

Novel federal easement created to monitor illicit foot traffic highlights the significance of the legal and financial complications arising from even a very uniquely subtle and virtually invisible public use of private land

Federal efforts to prevent unauthorized entry into the United States from Mexico have produced immense controversy at many levels, extending even to the arena of land rights, generating a case which clearly illustrates the importance of understanding the legal impact of easements, while raising numerous questions about the proper creation, use and valuation of easements. In addition, due to the federal involvement in this unique scenario, as the party responsible for the existence of the easement in question and the holder of the dominant estate, equally controversial issues relating to takings of private property for federal purposes are introduced, making the relevant strip of Southern California desert upon which the activity takes place a virtual tinderbox, filled with volatile legal implications. We will first take note of the vital factual events which triggered this conflict, to the extent that they have been outlined by the Court of Appeals for the Federal Circuit (CAFC) (FN 1) in ruling upon this matter, then we will review the results of the litigation, announced in March of 2015, and the principles upon which those results are based. It is hoped that this will prove to be a thought provoking exercise for all those professionals who have occasion to deal with easements that benefit the public, and similar acquisitions of land rights made for public purposes.

The United States Border Patrol (BP) apparently began seismic monitoring along the border between California and Mexico during the 1980s, if not earlier. Motion sensing devices were implanted in the ground, which electronically alerted BP to foot traffic, enabling BP agents to respond to illegal incursions (FN 2). Many of these devices were evidently placed upon private lands, and the right to place and maintain them may or may not have been legally acquired by the US in all such areas. A ranch of unspecified size, known as Rancho Vista Del Mar, situated in San Diego County, was among the properties subjected to such activity. In 1992, BP evidently obtained an easement from the owner or owners of that ranch, allowing BP to install, maintain and utilize monitoring devices on that property. This easement was expressly confined however, to a 20 foot wide strip along the southern border of the ranch, which apparently covered a very substantial area, potentially stretching for several miles along the international border. No controversy apparently arose during the 1990s over the use of this easement by BP, as the land evidently remained undeveloped, if not entirely vacant. At an unspecified date however, presumably circa 2000, a plan to develop the ranch property took shape and a partnership was formed, involving a multitude of parties, including Otay International. During the next few years the ranch was evidently subdivided into numerous parcels of unspecified size, with the apparent objective of converting it into an industrial park, and the site of this project came to be known as Otay Mesa.

By 2006, concerns had begun to arise about the impact of the BP activity upon the proposed development. The presence of the legal burden imposed by the documented BP easement was evidently not the primary source of concern, since that easement occupied only a negligible percentage of the site. Over the years however, the use being made by BP of the remote and desolate land had evidently expanded dramatically, far beyond the originally designated 20 foot strip, essentially consuming the entire site. At least 14 monitoring stations had been established, and BP agents apparently traversed the entirety of the vast desert area comprising the ranch, both on foot and in vehicles, whenever the need to do arose, possibly on a daily basis. In practical terms, the 20 foot limitation had simply been disregarded, and the whole site had been put to use by BP, since no one was there to object to the BP activities or point out that the documented easement was limited to a narrow strip. Otay and their partners became concerned about the potentially adverse impact that this extensive federal use of the subject property might have upon their title, and more specifically their chances of obtaining approval for their proposed development. Otay could have filed an action under the federal Quiet Title Act, challenging the federal use of the unencumbered portions of their land, upon the grounds that the US had acquired no right to use any portion of their property outside of the 20 foot strip. Rather than seeking to limit the federal use of their land to that strip however, the Otay partners elected to concede that the use of more than 20 feet of their property by BP, if not the entire site, was legitimately necessary, so in 2006 the Otay group filed an action against the US seeking compensation for a federal taking of their property.

During the initial litigation in federal court, or in anticipation thereof, the Otay group evidently

expressed a desire to carry out their development plan, despite the ongoing BP activity on their land, and indicated that they were open to mutual use of the site, for both public and private purposes. The federal legal team which was engaged upon this matter was evidently open and amenable to this idea, and found this position taken by Otay to be reasonable, so they apparently endeavored to craft documentation offering an appropriate and workable solution. Thus in 2008, the US introduced into the litigation a document which was characterized as a stipulation, defining the land rights that the US saw fit to assert upon the subject property. Agreeing with Otay that there was no need for the US to take the subject property in fee, in order to facilitate the use being made of the land by BP, the US defined the land rights interest which had been established by BP as an easement, blanketing the Otay Mesa site, and legal counsel for the Otay partners evidently made no objection to that stipulation. In so doing, the US voluntarily elected not to assert that the BP activity had resulted in the formation of any adverse or prescriptive land rights, either under the federal Quiet Title Act or otherwise, thereby conceding in effect that Otay had a valid claim for financial compensation, making proper valuation of the impact of the ongoing federal use of the Otay property north of the existing 20 foot border easement necessary. Thus the issue of fee title was eliminated from the judicial equation, and the sole issue for determination was the amount of compensation due to Otay for this conceded taking of a federal easement interest covering the subject property. In 2010 the trial court awarded the plaintiffs over 3 million dollars, on the grounds that 5 of the subdivided parcels, consisting of about 900 acres in total, had been burdened with a seismic monitoring easement, as a result of the installation of 14 specific monitoring devices by BP between 1999 and 2005. In so doing however, the trial court treated the federally acquired property interest as being temporary, rather than permanent in nature.

Neither of the litigants were satisfied with this outcome. Otay protested that the entire subdivided area covered by their development plan was impacted by the BP land use, so the trial court had wrongly limited the relevant area, and also argued that the trial court had wrongly based the compensation award on a mistakenly limited time period. The US maintained that the taking was permanent, rather than temporary, so the wrong methodology had been employed in reaching the valuation figure, since treating the easement as permanent would in this case, quite ironically, reduce rather than increase the compensation award. Thus this matter first came to the CAFC in 2012, as *Otay Mesa Property, et al v United States* (670 F3d 1358) and the CAFC recognized that the lower court's ruling was flawed in at least one vital respect, so the case would need to be remanded, to adjust the valuation of the easement in question. The language of the aforementioned stipulation was key to this initial CAFC ruling, since it specified that the easement was perpetual, so the decision of the trial court to treat it as temporary was clearly erroneous, and the stipulation also limited the relevant time period to a 6 year window commencing in 1999. While resolving those issues however, the stipulation language introduced another serious issue, by attempting to minimize the physical intrusiveness of the easement. When composing the stipulation, which defined the legal parameters of the easement, in an effort to facilitate mutual use of the relevant land and thereby obtain approval of the stipulation language from Otay, the US expressly agreed that any of the seismic sensors which occupied areas that required grading for the proposed development would be "redeployed" by BP, upon notice to BP that Otay had obtained a grading permit covering the area where any given sensor was located. This was certainly a logical idea, intended to address the conflicting needs of both entities, while protecting the sensors from destruction, but the stipulation was fundamentally flawed, because it contained no descriptive language whatsoever. The stipulation language did not require the sensors to be placed in the existing border easement, and did not limit their redeployment in any way, it was utterly devoid of specificity pertaining to the relocation of the problematic devices, thus the seeds of future contention had been planted, and ensuing events would serve to water them.

Since the CAFC ruling made it clear that the proposed blanket easement was judicially acceptable, and the only matter remaining to be resolved was a financial issue, rather than a title issue, the Otay partners evidently decided to proceed with the Otay Mesa project, and they were apparently able to obtain the necessary approval of their development plans. That approval however, was evidently conditioned upon some of the Otay parcels being reserved from improvement and left in their natural state, for land use mitigation purposes. This decision, effectively splitting the project site into an assortment of usable and unusable areas, operating in tandem with the aforementioned redeployment clause, set the stage for a new point of controversy, centered upon the distribution of the relocated sensors, which resulted from the efforts of the US legal team, as the authors of the language defining the easement, to allow the locational component of the easement to flex, in a manner which would accommodate the land use proposed by Otay. The redeployment

clause had opened the door to the relocation of any or all of the sensors, which the easement was designed to protect, but the stipulated agreement included no relocation plan, so where the sensors would be located after being redeployed, having been left unaddressed, was patently unclear, making this an unexpected source of additional contention, while further complicating the valuation process. In response to this situation, the trial court ruled on remand in 2013 that Otay was entitled to no compensation for the BP use of that portion of the easement covering the parcels that had been approved for industrial development, because under the stipulation Otay had the right to require the removal of all sensors from those parcels, simply by producing approved grading plans. Taking note of the distinct nature of the mitigation parcels however, the trial court granted Otay a reduced award, amounting to nearly half a million dollars, for the legal impact of the federal easement upon those unusable parcels, which contained about 600 acres that could not be graded or otherwise disturbed for private development purposes.

By introducing locational flexibility to the easement, the US was thus able to escape the payment of any compensation to Otay relating to the federal use of the developable portion of the site. Since the US had thereby granted Otay the option to order all sensors removed from the useful parcels, by proving that Otay had a legitimate need to use those areas, the sensors located in such areas no longer constituted an easement, because any land use which is subject to unilateral termination by the servient party cannot be properly characterized as an easement. Thus any need to place a value upon the industrial parcels, or to value the adverse impact which the presence of the sensors had upon them, was eliminated, since Otay was entitled to no award pertaining to those parcels, because the US held no genuine easement rights in those areas, by virtue of the sensor relocation option set forth in the stipulation. If the mitigation parcels had never been created, and the whole project site had been subject to grading, under the terms of the stipulation Otay could have ordered the US to move all of the sensors south, to the existing 20 foot easement along the border, thereby ending the controversy at this point, by eliminating the need for any valuation or compensation with respect to future use of the Otay land north of the original easement strip by BP. Similarly, if the undevelopable Otay parcels amounted only to truly worthless land, the controversy would also have ended at this point. Had that been the case, the US could simply have moved all of the sensors to the useless parcels, without any concern over compensation for the future use of those areas, and in fact that was the outcome which the US legal team sought to obtain. The element of land preservation entered the picture at this point however, as a result of the creation of the mitigation parcels, which proved to be powerful enough to block the pathway to financial victory that had been charted out by the federal personnel. The Otay partners were thus forced to accept the exclusion of the usable parcels from the valuation discussion, since they were unwilling to relinquish the right to force the US to remove the sensors from those areas, but this merely shifted the focal point of this battle, from the industrial park itself to the adjacent undevelopable land, which offered an attractive home for the sensors, upon their relocation.

Through this incredible twist of irony, the taking of the federal easement had no legal impact upon the usable Otay land, yet it was deemed to have a genuine and financially valuable legal impact upon their unusable land, under the lower court decision, because the parties had conclusively agreed that relocation of the sensors comprising the easement would be triggered by the presentation of a grading permit, so only those parcels which could not legally be graded, under the approved site plan, would ultimately be subject to the easement. Otay thus obtained the opportunity to proceed with their proposed project, judicially endowed with the ability to effectively oust the BP sensors from any portions of the site that were to be graded, yet this right came at a high cost to Otay, of over 2.5 million dollars, by virtue of the lower court's dramatic reduction of the original compensation award. In addition, the 2013 lower court ruling awarded Otay interest on the amount obtained by Otay for property damage accruing only after 2008, when the stipulation was adopted, leaving Otay still highly unsatisfied. The US was also not content with the 2013 result however, and took the position that Otay was entitled to no material compensation, since Otay had been given the capacity to compel BP to move all of the sensors to the mitigation parcels, which the US argued were of no real use or value at all to Otay, so the sensors would not constitute any significant invasion of Otay's property rights, once they were relocated to those dormant areas, and were thus no longer valid grounds for any substantial damage award (FN 3). In the view set forth by the US legal team, the presence of BP sensors on land that has been set aside for preservation, and thus can never be improved in any manner, does not represent a compensable taking, since such small and virtually invisible objects planted in the ground are not incompatible with environmental preservation.

Thus this controversy returned to the CAFC to be addressed again in 2015, as once again both sides took issue with the decision that had been produced at the trial court level, but this time the appellate panel was unreceptive to the complaints set forth by the litigants, with just one notable exception. In effect the adversaries had made their own bed, by constructing, approving and submitting the stipulation language defining the easement parameters, replete with locational uncertainty though it was, and the CAFC clarified to all of the combatants that they would now be judicially required to lie together in that bed (FN 4). The CAFC flatly rejected the US assertion that the prior use of the subject property by BP, extending the federal activity far beyond the original deeded easement area, never really amounted to a serious invasion of any private land rights, since the land was remote, wild and seemingly useless. The mere fact that the US had agreed, by virtue of the stipulation, to withdraw sensors from any areas required for development by Otay, the CAFC observed, did nothing to negate the fact that BP had made unauthorized public use of most if not all of the privately owned Otay Mesa site for several years prior to the inception of the litigation in 2006, vastly exceeding the 20 foot easement granted to the US in 1992, in obvious derogation of the private status of those lands. The stipulation was legally incapable of washing the slate clean, and absolving the US of all liability, in fact the stipulation specified that the US acknowledged liability for the acts of BP, so in the eyes of the CAFC damage compensation was clearly due to Otay for the land use made by BP prior to the litigation, regardless of whether the future actions of BP placed any perceptible burden upon any portion of the subject property or not.

The CAFC was equally unreceptive however, to the argument made by Otay that the entire 900 acre area comprising the 5 problematic parcels was encumbered by the easement, and agreed with the trial court that no damages could be predicated upon the presence of sensors upon the industrial parcels going forward, because Otay now has the authority to require them to be relocated by BP, upon showing proof that Otay has been legitimately authorized to grade and improve those areas. The CAFC further agreed with the trial court that the other Otay parcels, which had been devoted to land use mitigation, were still legally subject to the stipulated easement, since Otay had no legal means of forcing BP to cease using those areas, so both past and future damage compensation was due to Otay for the ongoing BP use of the 600 acres within those portions of the project site. At this point however, the CAFC again disagreed with the trial court, this time regarding the relevant timeframe upon which the interest on the Otay damage award was calculated. The relevant taking of private property rights by BP had begun, the CAFC pointed out, long before the 2008 stipulation was composed and adopted, so commencing the interest from that point in time was clearly erroneous. Otay was entitled to interest on the damage award, the CAFC confirmed, from the date when the first sensor was placed outside the 20 foot easement, which occurred in 1999 or earlier, thus the proper interest accrual date was 1999, since that year had been identified in the stipulation as the agreed date of origin of the intrusion upon the unencumbered portion of the subject property. The composition of the stipulation in 2008 marked nothing more than an acknowledgement that an invasion of property rights had already taken place, the CAFC recognized, so that date could not be adopted as the date of creation of the easement, since it represented only the point in time when the already existing easement, created by means of actual land use, was documented.

Having seen just how problematic a collision of easement law, federal land use, land preservation efforts and national security activities can be, let us now examine the principles upon which the ruling that the BP monitoring devices damaged the Otay Mesa property to the extent of roughly half a million dollars may be justified (FN 5). In the view of the CAFC, which is fully consistent with long established case law, the apparent uselessness of the relevant land was insufficient to alter the constitutional principle that any uninvited federal intrusion upon private property, which produces a reduction in the value of private land rights, commonly known as a "taking", necessitates compensation. The federal government, under this judicial application of that mandate, cannot be allowed to leverage the fact that much private land may be of relatively low value or utility as justification for placing an unauthorized burden upon such land, while providing no compensation to the owner thereof. Thus the mere fact that the Otay partners, as the fee owners of the unusable land, were restricted and prevented, pursuant to the approval of their site plan, from making any physical, actual or visible use of their land set aside for mitigation, did not serve to enable BP to appropriate that land, and put it to use for a publicly beneficial purpose, without due process of law. Spurred by pressure to take all possible measures to halt the flow of people who disregard the international boundary, BP itself was quite ironically guilty of an offense of that very same nature, having ignored the boundaries of their own easement, thereby engaging in a constitutional violation themselves. Had BP restrained their

policing activities to the deeded 20 foot strip acquired in 1992, and honored the easement boundary thus established, no litigation would have been necessary, it was the expansion of the BP activity beyond that clearly defined boundary, without any effort on the part of BP to acquire any additional land rights, which precipitated this litigation.

Once the foregoing constitutional basis for this ruling is understood, the relevance of certain attendant or corollary principles, which are often regrettably overlooked during easement creation, becomes clear. In defining and legally describing the boundaries of an easement, when designing or creating the easement in anticipation of acquisition, it is essential to encompass an area that is truly sufficient to meet the needs of the proposed land use, so that no usage of any land outside the defined area will need to be made, thereby properly limiting the cloud which the easement will represent upon the servient title. Once the locational component of the easement has been thus definitively identified and outlined, the question of whether the easement is intended to be permanent or temporary needs to be addressed. This is equally vital, as the Otay scenario illustrates with particular poignancy, because an easement without any specific expiration clause or mechanism will be judicially presumed to be permanent. Neither the mere fact that the easement may be susceptible to termination in any of several ways, nor the fact that it may contain virtually infinite and unlimited flexibility within the servient estate, can reduce the legal burden which it represents to temporary status, because the rights associated with the easement stand as permanent, even though the location may be undefined, variable or floating, and thus subject to relocation. In addition, from this decision we can also see that a permanent and legally binding easement can be defined by mutual agreement during a judicial proceeding, and such an easement is subject to subsequent relocation or reconfiguration by agreement of the parties, if locational specificity was left unaddressed when documenting the easement, provided that relocation was not expressly barred by the agreement language. These principles have broad application across the portion of the land rights spectrum which involves easements, and the subject of easement relocation in particular remains a relatively contentious one, which has received judicial approval in some states, while being judicially viewed as unwelcome in others.

The core lesson embodied in this case, with particularly high relevance for attorneys and land surveyors as well as land owners, is that neglecting to clarify the location of easement boundaries, typically results in failure to limit the relevant use of the land as intended, which can have a major impact upon property rights and result in extremely costly litigation. Properly defining easement boundaries is not only essential to minimize violations associated with subsequent land use however, it is also required to effectively value a proposed easement, prior to acquisition, and this is especially crucial in the public sector, since the disbursement of public funds is made contingent upon diligent documentation. Clearly defining both the physical location and the physical extent of an easement is necessary prior to appraisal, because uncertainty or controversy over the easement's exact size and location can have a major adverse influence upon the value of the underlying land once the easement takes legal effect. Moreover, this is true even if the servient land is not being put to any use at the time of valuation, and even if that land is not subject to typical future uses, since the compensation must always be based upon "precisely what the government takes ... exactly what has been taken by the Border Patrol" (FN 6) as the CAFC emphatically expressed this point. Blanket easements have traditionally held widespread appeal, since they afford maximum ease of description at the moment of creation, but they often lead to serious controversy, when unforeseen land use issues later arise and need to be adjudicated, as the case that we have reviewed here so well demonstrates. Taking care to properly define the true intended physical limits of any easement can be equal in importance to carefully defining those land uses and restrictions which the parties have agreed are relevant and applicable to the easement. Succinctly put, location matters, thus it is always worthy of serious attention in easement creation, if the objective is, as it should always be, to preclude future controversy.

FN 1

Land rights issues involving federal interests are typically handled at the appellate level by the well known numbered federal circuits, each of which covers a specific region, so jurisdiction is usually dictated by the location in which any given case is situated. The United States Court of Appeals for the Federal Circuit however, is an equivalent judicial panel based in Washington DC, which is charged with addressing issues arising from certain special federal activities and interests, regardless of where the relevant events took place. Thus the CAFC had jurisdiction over this affair and reviewed the judgments of the lower court, the United States Court of Federal Claims, in our nation's capitol, even though the relevant activities took place in

California.

FN 2

These monitoring devices, described as sensors, were evidently small boxes containing electronic components, with an antenna fixed to the top of the box. Each one was apparently embedded in the ground, so the antenna, projecting about one foot above the desert floor, was the only visible item. Each sensor evidently had the capacity to detect vibrations created by surface traffic, over an area of unspecified size, and transmit a signal indicating the presence of such movement, giving BP an opportunity to respond to such activity. These units were obviously tiny, unobtrusive and virtually invisible, particularly when placed in a typical virgin desert landscape, but it should be borne in mind that the units themselves did not represent the full measure of the land use being made by BP. The more significant aspect of the federal land use was the activity, and potential damage, which took place whenever BP agents entered the area, either to check on the devices or to apprehend intruders, since such occasions typically involve traversing the land in motorized vehicles.

FN 3

There is no indication that the US ever argued that limiting the sensors to the mitigation parcels was impractical, or that doing so would defeat the purpose of the monitoring scheme, by leaving the unmonitored parcels exposed to undetected illegal traffic, so no judicial consideration of the inherent viability of the monitoring scheme was required. In addition, no suggestion was evidently raised that it would be necessary or appropriate to restore any of the sensors to their original locations after the site work is completed. In creating the stipulation language, which does not specify that any particular sensor location is critical to the monitoring effort, the US effectively conceded that an excessive area, which is not genuinely needed for monitoring purposes, was put to use by BP. We can only presume therefore, that the easement will remain practical and will still serve the intended purpose of effective monitoring, even after all of the sensors have been removed from the industrial parcels.

FN 4

As is very often the case, both sides took certain positions that ultimately proved to be senseless. The US foolishly characterized the relevant land use as an easement, making damages for a taking of private land rights axiomatic, while needlessly eliminating the possibility of coordinating the ongoing use of the relevant area by BP through a wisely crafted and mutually beneficial permissive land use agreement, under which no valuation of any compensable taking of land rights would have been necessary. So the use of the term "easement" in the stipulation composed by the US, to define a land use which was really quite nebulous and flexible in nature, proved to be an unwise choice of language, from a financial perspective. Otay on the other hand foolishly asserted, and even sought to prove, that the invasion of the relevant property by BP actually occurred prior to the 1990s, in an effort to obtain more compensation. This was a futile argument however, which could only operate against Otay, because all such claims would have been barred under the federal Quiet Title Act, so the fact that the use of the land at issue by BP was recent use, rather than long established use, was actually highly advantageous to Otay. Otay managed to escape the consequences of it's mistake, unlike the US, which in the end had half a million reasons to regret using the word "easement" in the stipulation, illustrating the monumental importance that can legally attach to a single pivotal word.

FN 5

Whether or not a conservation easement will ever be created to cover the 600 acre undevelopable portion of the Otay Mesa tract is unknown. In rendering the 2015 opinion however, the CAFC logically presumed that the Otay group will attempt to create such an easement, since they are legally free to do so, at which point the presence of the monitoring devices, and the BP activity related to them, will presumably present a source of concern to any party or parties contracting to obtain such an easement. Since the sensor easement has now been judicially sanctioned, should any conservation easement be subsequently created in the same area, the result would be a scenario in which one easement overlays and burdens another easement. Thus in judicial contemplation the sensor easement represents a potentially serious diminution of any conservation value that the otherwise unusable land may hold.

FN 6

These specific quoted phrases appear in the 2012 CAFC opinion, amidst the discussion explaining why the

lower court's characterization of the easement as temporary was flawed, and thus produced an unjustified valuation figure. Detailed commentary upon valuation practices is beyond the scope of this article, so the reader is directed to the text of that opinion for the complete judicial perspective on this and other factors which were addressed by the CAFC relating solely to the valuation issue.

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