

The background of the image is a dense, chaotic pile of numerous rusty, brown soil nails. The nails are of various lengths and orientations, creating a textured, metallic surface. The lighting is somewhat uneven, with some areas appearing darker than others, emphasizing the three-dimensional nature of the pile.

Appraisal Issues Concerning Soil Nail Easements

By: Michael H. Leifer, Esq.
(949) 851-7294

eminentdomainlawyercalifornia.com



The Legal Description in the Deed or Resolution of Necessity

A convenient starting point



The Resolution of Necessity must set forth the rights taken.

CCP §1245.230 – Contents of Resolution of Necessity:

- Subdivision (b): “A description of the general location **and extent of the property to be taken**, with sufficient detail for reasonable identification.”



County of San Diego v. Bressi

(1986) 184 Cal.App.3d 112

- The public agency cannot contradict or limit the scope of the takings conclusively established in the resolution of necessity. (*Bressi, supra*, 185 Cal.App.3d at pp. 121-123.)



City of Salinas v. Homer

(1980) 106 Cal.App.3d 307

- Partial fee taking for roadway improvements and underground utilities.
- City only constructed road on part of the fee take.
- Owners sought to be compensated based on potential future use of the entire fee take for road purposes.
- City asserted it had “no present or future plan to use the strip of land in question for any purpose other than that called for under the street widening project.” (at p. 310.)
- Court rejected City’s argument regarding its “intended use.”
- Compensation required based on the right of the City to change that use at any point in the future. (at p. 312-313.)
 - Actual present use (underground utilities) was not determinative.
 - Rights taken for something other than subsurface utilities that caused the damage.



Examples of Legal Descriptions of Shared Right-of-Way

- Deed Reserving Soil Nail Easement to Public Agency:
 - **“RESERVING to the [public agency], an easement for soil nail purposes upon, over across and under a portion of the above-described land, described as follows: . . .”**



Examples of Legal Descriptions of Shared Right-of-Way

- Resolution of Necessity taking Soil Nail Easement
 - “An easement for soil nail purposes . . . described as follows: . . .”



Examples of Legal Descriptions of Shared Right-of-Way

- Resolution of Necessity taking Soil Nail Easement

- “An easement for soil nail purposes . . . described as follows: . . .

“The [public agency], its successors and assigns, and their respective agents and assigns, shall have the right to directionally drill into the subsurface of said real property hereinabove described for the purposes above set forth, from lands other than said property, without, however, the right to use or drill through the surface of said property or drill in such manner as to endanger the safety of any improvements that may be constructed on said property.

“Owner, his successors and assigns, shall retain all surface rights of the above-described easement area and rights to build permanent structures thereon. **All costs incurred for improvements made by the Owner, his successors and assigns, and such use shall not unreasonably interfere or act inconsistently with the rights of the [public agency], its successors and assigns, and the design and construction of any and all improvements to the easement area shall be first approved by the [public agency], whose review will not be unreasonably withheld.”**



Examples of Legal Descriptions of Shared Right-of-Way

- Easement for Freeway Structures:
 - “. . . An easement and right of way for freeway purposes to construct, replace, reconstruct, inspect, maintain, repair, operate or remove an overhead freeway bridge and/or ramp, supporting columns and footings, including any and all appurtenances thereto, over, under, upon and across the easement area, together with all necessary and convenient means of ingress and egress to and from the easement area and all abutter’s rights of access to and from owner’s remaining property to the freeway bridge and/or ramp.”



Examples of Legal Descriptions of Shared Right-of-Way

- Easement for Freeway Structure (contin.):

The property owner, its successors and assigns, will have the general right to use and enjoy the area of land under the aerial easement. The **general right to use** and enjoy said land by owner, its successors and assigns, shall however, be **subject to the following limitations and conditions:**

1. **No use** may be made of the area of land under the aerial easement hereinabove described which would impair the full use and safety of said freeway structure, its foundations or supporting element, or would otherwise interfere with the free flow of traffic thereon or would unreasonably impair the construction, replacement, reconstruction, inspection, maintenance, repair, operation or removal thereof.

2. **No use** may be made of the area of land under said aerial easement hereinabove described for the manufacture or storage of flammable, volatile, explosive or corrosive substances, and such substances shall not be brought onto said land except in such quantities as are normally required for the maintenance operations of occupants of said land and except as may be transported by rail or pipelines. Installation of any pipelines carrying volatile substances shall have the written approval of [REDACTED], its successor and assigns, as to the safety and compatibility with freeway purposes and such discretion shall not be exercised in a capricious or arbitrary manner. The use of any such substances shall be in conformance with all applicable code requirements.

3. No hazardous or unreasonably objectionable smoke, fumes, vapors, dust or odors shall be permitted, which would adversely affect the use or maintenance of said freeway or the traveling public thereon.

4. **No building** of combustible construction shall hereafter be constructed on the area of land under the aerial easement hereinabove described. [REDACTED], its successor and assigns, shall be given the opportunity to review and approve plans for any construction within said aerial easement area 60 days prior to said construction. No buildings, no permanent structures, and no advertising displays, may be constructed within 2.5 meters of the undersides nor within 4.5 meters (measured horizontally) of the sides of said freeway structure without the express written approval of [REDACTED], its successor and assigns. [REDACTED], its successor and assigns, shall have the discretion to determine whether such proposed construction will be inimical to or incompatible with the full enjoyment of the public rights in the freeway or against the public interest, but such discretion shall not be exercised in a capricious or arbitrary manner.

Examples of Legal Descriptions of Shared Right-of-Way: Is it really shared?

Remember, when we get married, what's mine is mine, what's yours is ours.



som^{ee}cards
user card

- Resolution of Necessity both takes property interests and gives them back.
- Statutory scheme, Resolution of Necessity or both then take them back again.



What rights remain with the property owner in the shared right-of-way?

Caltrans' Position: Streets & Highways statutory context controls. Caltrans in full control notwithstanding legal description.



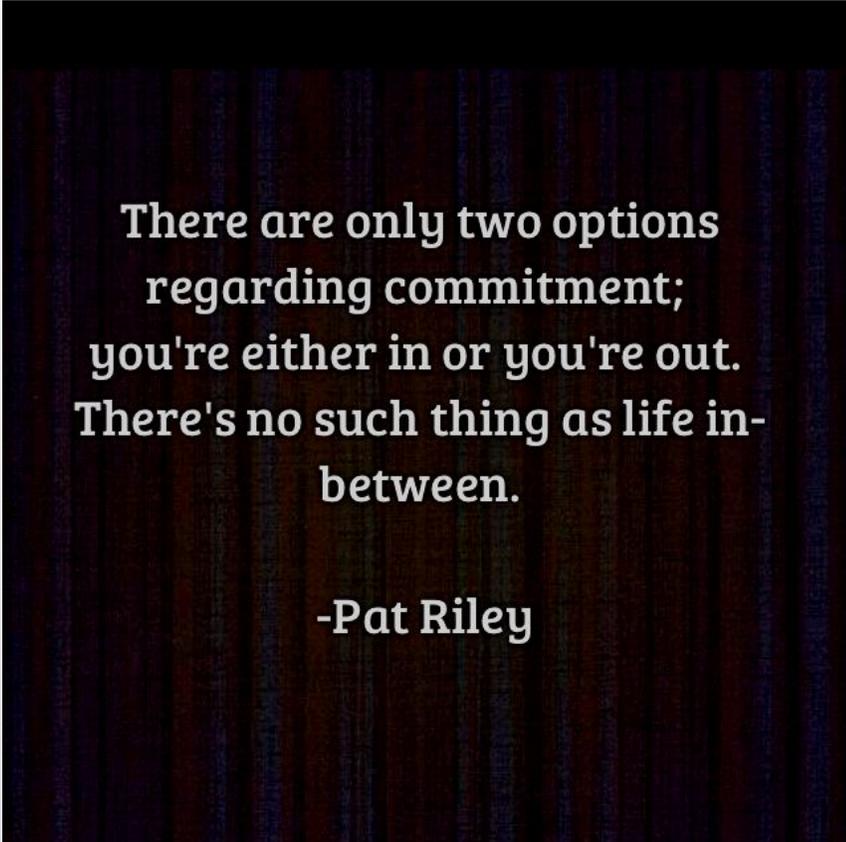
Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §90
 - “[Caltrans] shall have full possession and control of all state highways and all property and rights in property acquired for state highway purposes. . .”



Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §23:
Definition of “Highway”
 - “As used in this code, unless the particular provision or the context otherwise requires, ‘highway’ includes bridges, culverts, curbs, drains, **and all works incidental** to highway construction, improvement, and maintenance.”
- Soil nail easement area = highway.
- Freeway structure easement area = highway.



**There are only two options
regarding commitment;
you're either in or you're out.
There's no such thing as life in-
between.**

-Pat Riley



Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §92
 - “[Caltrans] may do any act necessary, convenient or proper for the construction, improvement, maintenance or use of all highways which are under its jurisdiction, possession or control.”



Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §660(a)
 - “ ‘Highway’ includes all, or any part, of the entire width of the right-of-way of a state highway, whether or not the entire area is actually used for highway purposes.”



Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §660(b)
 - “‘Encroachment’ includes any tower, pole, pole line, pipe, pipe line, fence, billboard, stand or building, or any structure, object of any kind or character not particularly mentioned in this section, or special event, which is in, under, or over any portion of the highway. . . .”



Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §670 – “Encroachments”.
 - Subd. (a): “The department may issue written permits, as provided in this chapter, authorizing the permittee to do any of the following acts:”
 - (2) “Place, change, or renew an encroachment.”
 - Subd. (b): “**Any person who does any act specified in this section without a permit is guilty of a misdemeanor.**”
- Caltrans may not allow encroachments.
- It’s up to Caltrans.
- In its discretion.
- Risky.
- Expensive.
- Time consuming.



Cal. Streets & Highways Code:

- Cal. Streets & Highways Code §721:
 - “[Caltrans] may immediately remove from any state highway any encroachment that:
 - (a) Is not removed, or the removal of which is not commenced and thereafter diligently prosecuted, prior to the expiration of five days from and after the service of the notice.
 - (b) Obstructs or prevents the use of the highway by the public.
 - (c) Consists of refuse.
 - (d) Is an advertising sign of any description . . .”
- Caltrans may “summarily remove” encroachments.



So... what rights remain with the property owner?

- The private property is servient to the public agency.
- Forced taking of right of way easement is not “sharing.”
- The private property owner’s use of the “shared” property is subject to discretion of the public agency.
 - Can be 100% at risk.
- Subject to public agency’s discretion.
- Even if 100% of the rights are not expressly taken today, the public agency could “adjust” its use of the right of way without any further compensation.
 - City of Salinas v. Homer (1980) 106 Cal.App.3d 307, 312-313.



The appraisal approach to “shared right of way”

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The present is uncertain. The future is uncertain.



- “Live” right-of-way on the shared private property is perpetual.
- The remainder is right of way. The right of way is the remainder.
- Perpetual forced relationship for operation and maintenance of a critical freeway structure.



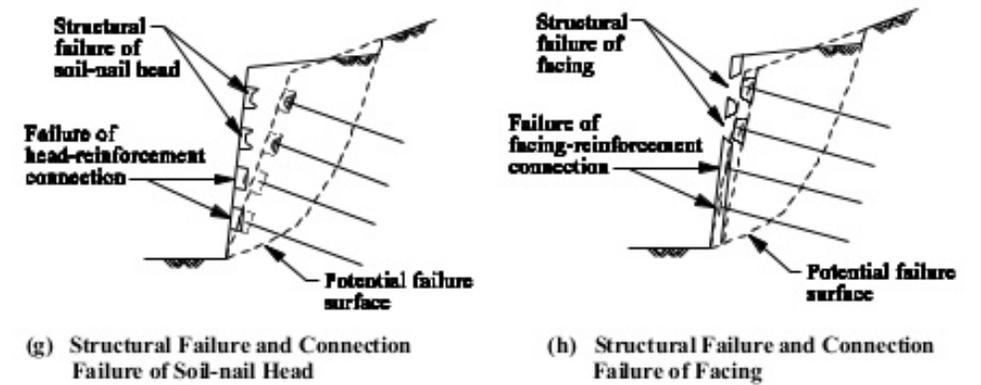
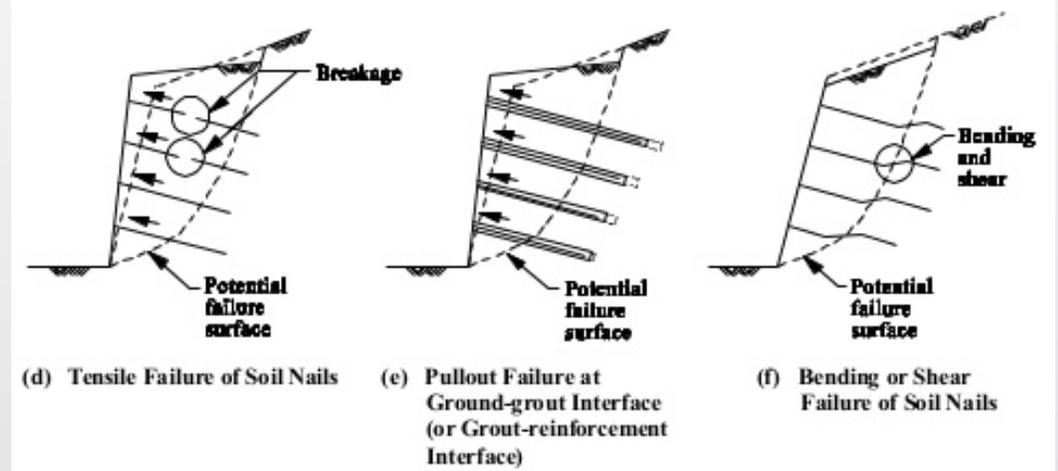
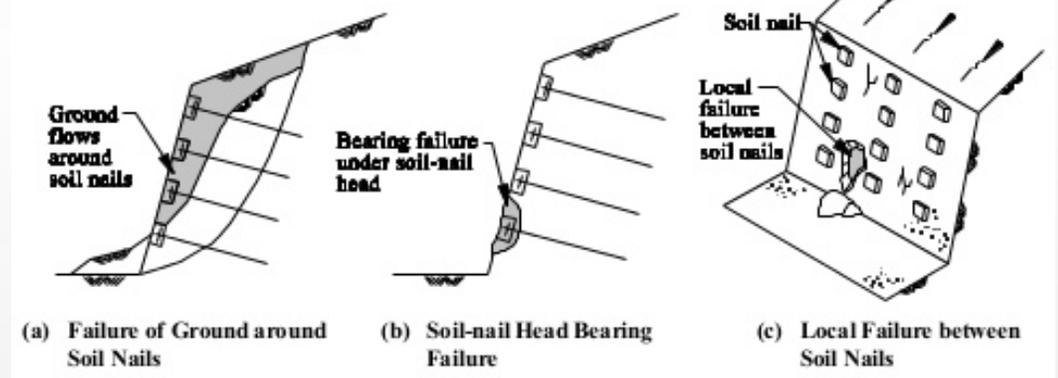
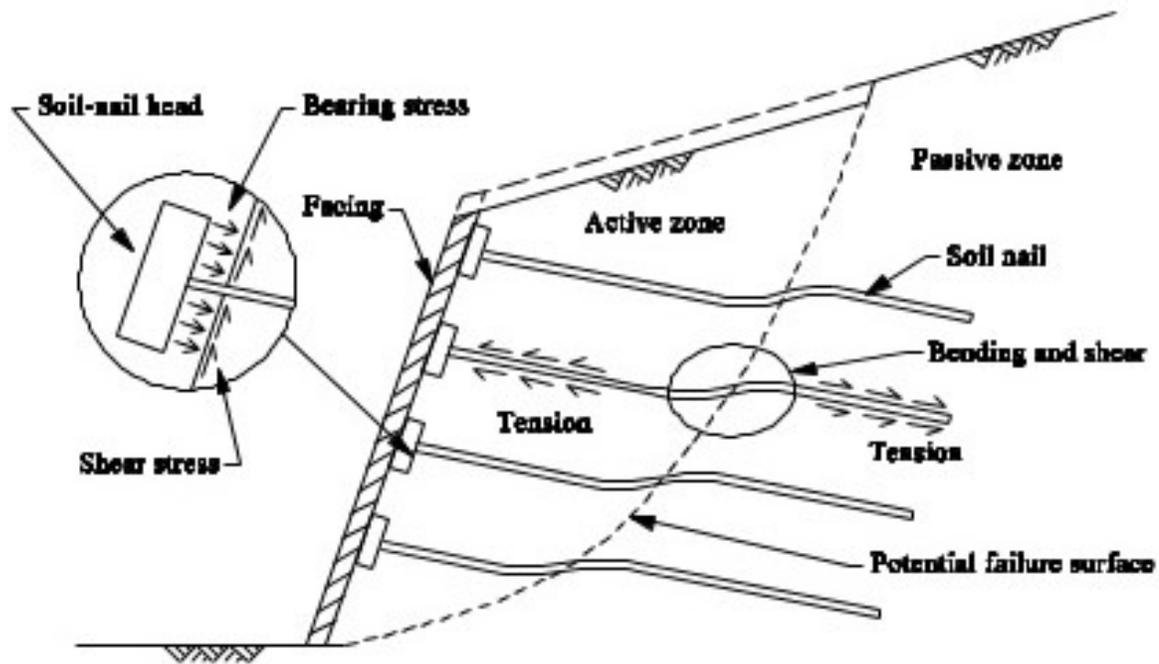
Future is uncertain and risky

- Legally: the private property remainder is part of the operating right of way/freeway.
- Factually: right of way structures can fail– design, implementation, maintenance, replacement.
 - Landslides of slopes owned/maintained by public agency.
 - Freeway collapse (earthquakes, tanker fires, etc.).

Future is uncertain and risky

- “soil nails” —relatively new in eminent domain world.
 - Subject to failure.
 - Engineering is based **on the soil condition of the adjacent property.**
 - Hardware is subject to deficiency.
 - Construction is complex.
 - Designed properly?
 - Implemented properly?
 - Issues arise during construction.
 - Techniques have to adapt and change during construction.
 - Longevity?
 - As-built information unavailable.







Future is uncertain and represents risk

- Private property owner is “sharing” a public structure and right-of-way that can fail, that must be maintained and/or replaced.
 - Experience: Public agency may deflect blame.
 - Property owner is subject to criticism if structure fails.

Future is uncertain and risky

- Private property owner's relationship with the public agency likely to get worse after the eminent domain case.
- Private property owner's time to obtain compensation is based upon appraisal analysis recognizing lack of remaining legal rights and abject inequality of bargaining power.



So, how should the appraiser approach these “shared” uses?



- Appraiser must consider
 - Uncertainty is certain. It exists now. Exists perpetually.
 - Public agency’s rights are dominant and legally may evolve without further claims for compensation.
 - Inequality of bargaining power concerning further shared easement.



Private property owner only has one time to get compensated

- Jury in eminent domain case “must ‘ . . . Once and for all fix the damages, **present and prospective**, that will accrue’ ” from the takings.
 - County of San Diego v. Bressi (1986) 184 Cal.App.3d 112, 123.
- The fair market value of the condemned property, together with severance damages and all other reasonably foreseeable damages resulting from the condemnation, must once and for all be fixed in the condemnation proceeding.
 - Albers v. County of Los Angeles (1965) 62 Cal.2d 250, 265.
- The General Rule: Property owner is estopped from subsequent claims for damage or compensation based on the takings in the Resolution of Necessity.
 - Ellena v. State of Calif. (1977) 69 Cal.App.3d 245, 250. 251, 254.



- Once a soil nail easement is forced on the subject property, the eminent domain is just the first battle.
- From an appraisal perspective, the war has been won by the public agency.
- Rights are perpetual.
- Owner v. Public Agency:
 - Legal rights are not equal.
 - Transactionally the parties are anything but equal—public agency has the resources of various departments at its disposal.
 - Financially not equal, of course.
 - Longevity not equal.