarified that while fee title is typically quieted in a successful private adverse possessor, no title purportedly held by the US, either in fee or in the form of an easement, can ever be quieted in the US through utilization of the QTA, because the sole objective of the QTA is to provide title and boundary resolution for the benefit of non-federal parties or entities. Consequentially, in order to secure any challenged federal title, if it is deemed necessary by federal personnel to take that step in any given case, the US must file a quiet title action against the QTA claimant, thereby stepping into the shoes of a plaintiff and washing away the purely defensive protection that is embodied in the QTA bar.

(The author of this series of articles, Brian Portwood (bportwood@mindspring.com) is a licensed professional land surveyor, federal employee and historian of land rights law, providing material for the ongoing professional education of all members of the land rights community. All of the materials cited herein are freely available in pdf form, either by means of a standard internet keyword search or directly from the author of this article, who invites all those interested in further reading on this subject to contact him.)

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