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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 1.57 ACRES OF LAND, MORE OR
15 LESS, SITUATED IN SAN DIEGO
16 COUNTY, STATE OF CALIFORNIA,
AND D&D LANDHOLDINGS, A LIMITED
PARTNERSHIP, ET AL.,

17 Defendants.
18

CASE NO. 12cv3055-LAB (MDD)

**ORDER GRANTING MOTION TO
EXCLUDE EVIDENCE OF NON-
ECONOMIC VALUE AND
SUBSTITUTE FACILITY COSTS**

19 The United States filed this action to condemn roughly 1.57 acres of land for the
20 purpose of securing the United States/Mexico border. There's no challenge to the
21 condemnation; the dispute is over how much the United States must compensate the County
22 of San Diego for the taking. The United States moves to exclude evidence of the property's
23 "non-economic" value and the cost of a substitute facility. (Docket no. 33.)

24 **I. Background**

25 **A. The County's Conservation Easement**

26 The condemned property is located within a roughly 90 acre conservation easement
27 owned by the County. (*Id.* at 6.) The County acquired the conservation easement from the
28 property's fee holders in return for allowing the fee holders to develop a salvage yard on

1 another site. (*Id.*; Docket no. 33-2 at 1.) The conservation easement requires the property
2 "be retained forever in its natural condition" and prevents any use "that will impair or interfere
3 with the [property's] conservation," including agricultural activity, construction, and
4 commercial or industrial use. (Docket no. 33-2 at 1–3.) The relevant deed explains that the
5 conservation easement "possesses wildlife and habitat values . . . of great importance to [the
6 County]" (*Id.* at 1.)

7 **B. Multiple Species Conservation Program**

8 The County is a party to a "Multiple Species Conservation Program" agreement
9 ("MSCP") between it, the United States Fish and Wildlife Service, and the California
10 Department of Fish and Game. (Docket no. 33-4.) The County contends the MSPC requires
11 it to own and maintain a specified quantity of habitat acreage, such as the conservation
12 easement. (Docket no. 35 at 2; Docket no. 33-3 at 2.) The MSPC includes a force majeure
13 clause stating, in pertinent part:

14 In the event that the County is wholly or partially prevented from performing
15 obligations under this Agreement because of unforeseeable causes beyond
16 the reasonable control of and without the fault or negligence of the
17 County . . . including but not limited to . . . actions of federal or state agencies
18 or other local jurisdictions, the County shall be excused from whatever
19 performance is affected by such unforeseeable cause to the extent so affected,
and such failure to perform shall not be considered a material violation or
breach, provided that . . . [t]he suspension of performance is of no greater
scope and no longer duration than is required by the force majeure; [and] [t]he
County uses its best efforts to remedy its inability to perform

20 (*Docket no. 33-4, at 24.*)

21 **C. The Impact of the Taking on the Conservation Easement**

22 The United States used about 0.43 acres of the condemned property to build a vehicle
23 turnaround. (*Id.* at 5.) The County contends that the vehicle turnaround renders that portion
24 of the property unsuitable for habitat conservation purposes and destroys burrowing owl
25 habitat. (Docket no. 35 at 3.) Thus, the County argues, the vehicle turnaround deprives it
26 of its interest in the property and affects its compliance with the MSPC. The parties disagree
27 on the measure of just compensation for this roughly 0.43 acre area.

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1 **II. Discussion**

2 The United States argues: (1) just compensation is determined by private market
3 value, so the Court should preclude evidence relating to the value of habitat conservation,
4 public interest, or other non-economic considerations; and (2) the County isn't obligated to
5 replace the condemned property, so the Court should preclude evidence relating to
6 replacement cost of a substitute facility. (Docket no. 33 at 9, 13.)

7 **A. Legal Standard**

8 Federal Rule of Civil Procedure 71.1(h) requires the judge in a condemnation case
9 to decide all issues presented except the amount of just compensation. *See United States*
10 *v. Reynolds*, 397 U.S. 14, 19 (1970) (interpreting Rule 71.1 to require that "except for the
11 single issue of just compensation, the trial judge is to decide all issues, legal and factual, that
12 may be presented"). "Consequently, the trial court is responsible for making preliminary
13 determinations that affect the valuation of condemned property." *United States v. 32.42*
14 *Acres of Land*, 2009 WL 2424303, at *2 (S.D. Cal. Aug. 6, 2009).

15 "[J]ust compensation is the value of the interest taken." *United States v. Petty Motor*
16 *Co.*, 327 U.S. 372, 377 (1946). It's normally measured by the market value of the property
17 at the time of the taking. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). Under
18 this measure, "[c]onsiderations that may not reasonably be held to affect market value are
19 excluded." *Id.* (internal quotation marks omitted).

20 Courts deviate from the market value measure of just compensation "when market
21 value has been too difficult to find, or when its application would result in manifest injustice
22 to owner or public." *Id.* (internal quotation marks omitted). "Such cases, for the most part,
23 involve properties that are seldom, if ever, sold in the open market." *Id.* at 30. "In recognition
24 of this unique problem, courts have developed the 'substitute facilities' doctrine as an
25 alternative valuation method in public condemnation proceedings." *Prince William Cnty.*
26 *Serv. Auth. v. United States*, 25 Cl. Ct. 678, 680 (1992) (collecting cases). "Under the
27 substitute facilities doctrine, courts have recognized that the cost of providing necessary
28 substitute facilities is a proper measure of just compensation if the condemnee has a duty

1 to replace the condemned facility or if substitute facilities are reasonably necessary in the
2 circumstances." *Id.*

3 **B. Consideration of "Non-Economic" Evidence**

4 The United States asks the Court to exclude "evidence of non-economic
5 considerations," but doesn't identify the specific evidence it seeks to exclude. (Docket no.
6 33 at 11–12 (internal quotation marks omitted).) It apparently suspects that the County will
7 rely on the subjective value it puts on its conservation easement, as opposed to the
8 conservation easement's market value. (*Id.* at 10.) The County doesn't contest that market
9 value is generally the relevant measure for just compensation. Instead, it contends that its
10 conservation easement *does* have a private market value. (Docket no. 35 at 4.) It explains:

11 [C]onservation easement property interests, which protect certain wildlife,
12 habitats, and biological species, are freely traded in private, as well as public
13 markets. These easements are valued based on their demand by willing
14 buyers So while habitat properties do have a government demand that
15 results in a public value, they also have a private demand that results in an
16 economic value It is the County's position that the highest and best use
of the property being condemned is its use as a conservation easement and
that value is based on the habitat contained on it. This particular property
contains burrowing owl habitat, a rare commodity, and serves the last viable
population of burrowing owls in San Diego County.

17 (*Id.*) In response, the United States argues: (1) its biological survey didn't find any signs of
18 burrowing owls and, in fact, revealed that the vehicle turnaround property had already been
19 disturbed by non-native plant species; and (2) the fee owner already extracted the economic
20 value of the conservation easement by trading it for the right to develop a salvage yard on
21 another site. (Docket no. 38 at 5–8.)

22 At this stage of the case, without the benefit of discovery, it's unclear whether
23 conservation easements on burrowing owl habitat have significant private market value and,
24 if so, whether the condition of the vehicle turnaround property negated its value. The fee
25 owner's actions have little relevance to these open questions. If anything, the fact that the
26 fee owner was able to obtain economically valuable development rights in exchange for the
27 conservation easement suggests that the conservation easement may have nontrivial
28 economic value. Thus, the Court is unable to declare that the vehicle turnaround property

1 has no, or merely nominal, value. But, to the extent the United States seeks to limit the
2 County's evidence to that relating to market value, the motion is **GRANTED**.

3 **C. Cost of a Substitute Facility**

4 The United States also seeks to exclude evidence regarding the replacement cost of
5 a substitute facility. It argues that the substitute facility doctrine doesn't apply because,
6 pursuant to the MSPC's force majeure clause, the County "has no obligation to replace the
7 0.43-acre property taken." (Docket no. 33 at 13.) The Court agrees. That the relief provided
8 by the force majeure clause is of "no greater scope and no longer duration than is required"
9 doesn't change this conclusion. Nor does the requirement that the County "use[] its best
10 efforts to remedy its inability to perform." The United States' condemnation isn't temporary.
11 Its construction of the vehicle turnaround renders the property incompatible with use for
12 habitat conservation. Try as it might, the County can't remedy its inability to maintain the
13 vehicle turnaround property as preserved habitat acreage. Since the force majeure clause
14 relieves the County of its duty with respect to the roughly 0.43 acres taken, the substitute
15 facility doctrine doesn't apply.¹ See *Prince William Cnty. Serv. Auth.*, 25 Cl. Ct. at 680.
16 Unless the cost of a substitute facility is relevant to the market value of the County's interest
17 in the vehicle turnaround property, it's irrelevant and inadmissible and the Court **GRANTS**
18 the United States' motion to exclude it.

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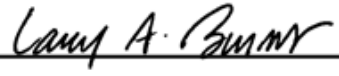
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27 ¹ The substitute facilities doctrine is also unsuitable because it's inconsistent with the
28 County's theory that conservation easement property interests are "freely traded in private
... markets" and that there's "private demand" for conservation easements that "results in
an economic value." See *50 Acres of Land*, 469 U.S. at 29.

1 **III. Conclusion**

2 As set forth above, the Court **GRANTS** the United States' motion to exclude. (Docket
3 no. 33.) The parties are **ORDERED** to contact Magistrate Judge Dembin within three days
4 of this order to schedule a case management conference.

5 **IT IS SO ORDERED.**

6 DATED: September 8, 2015

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8 **HONORABLE LARRY ALAN BURNS**
9 United States District Judge