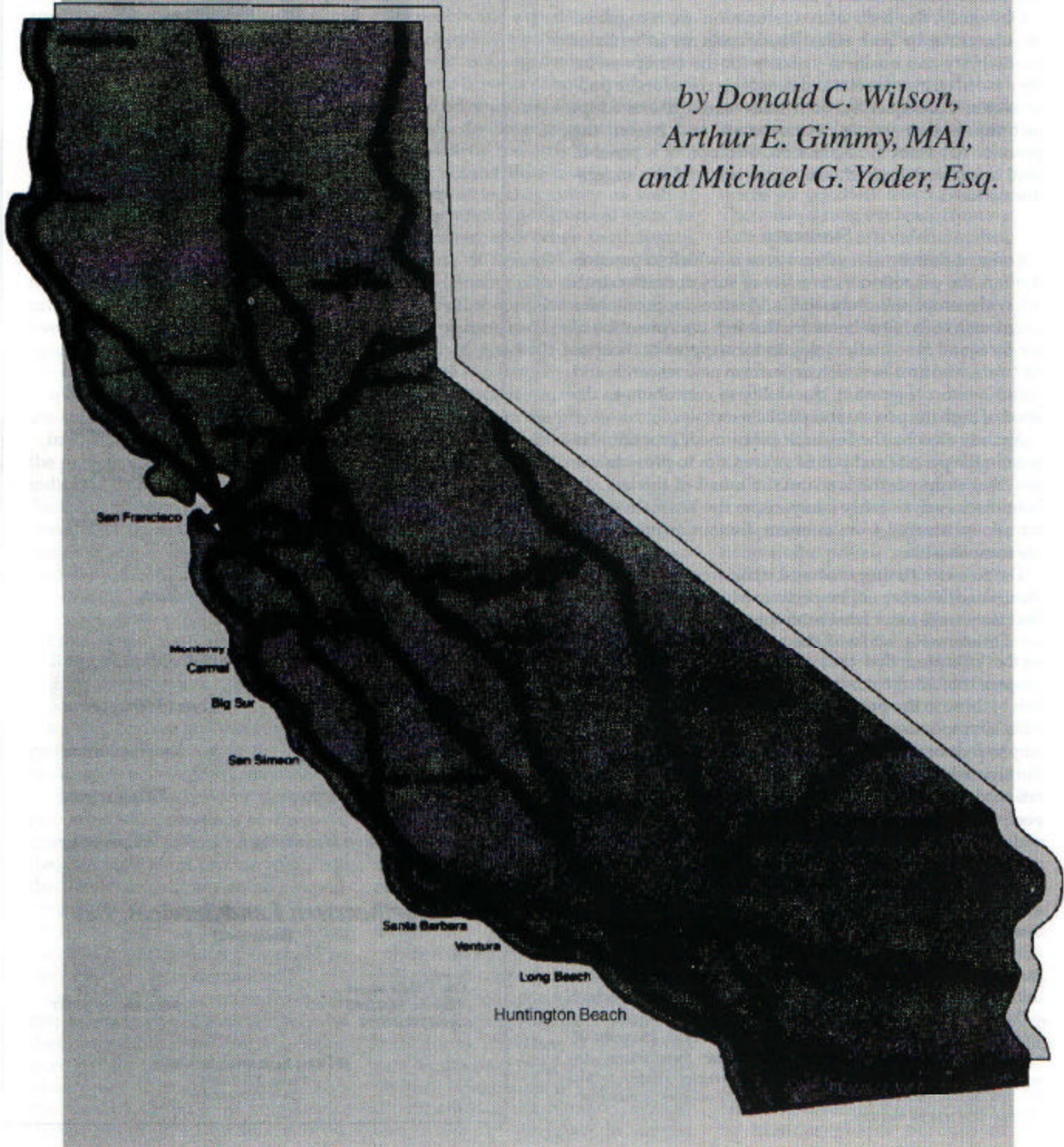


# PARTIAL TAKINGS OF MITIGATION REAL ESTATE: A Case Study of Severance Damages

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**A** CALIFORNIA JURY recently awarded \$4.5 million in compensation and severance damages to two property owners whose environmentally sensitive properties in Huntington Beach were partially taken by the California Department of Transportation (Caltrans).<sup>1</sup>

The highest and best use of the properties prior to condemnation was as mitigation real estate. Mitigation real estate (MRE) is property suited for acquisition and/or enhancement to create a protected environment similar to protected environment lost to development at another location (see *Right of Way* August/September 1994 for a discussion of mitigation real estate and its valuation).<sup>2</sup>

The Huntington Beach case merits attention, because it demonstrates: 1.) MRE can have significant market value in condemnation; and 2.) partial takes of MRE can trigger significant severance damages to a remainder parcel in such cases.

#### *The Property Before Condemnation*

Defendants Pacific Enviro Design and Coastal Magnolia Group owned 67 acres of undeveloped land on the inland side of Pacific Coast Highway (PCH) in the city of Huntington Beach, Orange County, California. The 67-acre parcel was bounded by streets on the north, west and south sides, and by a tidal channel on the east side. The parcel had practical and legal access only on the PCH frontage. The California Coastal Commission regulations delineated most of the parcel as wetlands. Ground water ponded on portions of it. Habitat existed for the endangered Belding's Savannah Sparrow and other species.

City zoning and planning overlays mandated wetland preservation, rather than development, as a probable use. Portions of the site were also within the jurisdictional influence of U.S. Army Corps of Engineers, under Section 404 of the Clean Water Act, and the entire parcel was subject to the influence of the California Coastal Commission's coastal zone jurisdiction. In combination, these regulatory constraints made

traditional development improbable.

Surrounding land uses included the state beach across PCH, a wetland and large power station to the north, a tidal channel and residential development to the east, and protected and enhanced marsh to the south.

#### *A Partial Take and a Landlocked Remainder*

Caltrans widened PCH in the vicinity of the subject property in 1992. The widening allegedly caused damage to wetlands areas and the California Coastal Commission required Caltrans to mitigate the damage.

The plaintiff, the state of California (acting by and through Caltrans), was required to construct irrigated sand dunes and restore environmentally sensitive sand dune habitat to serve as a buffer to protect and enhance certain wetlands areas allegedly impacted, including the wetlands areas on the defendants' property.

In order to reconstruct the dunes,

Caltrans needed to condemn 7.44 acres of defendants' property. Suit was filed on March 6, 1992; and on March 17, 1992, Caltrans obtained an Order for Possession entitling Caltrans to take possession of defendants' 7.44 acres on March 20, 1992.

The property taken was an irregularly shaped, approximately 100 to 150-foot wide stretch of land along PCH. The partial take left a landlocked, 59.56-acre remainder parcel.<sup>3</sup>

Once in possession of the property, Caltrans constructed sand dunes and restored environmentally sensitive sand dune habitat that blocked view and access to and from the remainder parcel.

#### *The Court Determines a Relevant Market Exists for Conservation and/or Environmental Mitigation Use of the Parcel*

In the legal issues phase of the trial, the court determined that:

1. Caltrans had illegally reserved an

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easement over part of defendants' property and that defendants were entitled to compensation for the taking of all 7.44 acres;

2. There was a relevant market for defendants' property based upon conservation and/or mitigation use;

3. Defendants' property rights should not be valued without reference to existing land use constraints under *People ex rel. Dept. Pub. Wks. v. Southern Pac. Trans. Co.*, 33 Cal. App. 3d 960, 109 Cal. Rptr. 525 (1973);

4. Defendants' use and enjoyment of their remaining property had been substantially impaired and that defendants' were entitled to seek and prove severance damages; and

5. Caltrans had unreasonably delayed in advising defendant of its intent to condemn the 7.44 acres in order to construct sand dunes and restore environmentally sensitive dune habitat, and that defendants were entitled to

seek and prove pre-condemnation damages.

The two most significant of these determinations, from a MRE valuation perspective, were numbers 2 and 4. They meant that the market value of the property could be based on a highest and best use assumption of conservation and/or mitigation, with the valuation estimate based on comparable sales of such properties, including negotiated transactions involving condemning authorities. Further, the court recognized a potential impairment of use and enjoyment in the remainder resulting from the partial taking. Hence, severance damages could be argued based on diminution of conservation and/or mitigation utility and enjoyment of the remainder parcel.

Thus informed, Caltrans and defendants both approached condemnation valuation of the subject property under the assumption that the highest and

best use of the subject parcel was mitigation.

### *The Dispute Over Just Compensation*

The property owner and Caltrans were unable to agree on just compensation for the partial taking, disagreeing on both the value of the part taken and on severance damages resulting from the take. Trial by jury on compensation and damages became necessary to resolve the dispute.

### *Contentions and Decision: the Part Taken*

Under the MRE use assumption, Caltrans relied on comparable sales presented during the legal issues phase of the trial, and estimated the part taken to have a market value of \$80,000 per acre. The comparable sales included a variety of purchases, several by condemning authorities, of parcels acquired to mitigate damage to protected areas.

Defendants used many of the same comparable sales plus additional ones, some discovered near the subject parcel, indicating a higher value. Defendants estimated \$150,000 per acre for the value of the part taken. The jury awarded \$130,000 per acre for the part taken.

### *Contentions and Decision: Severance Damages to the Remainder*

A particularly significant dispute concerned severance damages. Plaintiff claimed that the partial taking caused no severance damage to the remainder. Plaintiff reasoned that the highest and best use of the parcel before and after the partial take was to mitigate development damage, particularly to deep water habitat caused by entities, such as the ports of Long Beach and Los Angeles, that have filled protected parts of their harbors for terminals. Plaintiff presented several experts to demonstrate that the mitigation utility of the remainder parcel would be undiminished by the taking, that is the remainder could still feasibly be inundated via the adjacent tidal channel and enhanced to provide a substitute deep



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water habitat. However, plaintiff introduced no comparable sales data and analysis comparing accessible versus landlocked mitigation parcels to document that land locking of such a mitigation parcel would not trigger a diminution in value.

Defendants contended that significant severance damage resulted from the partial take. Essentially, defendants reasoned that, before the taking, the property was a strong candidate for mitigation, because the wetland/endangered species habitat was significantly degraded, threatened, and capable of mitigating a variety of habitat damage—including deep water habitat damaged by ports. The degradation meant a significant degree of enhancement was possible (enhancement potential tends to make a site attractive to mitigators and regulators). The continuing threat to habitat on site, stemming from proximity impacts and access and view from surrounding streets and activities, meant mitigators and regulators could be expected to place a high priority on acquiring the property for protection.<sup>4</sup> The varied capability for mitigation meant the property could feasibly mitigate deep water habitat damage—historically a class of habitat damage that mitigators had paid most to mitigate.

After the taking, however, defendants argued that the remainder's utility for mitigation had been diminished as follows:

1. The dune enhancement of the part taken upgraded the habitat quality of the remainder, particularly the Beldings Savannah Sparrow habitat, by significantly insulating the site from street access, view and surrounding pollution. As a result, the remainder offered mitigators and regulators less potential for mitigation enhancement. Therefore, the remainder's utility to mitigators and regulators was greatly diminished, as was the price that mitigators might be expected to pay for the remainder;

2. The dune enhancement of the part taken also diminished the degree of threat to the habitat of the remainder parcel. Therefore, the partial take reduced the urgency of protecting the remainder, lowered the priority of its ac-

quisition, and delayed and diminished the price mitigators would pay; and

3. Upgraded habitat quality and reduced threat made the site less feasible for deep water habitat mitigation. Converting protected, enhanced habitat to deep water habitat, was much less likely than converting unprotected, degraded habitat. Therefore, the remainder parcel was unlikely to be acquired for mitigation by the highest paying class of mitigators.

Defendants introduced 11 comparable sales of "before" parcels acquired for mitigation and/or conservation purposes, all having access in varying degrees, as evidence of the market value of the entire parcel in the before condition, and of the part taken in the before condition. Defendants also introduced two comparable sales of parcels acquired for mitigation and/or conservation purposes that lacked street access and further environmental enhancement. These evidenced the market value of the remainder in the

after condition. The comparable sales for the after condition indicated a unit value vastly less than the comparable sales in the before condition. Based on the difference between accessible and inaccessible parcels, Defendants claimed severance damages resulting from the partial taking of 90 percent of the \$150,000 per acre value in the before condition.

#### *Summary of Findings*

On December 23, 1994, after a 15-day trial, and a jury deliberation of five hours, the jury awarded Defendants \$967,330 for the 7.44-acre part taken and \$3,542,450 (46 percent of its \$130,000 per acre before value, or approximately \$59,500 per acre) in severance damages to the remainder parcel. The award for the part taken was weighted heavily in favor of defendants' contention. The award for severance damages recognized defendants' contention that use and enjoyment were vastly diminished, and rejected

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the plaintiff's contention that no diminishment occurred.

*Significance and Implications*

This case is significant for several reasons.

1. It is probably the first condemnation and award of severance damages for a partial taking of mitigation real estate in the United States. As such, it demonstrates that partial takings of MRE can trigger severance damages to remainders in certain circumstances.

2. It demonstrates that partial takings of MRE may damage remainder parcels through diminution of utility and enjoyment in the mitigation process.

3. It demonstrates that the traditional condemnation valuation framework is capable of recognizing and articulating severance damages to an MRE remainder through use of the basic comparable sales approach.

At least two major implications flow from the finding.

1. Condemning authorities should take care to sculpt partial takes of MRE to minimize diminution in utility and enjoyment of the remainder to avoid significant severance damage awards.

2. Property owners of MRE should rigorously investigate the possibility

that partial takes of MRE may trigger significant reductions in use/mitigation potential and severance damages to which they may be entitled.

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REFERENCES

1 *People of the State of California v. Pacific Enviro Design and Coastal Magnolia Group; Orange County Superior Court; Case No. 684146; December 23, 1994.*

2 An example of MRE is an upland parcel adjacent to a wetland that can be feasibly re-contoured with grading and vegetated to make additional wetlands.

3 The frontage along streets intersecting PCH was never considered practical access due to barriers erected in the construction of the two streets.

4 Indeed, the subject site was rated the highest among eight potential acquisition targets in the EIS for the expansion of the ports of Long Beach and Los Angeles before the sand dunes were developed by Caltrans after the taking.



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