

# Acquisitions of Public Utilities and Other High- Value Property

**51<sup>ST</sup> ANNUAL SOCAL LITIGATION CONFERENCE**

**KENDALL MACVEY, ESQ. / STEPHEN ROACH, MAI, SRA, AI-GRS**

# Introduction

- ▶ What's the biggest appraisal spread you've ever seen?
- ▶ My record is:
  - ▶ Plaintiff = \$330,000
  - ▶ Defendant = Top scenario - \$1.2 ***billion***

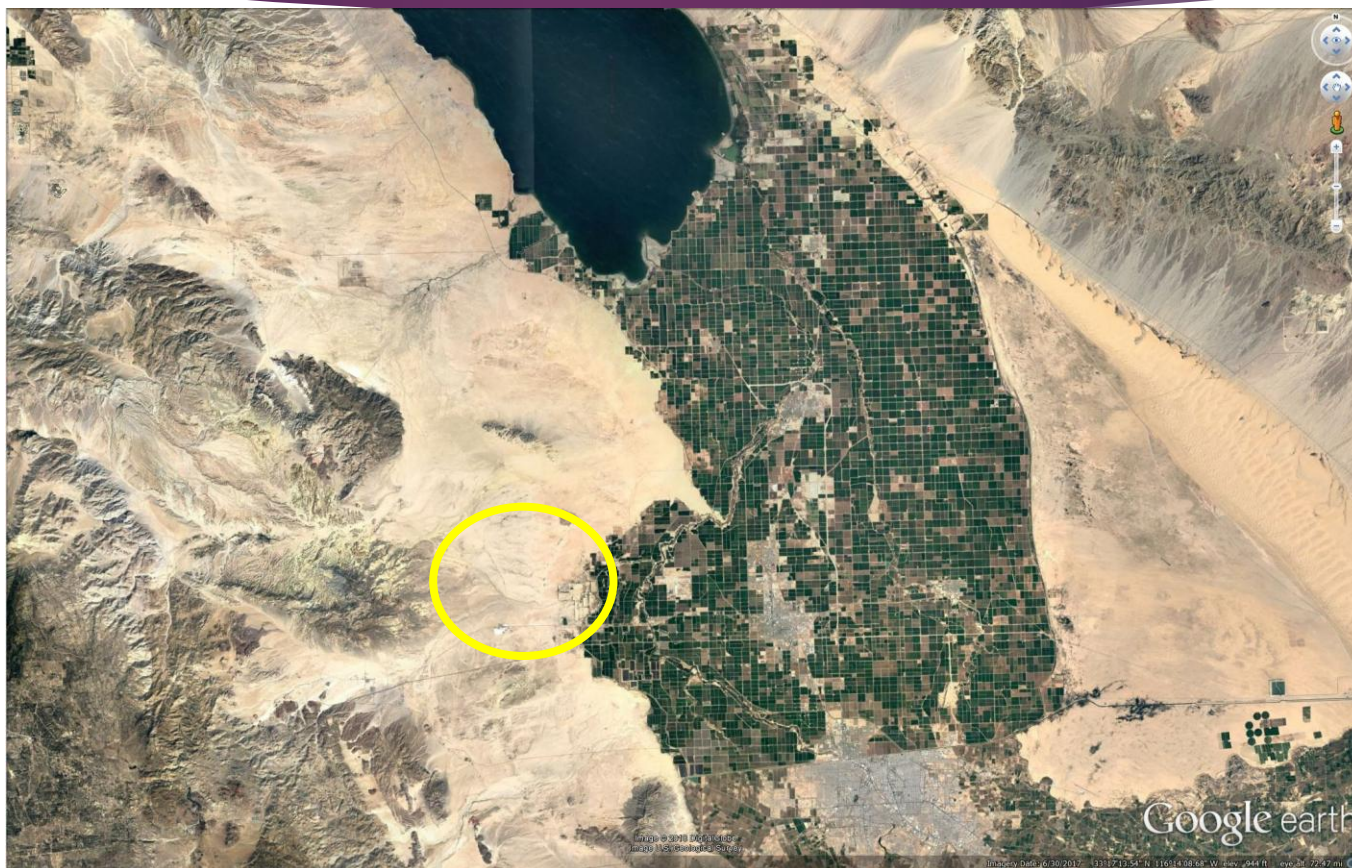
# Causes of Disparity

- ▶ What causes large value differences for high-value properties?
  - ▶ Truly unique properties
  - ▶ Larger parcel determination
  - ▶ Highest and best use conclusions
  - ▶ Application of the project influence rule (what's the “before condition” and what's “the project”?)
  - ▶ Other reasons (entitlements, property rights appraised, data selection and analysis)

# Unique Properties

- ▶ The USA condemned about 2,500 acres it had leased for years for a bombing range
- ▶ The HBU was uncertain (no utilities and little growth and development)
- ▶ I valued it as a long-term hold
- ▶ The owner valued it based on mining a “valuable” mineral

# Unique Properties



# Unique Properties

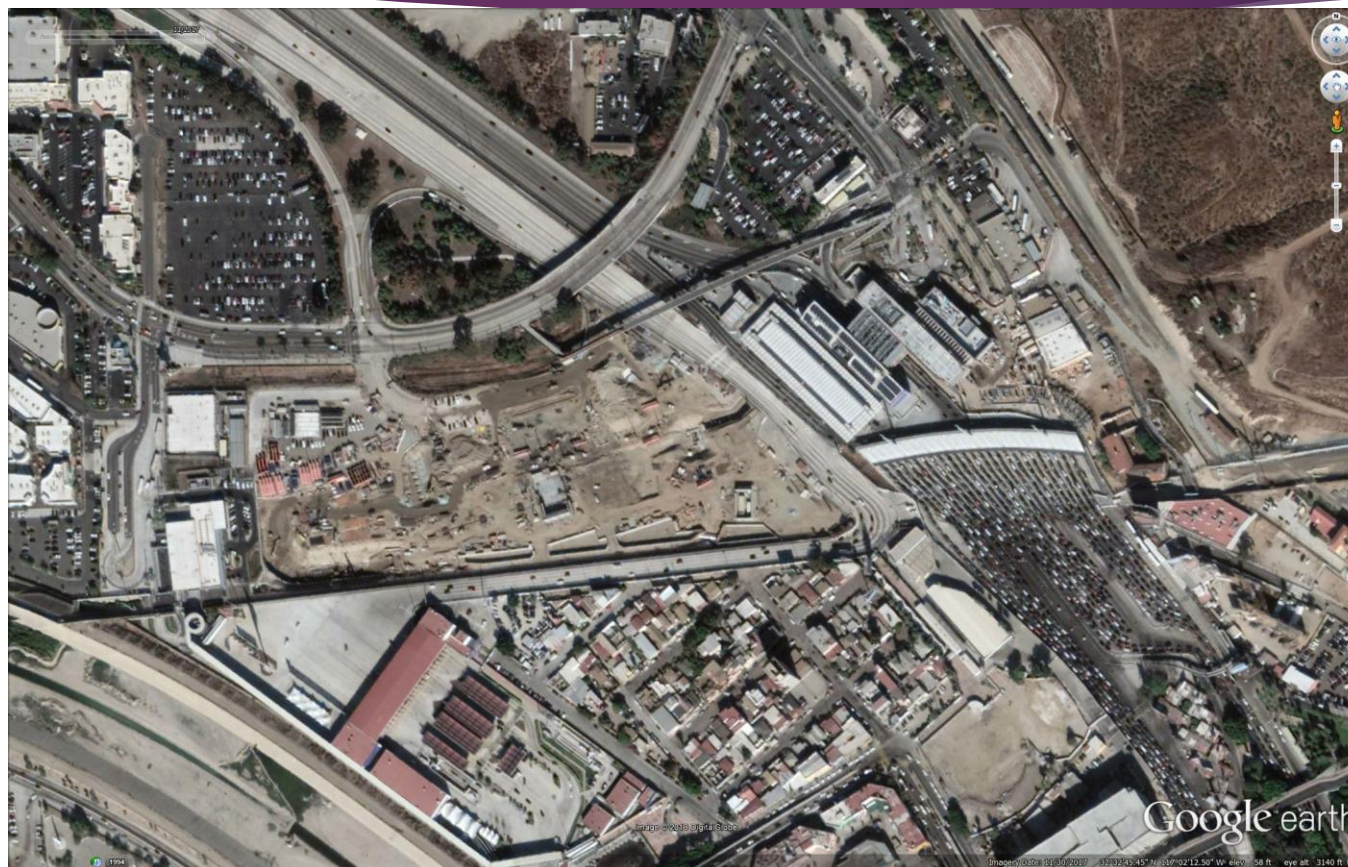
- ▶ There had been historic mining at low quantities
- ▶ DOJ's mineral expert said
  - ▶ The mineral wasn't actually the right one
  - ▶ It didn't occur in a marketable quantity
  - ▶ There was no provable demand
- ▶ The expert's opinion was critical to successful resolution of the case

# Unique Properties

- ▶ The subject was a border-adjacent duty free shop with parking.
- ▶ It was the **only** property in the area with direct southbound vehicle access to the border
- ▶ Land sales in the area are not really indicative of the value of this unique site



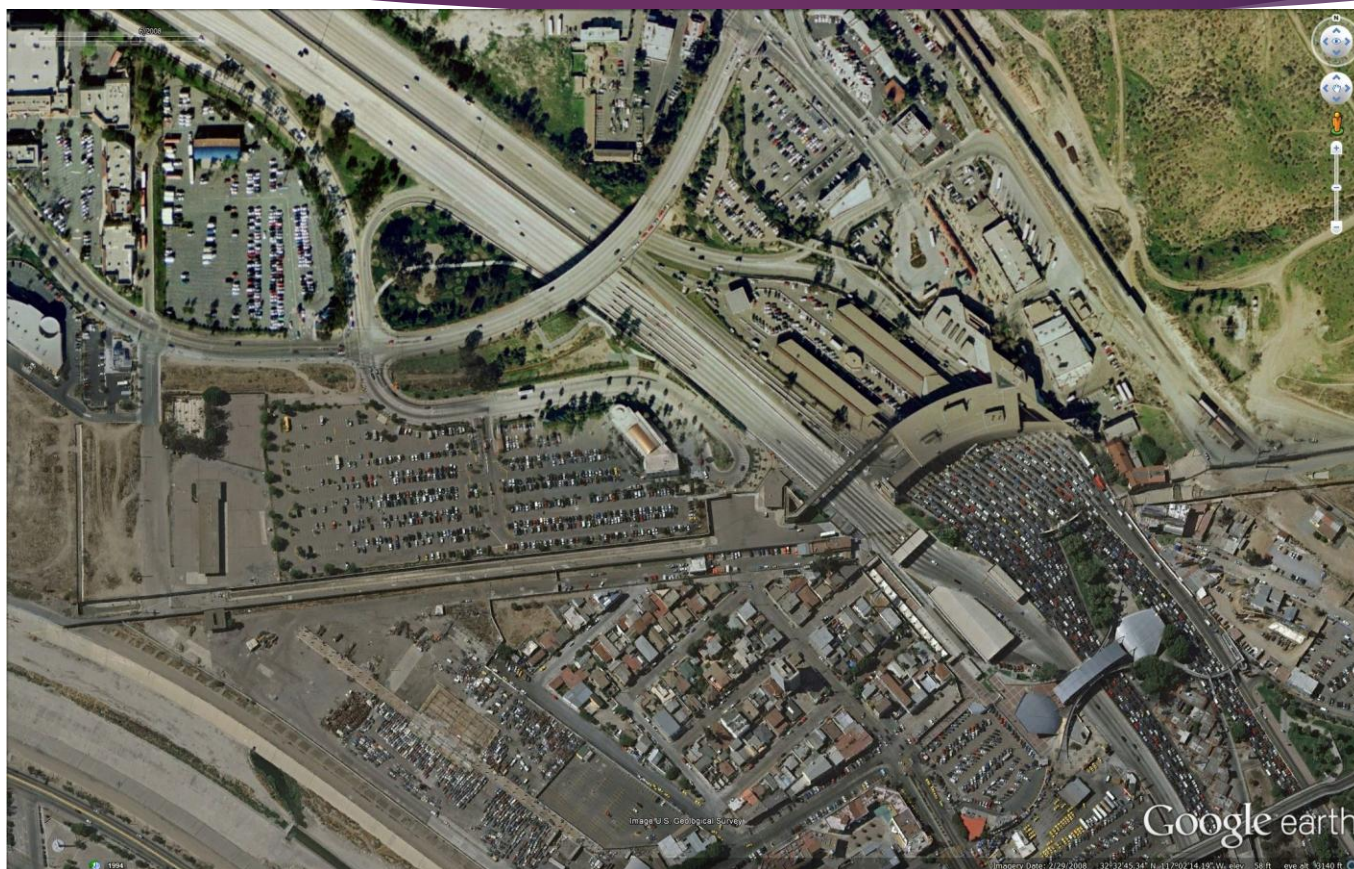
# Unique Properties



2017  
Aerial



# Unique Properties



**2008  
Aerial**

# Unique Properties

- ▶ While loss of goodwill isn't compensable in federal acquisitions, the benefits of the unique location are
- ▶ There was **lots** of provable demand in this case
- ▶ We likened it to a “beachfront” property, and looked for other unique locations. (Other port properties, airports, etc.)

# Larger Parcel Determination

- ▶ The determination of the larger parcel is a critical first step in the valuation
- ▶ Tests are the “three unities” (ownership, use, contiguity)
- ▶ Determination can impact the value of the part taken and the magnitude of damages and/or benefits

# Larger Parcel Determination

- ▶ US v. 17.69 acres – a partial acquisition for a border fence project
- ▶ I said LP was 100 acres; value of impact was \$270,000
- ▶ Owner's appraiser said LP was 500 acres; value of impact was \$95,000,000 due to loss of a planned NASCAR track



# Larger Parcel Determination





# Highest and Best Use

- ▶ HBU is the foundation of every appraisal
  - ▶ Physically possible
  - ▶ Legally permissible
  - ▶ Financially feasible
  - ▶ Maximally productive
- ▶ Legal permissibility and financial feasibility seem to be responsible for the greatest differences

# Highest and Best Use

- ▶ “When necessary for credible assignment results in developing a market value opinion, an appraiser must . . . Identify and analyze the effect on use and value of **existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand**, the physical adaptability of the real estate, and **market area trends** . . .” – USPAP, SR 1-3 (a)

# Highest and Best Use

- ▶ “Elements affecting value that depend upon events or combinations of occurrences which, **while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration**, for that would be to allow **mere speculation and conjecture** to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.” – *Olson v. United States* 292 U.S. 246, 257 (1934)

# Project Influence Rule

- ▶ “The fair market value of the property taken **shall not include any increase or decrease** in the value of the property **that is attributable to any of the following**:
  - a) The **project** for which the property is taken.
  - b) The **eminent domain proceeding** in which the property is taken.
  - c) Any **preliminary actions of the plaintiff** relating to the taking of the property.” - CA CCP 1263.330

# Project Influence Rule

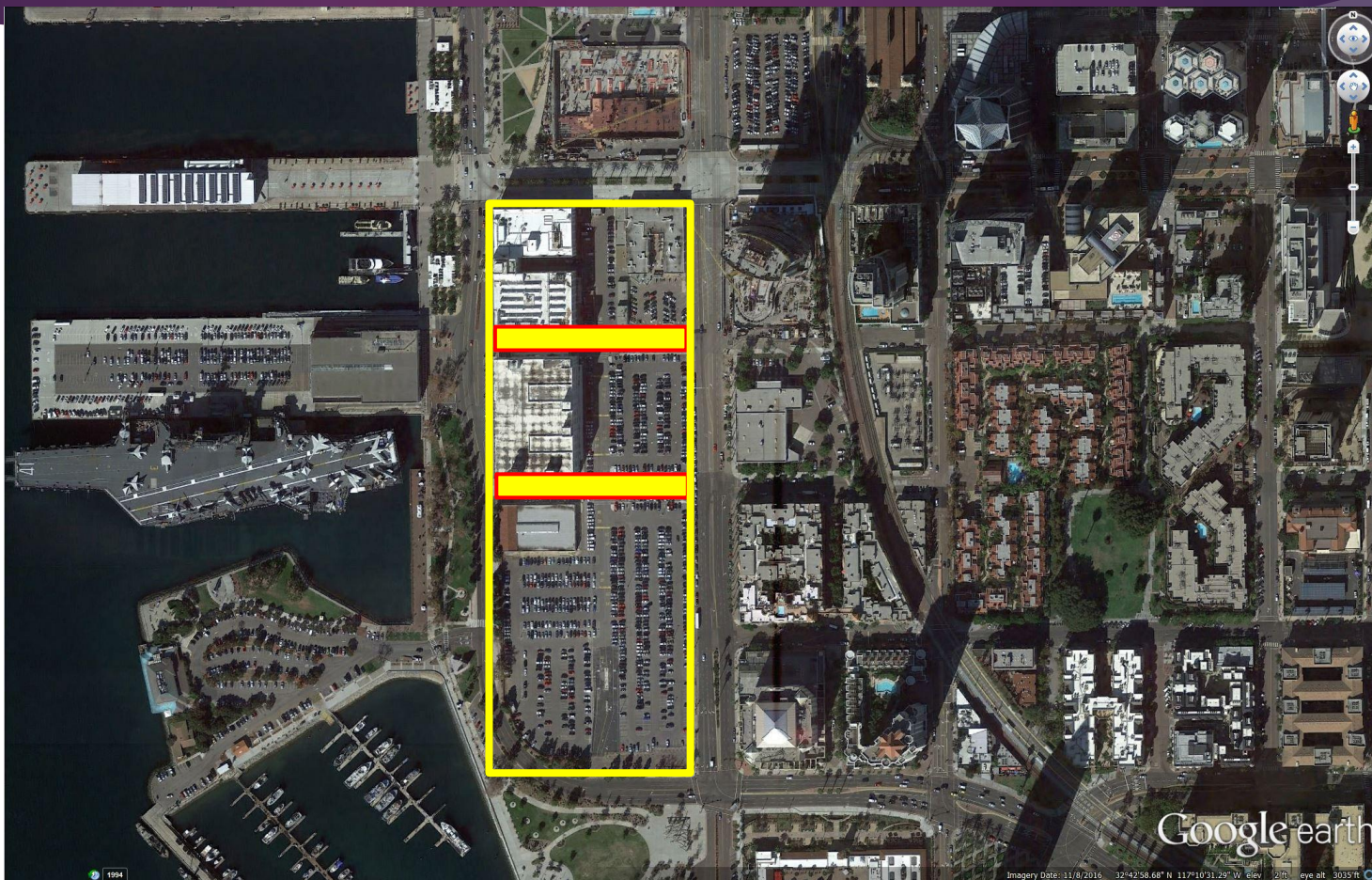
- ▶ “Any ***increase or decrease in the market value*** of real property prior to the date of valuation ***caused by the government project*** for which the property is being acquired ***must be disregarded*** in developing the appraisal. Under federal law, valuations for just compensation purposes must disregard any government project influence on a property’s market value ***once it is within the scope of the government’s project.***” – UASFLA 1.2.7.3.3.



# Project Influence Rule

- ▶ There are a number of California cases on point, including:
  - ▶ *Merced Irrigation Dist. v. Woolstenhulme*
  - ▶ *San Diego v. Rancho Peñasquitos Properties*
  - ▶ *San Diego v. Barratt American*

# Project Influence Rule



# Project Influence Rule

- ▶ I concluded that the property was legitimately limited to street use – value: \$10,000
- ▶ Owner's appraiser concluded the street restrictions were project-influenced, and valued it as developable – value: ±\$40 million
- ▶ There would have been demand for development if available and developable
- ▶ The entire issue – what's "the project" and when was the property within the scope?

# Other Causes

- ▶ Entitlements
  - ▶ can have huge value impacts, especially in coastal areas
  - ▶ Project influence rule? (*Jefferson St. Ventures v. Indio*)
- ▶ Property rights appraised
  - ▶ Fee simple or leased fee?
  - ▶ *People v. Lynbar* issue?
- ▶ Data selection and analysis)

# Other Thoughts

- ▶ The common theme is that these are complex matters
- ▶ Legal and appraisal issues often intertwine, requiring attorneys and appraisers to interact
- ▶ Other experts are typically needed
  - ▶ Engineers (civil, geotech, traffic, structural, acoustics)
  - ▶ Land planners/entitlement experts
  - ▶ Construction/cost experts
  - ▶ Other (biologist, forensic accountants, etc.)



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