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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

242.93 ACRES OF LAND, et al.

Defendants.

CASE NO. 10cv1133 BEN (CAB)

ORDER RE: MOTIONS IN LIMINE

(Docket Nos. 84, 85, 86, and 92)

**INTRODUCTION**

The United States has filed three motions in limine: (1) to exclude all evidence “allegedly supporting David Wick’s opinion of value;” (2) to exclude all evidence of possible future takings over the subject property; and (3) to exclude all evidence of comparable sales relied on by Defendants. The Defendants have also filed a motion in limine to exclude the expert testimony of the United States’ appraiser, Stephen Roach, and evidence supporting his opinion. For the reasons stated below, the United States’ motion in limine No. 1 is granted. The United States’ motions in limine Nos. 2 and 3 are denied. The Defendants’ motion in limine is denied.

**BACKGROUND**

On May 25, 2010, the United States filed a Complaint and Declaration of Taking condemning a temporary, non-exclusive, right to enter Defendants’ property for twelve months. At trial, both parties will present evidence going to the value of the taking.

1 **DISCUSSION**

2 **I. United States Motion in Limine No. 1.**

3 The United States moves to exclude evidence supporting the valuation opinion testimony  
4 of Mr. David Wick. Wick’s opinion was to be offered by the Defendants. However, this Court  
5 has excluded the expert opinion of Wick. The United States now moves to exclude some 40  
6 documents that Wick produced at his second deposition. These documents evidence property  
7 transactions that the Defendants seek to identify as comparable leases. The United States argues  
8 that these documents/leases should be excluded along with Wick’s opinion testimony. The United  
9 States also argues that these documents/leases should be excluded because they were first  
10 produced by the Defendants long after the close of discovery.

11 The Court agrees. Since Wick will not be permitted to offer opinion testimony, the  
12 documents and leases supporting his opinion testimony will be excluded, unless a sufficient  
13 foundation is laid for each document or lease by another qualified witness. “[T]here is a  
14 distinction between admitting a comparable sale as direct proof of a property’s value and allowing  
15 an expert to refer to the comparable sales in explaining his/her own valuation of a property.”  
16 *United States v. 87.89 Acres of Land*, Case No. Civ. F03-6064 AWILJO, 2005 WL 2810641, \*18  
17 (E.D. Cal. Oct. 25, 2005) (*citing United States v. Johnson*, 285 F.2d 35, 40-41 (9<sup>th</sup> Cir. 1960)).  
18 These excluded documents are identified as exhibits lettered: “H” through “Z”, and, “AA” through  
19 “AU.”

20 Moreover, while Defendants point out that 32 of the 40 documents were also produced  
21 prior to the discovery cutoff, at least eight of these 40 documents were not disclosed until well  
22 after the discovery deadline. As a discovery sanction under FRCP Rule 37, these eight documents  
23 may not be introduced by the Defendants for any reason. These eight documents are identified by  
24 the Defendants as exhibits lettered: “O,” “AA,” “AE,” “AM,” “AN,” “AO,” “AP,” and “AU.”

25 **II. United States Motion in Limine No. 2.**

26 The United States anticipates that the Defendants will attempt to use evidence of possible  
27 future takings as evidence to prove damages to the subject property. The Defendants have  
28 responded saying that is not the intent. Accordingly, this motion in limine is DENIED as moot.

1 **III. United States Motion in Limine No. 3.**

2 The United States moves to exclude evidence of 21 transactions relied on by the  
3 Defendants' expert, Mr. Randy Tagg. The United States argues that the 21 property transactions  
4 are not suitably comparable to the right of entry taken by the United States.

5 This Court will permit Tagg to testify as an expert witness. As an expert witness, his  
6 opinion will be based upon property transactions and values that, in his opinion, are comparable.  
7 The United States will have an opportunity on cross-examination to probe and explore the  
8 characteristics and values of the comparables upon which Tagg's opinion relies. *See United States*  
9 *v. 429.59 Acres of Land*, 612 F.2d 459, 462 (9<sup>th</sup> Cir. 1980) ("Comparable sales may be cited by the  
10 expert as a basis for his opinion on the value of the property. When sales of other property are  
11 used as a basis of expert testimony, the requirement of showing similarity between the subject  
12 property and the other sales is not as rigorous as it is when the sales of other property are offered  
13 as substantive proof of value. Instead, the proper inquiry is whether the expert has made careful  
14 inquiry into the facts of the other sales, and whether his opinion is founded upon such careful  
15 inquiry. In situations where there are few instances of comparable sales in recent times, the expert  
16 is only expected to make a reasonable estimate of the market value of the subject property after  
17 examining all the relevant facts.") (citations omitted); *see also Johnson*, 285 F.2d at 40-41. This  
18 motion in limine is denied.<sup>1</sup>

19 **IV. The Defendants' Motion in Limine**

20 The Defendants move to preclude the expert testimony of the United States' appraiser, Mr.  
21 Stephen Roach. The Defendants argue that Roach's testimony is based on inadmissible evidence  
22 of 46 right of way easements, the United States' use of the easement taken, and statements of  
23 permissive entry without easements. The Defendants also seek to exclude Roach's ultimate  
24 opinion of value.

25 As an expert witness, Roach's opinion will also be based upon property transactions and  
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27 <sup>1</sup>This Court's denial of any motion in limine does not necessarily mean that the evidence will  
28 be admitted at trial. *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1401 (N.D.  
Ill. 1993). "The court will entertain objections on individual proffers as they arise at trial, even though  
the proffer falls within the scope of a denied motion in limine." *Id.*

1 values that, in his opinion, are comparable. The Court will not probe with a scalpel, in the  
2 operation room of a motion in limine, the basis for an expert's opinion. "Where, for any reason,  
3 property has no market, resort must be had to other data to ascertain its value; and, even in the  
4 ordinary case, assessment of market value involves the use of assumptions, which make it unlikely  
5 that the appraisal will reflect true value with nicety." *United States v. Miller*, 317 U.S. 369, 374  
6 (1943) (citations omitted). The Defendants will also have an opportunity on cross-examination to  
7 probe and explore the characteristics and values of the comparables upon which Roach's opinion  
8 relies. *429.59 Acres of Land*, 612 F.2d at 462; *Johnson*, 285 F.2d at 40-41. This motion in limine  
9 is denied.<sup>2</sup>

### 10 CONCLUSION

11 The United States' motion in limine No. 1 is granted as follows: the documents and leases  
12 supporting Wick's opinion testimony will be excluded, unless a sufficient foundation is laid for  
13 each document or lease by another qualified witness. These documents are identified as exhibits  
14 lettered: "H" through "Z", and, "AA" through "AU." Moreover, eight documents may not be  
15 introduced by the Defendants for any reason (Exhibits "O," "AA," "AE," "AM," "AN," "AO,"  
16 "AP," and "AU").

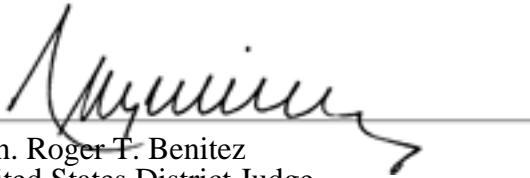
17 The United States' motion in limine No. 2 is denied as moot.

18 The United States' motion in limine No. 3 is denied.

19 The Defendants' motion in limine is denied.

20 **IT IS SO ORDERED.**

21 DATED: October 16, 2012

22   
23 Hon. Roger T. Benitez  
24 United States District Judge

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<sup>2</sup>See n.1, supra.