

**ORAL ARGUMENT – 1/30/02**  
**01-0168 & 01-0150**  
**GUADALUPE-BLANCO RIVER AUTHORITY. VS. KRAFT**

CARROLL: The reason that pipeline easements do not change the highest and best use of the land that they occupy is because people do not pay more for land with pipeline easements on them than they do for land without pipeline easements on them.

It is fundamental to the concept of the highest and best use that there must be an associated value with that highest and best use. You cannot have a highest and best use without there being an associated value. And that value must be present in the market place, and the market place does not demonstrate that existing pipeline easements result in land selling for any more money.

Now it is true that when a private pipeline company without the power of eminent domain crosses a landowner's property, that landowner is going to attempt to recover as much money as he can because of that pipeline project. And there's nothing wrong with that.

But after the pipeline is in the ground and someone is interested in buying that particular piece of property, they are not going to pay that landowner any more money because the pipeline is on it. The pipeline benefits a third party such as Koch Pipeline Co. or Exxon Pipeline Co., not the owner of the land. And accordingly, an existing pipeline easement creates no value to the land and therefore does not change the highest and best use. And the evidence in this case I think clearly demonstrates that that is what the situation is.

HANKINSON: You would agree the highest and best use under Texas law is usually a fact issue?

CARROLL: It is I think usually a fact issue, but it must be based on reliable, relevant testimony and on testimony that's in accordance with the rules of law.

HANKINSON: If you agree that it's a fact issue under what circumstances would it not be a fact issue and what would be the test that we would apply to make that determination?

CARROLL: In this case if you could show that people buy land with existing pipeline easements on them and pay more money for the property because of that existing pipeline easement, then you could say that there's a highest and best use. But unless you can show that people buy land and pay more money, there's more value associated with a pipeline easement, then the testimony is unreliable.

HANKINSON: Well we're back to the admissibility of the evidence. My question is does - I'm really focusing on whether it's a fact issue or a legal issue of highest and best use. And my

understanding is under Texas law on condemnation highest and best use is typically a fact issue. And I understand that part of the way that you have phrased the issue in this case and the way the case has been briefed is that you claim that highest and best use cannot be for a pipeline because certain requirements have not been met. Which sounds like to me you're changing it into a legal issue as opposed to a fact issue.

CARROLL: I think it is a legal issue.

HANKINSON: Okay. And so my question is, under what circumstances then do you think the highest and best use becomes a legal issue as opposed to a fact issue?

CARROLL: When there is no evidence whatsoever that the highest and best use creates a value. The alleged highest and best use creates a value. That is a fundamental aspect of highest and best use. And when that's not the case there is none. In this case, Mr. Kangieser testified, he admitted I would submit that his opinion of highest and best use, he claimed that the Koch easement, which had been on the Zwahr property since the 1950's, changed the highest and best use of the property and made it for right of way or easement purposes. But he simultaneously testified that it created no value on no less than 5 occasions, on both cross examination and redirect examination, he testified that until Exxon approached Koch and got Koch's permission to overlap the easement, in otherwise until after Exxon's project came along, the value of the Zwahr's interest and the land covered by the Koch easement was nominal or of no value. It was only upon the advent of Exxon's project that land which was otherwise worth \$1000 an acre became worth \$35,000 an acre.

Testimony of other witnesses in this case confirms that. Mr. Allen, one of our witnesses, testified that there is no appreciable difference in value between pipeline easements and tracts not containing pipeline easements. Mr. D \_\_\_\_\_ testified that there is no market data to indicate that rural agricultural property sells at a different price with or without pipelines. And most persuasively is Mr. Zwahr's testimony. He bought this 49 acres in Dec. 1989, approximately 5 years before the taking, and he paid \$900 per acre for the property. He didn't pay \$35,000 an acre for the land covered by the Koch easement. And he testified very clearly, he was aware of the Koch easement when he bought the property, but it made no difference in his decision making. That's exactly the reality here: people don't pay more for land because there's a pipeline easement on it. The only reason according to Mr. Kangieser what caused this land to become worth \$35,000 an acre instead of \$1,000 an acre is the Exxon project. And actually I think the most telling evidence of that is Mr. Kangieser's testimony on what the situation was after the taking. Mr. Kangieser said after the taking was completed, and the Zwahrs had been paid, the value of the land to the Zwahrs covered now by two pipelines, both the Koch easement and the Exxon easement was zero.

If pipelines create a highest and best use, which create a value 35 times what the land value otherwise would be, then why isn't there value remaining after it's over? Now we've got two pipelines. The answer is, there's no change in highest and best use because there's no value, and therefore, this theory is wrong.

HANKINSON: The basis for your complaint here is that all of this testimony should have been excluded during the trial under rule 702?

CARROLL: That's correct.

HANKINSON: Would you tie what you've all just talked about back into Rule 702 and tell us what the legal analysis is under 702?

CARROLL: This is a case under rule 702 based not simply on the fact that the appraiser's testimony was unreliable and not relevant, but also based on the fact that it was not lawful. That it was based on project enhancement, which is the rule that's been followed by this court in this state for 100 years, which says that compensation cannot be increased or decreased by a change in market value attributable to the project itself. So my argument is, this is to some extent the reason it's contrary to Rule 702 is because the TC allowed the witness to testify in contravention of a rule of law.

HANKINSON: And that made the testimony irrelevant.

CARROLL: And unreliable.

HANKINSON: Then under your analysis do we need go no further than looking at the project enhancement issue and whether or not the opinions comported with Texas law on that issue? Does that resolve the case?

CARROLL: I think it does, but I think there's even a more important issue in this case than project enhancement.

HANKINSON: I understand there's another issue you would like for us to talk about. But my question is, did that resolve the case?

CARROLL: I think that resolves the case. Because if the property had no value according to Mr. Kangieser before Exxon's project began, - if Exxon's had never crossed the property, according to Mr. Kangieser, the value of that Koch easement was worth nothing.

HANKINSON: I understand why that would be irrelevant under the applicable market value test under Texas law for a partial taking. Explain to me why it would be - you said it's also unreliable. Why would it be unreliable under Gammill and Robinson? I'm having a hard time making that connection.

CARROLL: Let me explain it this way. And it has to do with the measure of damages. And it has to do with the data that was brought. The pipeline \_\_\_\_\_ method which was approved by this court, although the court didn't use that language, it's exactly what they approved says, that one or more existing pipelines necessarily makes the highest and best use of that land for right-of-

way purposes. And secondly, that use pipeline easement sales to determine the value.

It is important to understand what the proper measure of damages is in a case like this, because I think that will answer your question. Adequate compensation has always been measured in Texas by the landowner's loss and value and not by any gain to the condemner. Not by the value of the condemner's use. And adequate compensation for a portion of the land taken where the landowner retains some beneficial use in that portion of the land taken is measured by the value before the taking without considering any of the uses to which the landowner is going to put the property less the value of the land after the taking where you do consider the uses to which the landowner puts the property.

The problem with this methodology is that it is measuring the wrong measure of damages. It is measuring the value of what Exxon is gaining not what the landowner is losing. Mr. Kangieser stated at vol. 3, page 86 of the record, that his assignment was to estimate the value of the easement rights being acquired by Exxon. I would submit nothing is further from the truth. The assignment should have been what's the value of the Zwahr's property before Exxon shows up. And then you subtract from that how much loss in value has occurred because of the rights Exxon has acquired.

In their brief the Zwahr's asserted market value is determined by utilization of the property taken. And they are entitled to recover the market value for a highly hazardous specialized use. That is what pipeline easement sales measure, the market value of a specialized highly hazardous use. But they are not measuring the loss and value to the Zwahr's property. The Zwahr's property is worth approximately \$1,000 an acre. Mr. Kangieser said it got no benefit from the Koch easement. The value did not increase. So the proper measure of damages here is to determine what the Zwahrs had before and then how much that value has decreased. What happened here is Mr. Zwahr's property is worth \$1,000 an acre and somehow it becomes worth \$35,000 an acre because of Exxon's project, which is unlawful. Not simply irrelevant.

HANKINSON: Nothing that you have argued in this case is inconsistent with Bower is it?

CARROLL: I do not believe so. With one exception. I do not think - again the test goes back to would someone pay more for Mr. Bower's property because he used it...

HANKINSON: Mr. Bower was marketing pipelines apparently, and according to the facts that are cited in the case it severed that part of his property and was out trying to make money off selling pipeline easements.

CARROLL: Very true, which is certainly distinguishable from our situation. I think the evidence of value has to be, because Mr. Bower is using that property in that way, would someone pay Mr. Bower more money for that portion of his property? If so, it had more value. Now what I disagree with the Bower court is that then allowed the appraiser to use pipeline easement sales to determine that value, which reflects project driven value, which is the Louisiana SC, are not reliable

indications of value, and which are not measuring the loss to the landowner but are measuring the value to the condemner. They are based on the use to which the easement is being put.

HANKINSON: I'm a little confused about the record in this case based on the briefing. Did the Zwahr's expert in fact use pipeline easement sales as part of his methodology? Your reply briefing indicates their references to that were outside the record.

CARROLL: Defendant's ex. 34 contains the sales used by Mr. Kangieser. He used 6 comparable sales.

HANKINSON: And those are pipeline easement sales?

CARROLL: Those are pipeline easement sales. Those were the comparable sales he used. The principal problem with that is it's the wrong measure of damages. But he did use 6 sales and they are contained in that exhibit.

HANKINSON: But the additional reference is in the respondent's brief to other sales by Exxon and I think it was HL&P are in fact outside the record. Is that the distinction?

CARROLL: The Exxon sales are outside of the record. An HL&P representative testified at the trial, but he specifically said his testimony was not related to fair market value. He was testifying to a rate schedule that HL&P uses. Then Mr. Kangieser, two of his comparable sales were HL&P sales to various pipeline companies.

ENOCH: Pipeline sales. Are those in lieu of condemnation? How do you get to a pipeline right-of-way sale?

CARROLL: Private pipeline companies who don't have the power of eminent domain do go and buy easements so they can install their private pipeline. And they buy easements from landowners. And that is the source of the private easements sales that Mr. Kangieser used.

ENOCH: And you say that's not appropriate to be used - if you have a track record of pipeline easement sales between willing buyers and willing sellers, you're saying that's not an appropriate measure when the gov't takes an easement from your land?

CARROLL: It's not an appropriate measure because it's measuring the value of the pipeline company's use. It's measuring as Mr. Kangieser said his job in this case was the market value of the rights being acquired by Exxon.

ENOCH: But if I go buy a residential house is not the willing buyer and willing seller, or adjusting their values based on what the value is to me versus the value to them to not sell?

CARROLL: I dispute that it's a fair market value transaction. Because I do not think as

the court restated in Sharboneau, I do think the pipeline company is under a compulsion to buy. As the Louisiana SC found in Exxon v. Hill there are lots of extraneous factors that are involved in that. But the principal problem with it is, it is measuring what a pipeline easement is worth. I would submit to the court that's not the correct question here no more than if the Texas Dept. of Transp. condemns a highway is it the proper measure of damages to determine what a highway is worth, or what a highway project is worth. No more than if an independent school district condemns land for a school is a proper measure of damage to determine what a school projects worth. The proper measure of damages is, what's the landowner's value before the project shows up and how much has that value been diminished? That's not the same thing as what the value of a pipeline easement is.

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RESPONDENT

LAWYER: The nexus of Texas imminent domain law originates in art. 1, §17 of the Texas constitution. Basically it says, no person's property can be taken, damaged, destroyed or apply to a public use without payment of adequate compensation. The law in Texas equates adequate compensation to market value. Both sides in court I think agree on the definition of market value. It is simply what a willing buyer will pay a willing seller.

If we look very closely at which aspect of the constitutional mandate that evolved here, what Exxon presents as very complicated and very \_\_\_\_\_ becomes very simple. What is being acquired in this proceeding is an easement.

OWEN: Koch had already paid for a pipeline easement. And they had the exclusive right to grant or allow somebody else to come in and use this same property as a pipeline easement.

LAWYER: Exclusivity would be contested. The law in Texas is that in order to be exclusive it must on its face claim exclusivity. What is taking is an easement. What we have to value is an easement. Pipeline companies in Texas cannot take feet. And there's a reason for that. They are taking an easement. What I instruct my appraisers to appraise is the value of an easement.

HANKINSON: But Texas law requires that we value the market value based on highest and best use which is the actual use that the property is being used for at the time of the taking. By looking at what Exxon wants to do with the property, you shifted to a different focus. I understand that the landowner can rebut the current use with certain testimony, but in any event it seems to me you shifted the focus to the future use as opposed to the actual use which is the starting point for highest and best use. So how do you square that with Texas law?

LAWYER: Well Texas law actually creates a presumption in favor of the existing use being the highest and best use. The existing use was a pipeline easement.

HANKINSON: And your expert testified that it wasn't worth anything.

LAWYER: My expert testified that it was worth something too. The fact that he's asked the same question 12 different times and they get answers, and they like 6 of them, doesn't change the fact that he said the property had value before Exxon came along. It's a potential value that awaits a buyer.

OWEN: What does the evidence show about whether your clients could have allowed another pipeline to come in here without Koch's permission?

LAWYER: It wasn't an issue.

OWEN: They couldn't have done it right?

LAWYER: I would have said they could. You have instances, for instance, where it's well established practice of HL&P who has power line easements to sell somebody the right to lay a pipe in their power line easement. However, that pipeline company also has to pay the owner of that underlying fee.

OWEN: I guess that is where I was getting to. Exxon paying both Koch and your clients. And presumably they are paying Koch for the right to lay the pipeline in the pipeline easement. And they are paying your client for the use that your clients were making of the property separate and apart from \_\_\_\_\_.

LAWYER: I think the record will reflect there was no compensation paid to Koch.

HANKINSON: I'm still confused about how we tie in your approach to wanting to look at the value of the easement as opposed to looking at the existing use of the property and the value associated with it which is what we are required to do under Texas law. And your clients were using it to farm cotton.

LAWYER: I understand.

HANKINSON: So I need help with that, with that analytical piece.

LAWYER: Both experts of Exxon testified that by virtue of the Exxon easement the property was depreciated either 90% according to one of them or 50% according to the other. Exxon's appraisal approach was average acreage values. That is, they appraised 47 acres. This is a 1.01 acre taking. They took 1 acre value as the value of the easement. However, that technique is specifically prohibited in Texas under both the State v. ADSS Properties, Inc., and State v. Meyer. If you have two separate distinct economic units, you cannot average value.

HANKINSON: But as to your client, this was not a separate economic unit. They were using the entire surface of the property for cotton farming.

LAWYER: That is correct. But as to the Koch easement there are significant constraints on what we can in fact do with it. We can't impound water. We can't dig ditches. We can't put in drainage structures. We can't do anything that would impair or place that pipeline in the ground at risk. Exxon's experts were instructed to disregard the presence of the co-client.

HANKINSON: But why doesn't that make the property worth less rather than worth more if your client is restricted of the Koch easement from doing various things with the property?

LAWYER: What it does is direct the market inquiry to the value of easements, which is a separate and distinct value from cotton farming. I can give you an example. Most of you gentlemen are right handed. You will carry your wallets in your right hip pocket. I want to tell you, I want to rent left hip pocket. One time payment of perpetuity for ever and ever. What's the first thing you are going to want to know? Wouldn't you be a little curious about what I'm going to do with it?

HANKINSON: I'm still having a hard time figuring out how valuing the easement fits under existing Texas law on how we determine just compensation for property that's been condemned. Valuing the future use that the entity condemning wants to do rather than valuing under the market value test that we must apply? And that seems to me to be the fundamental question.

LAWYER: My base contention simply is, they are not taking fees for the value of the land per se is irrelevant. An easement is simply the right to use the land of another.

OWEN: That's what I don't understand. You're saying you can't even dig ditches out there. Certainly your client couldn't have come and allowed Exxon to dig on top of Koch's pipeline without Koch's permission. So it wasn't your client that had to give the permission to dig. It was Koch. You didn't have the right to give Exxon the right to dig. The clients did.

LAWYER: It doesn't matter once the right is given. We are entitled to compensation for Exxon placing the pipe on our property.

OWEN: I think the point you made a minute ago with the pocket example, was that they put in a high pressure dangerous line. Isn't that damage to the remainder which is a separate and distinct question from the value of what your clients owned in the easement tract?

LAWYER: Not at all. It's a question of the level of compensation required before you arrive at a willing seller. The utilization in part sets the price. If I use that pocket to keep a brand new fresh laundered handkerchief, you would have one set of values. On the other hand, if I want to put a very thin glass vile of nitroglycerine in it, you would have another one.

OWEN: But if you sold the entire piece of property, you don't care what use it's put to. The concern there is how that's going to affect your adjoining remaining property. So we're talking about remainder damages. They are not the value of the pipeline easement itself.



LAWYER: Mr. Kangieser on behalf of the landowner testified to 6 pipeline sales. Among those were 2 sales designed for specific purposes. One of them was to prove that pipeline easements had a much higher value than the adjacent properties. In both of those instances, the landowner had sold multiple land rights with a per line \_\_\_\_\_ clause with a CPI. Those sales were also designed to illustrate the fallacy of a pipeline company taking an easement for a one time cash payment for perpetuity. I can't offer any explanation why they get a perpetual easement. It's not fair to the landowner. But they do. They won't sell them. Exxon will not sell a perpetual easement. Exxon sells on an annual rental \$62.50 per rod(?) with an annual cpi. HL&P won't sell a perpetual easement. They sell a 30 year term. We should be able to periodically renegotiate.

OWEN: But the point here is Koch already had a perpetual easement and it was Koch that controlled the rights to dig on that easement, not your clients.

LAWYER: Koch has control over the easement to the extent necessary to protect its line. Beyond that it doesn't have the type of controls you apparently think they do.

OWEN: But the bottom line is, could your clients have allowed Exxon to go out there and build the pipeline over Koch's objections?

LAWYER: My answer would be yes.

OWEN: Where is the evidence in the record to support that?

LAWYER: Not in the record. The base law is simply you can't interfere with the existing pipe. That doesn't mean you can't use the easement. And most of them are specifically restricted. There's a whole shopping list of things that the landowner retains the right to do. And one of those is place pipelines.

OWEN: This easement doesn't say that. Is that correct?

LAWYER: No. It doesn't. That's what all your judgments say when they plea the specific right like Exxon. When they pled to take this easement they left us certain rights. One of them is the right to cross the easement with pipes. Although I don't think that Exxon's reservation of rights we would be permitted to go parallel and adjacent within 10 feet. They took a 50 ft. easement, and 30 ft of it we're specifically at liberty to lay additional pipes within. Exxon facing its own easement is 5 ft.

And I would like to point out one thing. Your synopsis brochure indicates that this is a profession of pipeline corridor values. That's not my terminology. And that's not my expert's terminology. He specifically denied that this is a corridor. It doesn't have to be a corridor.

HANKINSON: So you're not claiming that Bower is a case that is relevant to our determination of the issues here?

LAWYER: Bower has been discredited in the general utilization because 1) it does absolutely no good (and this is part of this record) to try to market pipeline easements. Unless a pipeline company is going from point A to point B and crossing you it's not going to happen. No single landowner, and I represent people that have 19 continuous miles of pipeline easements.

HANKINSON: Then doesn't that completely undercut your argument that there is no market value for them? It seems to me you catch yourself coming and going on that then.

LAWYER: The market is there. The value is there. But it depends on the utilization to be made by the buyer as to which market you address.

HANKINSON: But you just said it wasn't. That Bower really is not good law and has been discredited because there really is no market for pipeline easements.

LAWYER: No. I'm saying the three prong test in Bower is not valid. And as to severance it had already been severed. It was severed by United Cast(?). The three tests are: if it's severed; if there's existing pipelines; and if there's a market for pipelines that you can demonstrate.

We have hundreds of pipeline easements sales. There is a readily ascertainable market. It is very difficult to get two.

ENOCH: The argument Mr. Carroll was making, however, is they may have sales but that is not your sales of a willing seller and a willing buyer as understood in the appraisal method. And he didn't give me any specifics, but I could think of one where you only have one buyer, a pipeline company. There's only one buyer for this kind of configuration - a pipeline company. The argument that's made is, using as an example, but this is not a willing seller and a willing buyer. The buyer is limited to buying easements and the seller is limited to selling to only people who need an easement.

LAWYER: All of the sales testified to is testified to as willing buyer/willing seller transactions. In fact, Mr. Dom \_\_\_\_\_ testifying for Exxon, brought in 16 sales on a pipeline route VASF. VASF was a private line. It was 47 miles long. There were approximately 200 transactions involved in that easement. We have all of that data relevant to the Hill argument, relevant to reliability. We have the first easements bought. Relevant to the hold out argument, we have the last easement bought. We have statistical analysis including averages.

HANKINSON: Would you respond to Mr. Carroll's argument that in fact what the record reflects is that there was nominal value associated with this until Exxon decided it wanted an easement through your client's property and that that is what gave it value, and therefore, project enhancement is at issue here and it makes this testimony as Mr. Carroll calls it unlawful.

LAWYER: I think there's a direct quote out of the record in my brief where Mr. Kangieser says, the property had the value before Exxon came along and that it didn't matter what pipeline

came along. The ultimate issue really is...

HANKINSON: So that particular 1.01 acres was worth \$36,000 before Exxon ever came along even though there's also record testimony that the entirety of your client's property was worth \$50,000.

LAWYER: It is worth that amount in the advent of a buyer coming along and wanting to buy it for pipeline utilization.

HANKINSON: And as to Mr. Carroll's argument, as I understand it, that once the buyer comes along that that means that the actual act of taking the property is what causes the increase in value and that that is inconsistent with Texas law. What is your response to that legal argument?

LAWYER: Basically my response is a condemning authority should not be able to buy it any cheaper than a noncondemning authority. That is not the overall scheme behind giving them the power of eminent domain, so that they can buy pipeline easements for cotton land prices. We sell pipeline easements all the time, but we sell them for pipeline easement prices. And the presence or absence of the power of eminent domain doesn't change what the market tells us about what a pipeline easement is worth. All projects have an influence on value. Put in a mall and see what happens to the value in the vicinity. Any project that represents a different utilization of existing lands is going to have an impact on the value of the properties both being taken...

HANKINSON: But if I own a piece of property and it is worth a certain amount of money, and then the city of Austin announces it's going to put its new dump right next to my property, obviously my property value is going to go down. Then as the landowner does that mean I'm going to get less as a result of the nature of the project or am I going to get the value of my property at the point in time that I owned it at the taking before in fact the value was impacted by the City of Austin's decision to put a dump next to my property? It seems to me it has to work both ways if that's the case.

LAWYER: It would. And it could be that if your property is suitable for dump purposes it will be worth a great deal more money than the average agricultural property.

HANKINSON: Let's just say that my property value is going to go down because of it. You want to take part of my property, the other half is still going to be sitting there right next to it, now my next door neighbor is going to be a dump. So there's going to be some damage to the remainder. And obviously if I look at the effect of putting the dump, then the city of Austin is going to have to pay me less money than if they were to give me the value of my property before the effect of the condemnation is taken into account. That's the way your rule would work as I understand it.

LAWYER: I understand. And is generally conceded that pipelines have detrimental impact on the immediately adjacent properties. By valuing the easement in accordance with the market value of easements you roll that into the value of the easement per se.

HANKINSON: Go back to my question. My question though based on what I understand the test that you want us to apply, the city of Austin is going to get to pay me less than they otherwise would have because of the effect of the dump that they are putting on part of my property that will now be the boundaries for the rest of my property. And that's acceptable.

LAWYER: Well obviously if you're going to assume the presence of the dump devaluates the property, and if you're talking about the price actually paid for the property taking for the project, that would be project influence and it wouldn't be permissible.

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#### REBUTTAL

CARROLL: Fundamentally, the pipeline corridor method approved in Zwahr is an attack on the loss and value measure of damages and the before and after method, which has been the law in Texas since Texas began.

It seeks to value the easement not based on the loss and value to the Zwahr's property, but based on what the condemnor's gained. Based on as my opponent just said utilization sets the price. Based on the use of the easement by the condemnor, not based on loss. It's inconsistent with the Carpenter case decided by this court in 1936, inconsistent with Palleo(?), and inconsistent with the West Gate decision decided by this court 10 years ago.

ENOCH: Suppose that there is a record in the deed records of people actually buying and selling pipeline easements. Through the course of the records we find and we trace that there actually is a market out there. There are people who buy and sell pipeline easements.

CARROLL: If there is a market where people buy property and pay more for it because there's a pipeline easement, then there is valid evidence to support the fact that my client ought to pay more for it.

ENOCH: I'm not sure how you show that, and maybe that's where I need...

CARROLL: The way you would show it is to compare different properties that have pipeline easements on them and that don't. And do people pay more for properties with the pipeline easements on them than they do without. But there are pipeline companies that buy easements. But that's valuing the value of the easement not the value of loss.

ENOCH: What happens to the comparables? If I have a series of transactions where people are buying 30 ft. wide, 4,000 ft. long pieces of property for pipeline easements, and I see that, and here's somebody whose got a 30 ft, 4000 ft long piece and comparable, wouldn't your argument mean that I've got to go find some raw land out here that doesn't have an easement on it and try and create a comparable \_\_\_\_\_?

CARROLL: My argument would be, that if people buy pipeline easements respecting their purposes, then that would be some evidence. But my record would be that, yes, the appropriate evidence has to be whether people buy land for more money with easements. Because if you're measuring the loss in value to the land, that's what you've got to do. Mr. Zwahr owned land that was worth \$1,000 an acre. And under this record they are paying him \$35,000 an acre for the same property that he paid \$900 for 5 years earlier. It's the loss in value. You're not valuing a pipeline easement. You're valuing how much value has the Zwahr's lost because of the pipeline easement.

In the Carpenter and West Gate cases, the landowner did not have any beneficial use remaining in the part taken. So the standard in those cases is what's the value of the part taken and what's the difference in before and after value of the remainder. But the difference in this case is there is beneficial use of the landowner in the part taken. So for instance, he can grow cotton on it. Mr. \_\_\_\_\_ just said he can put other pipelines in. So there's beneficial use. Where there's beneficial use in the part taken, the before and after standard applies to the part taken. Because otherwise you can't measure - the landowner is not entitled to be paid for the use in value he still has. So with that distinction, the West Gate decision, the Carpenter decision all say you make the landowner whole, you measure his damages by how much he's lost. In this case they are measuring damages by how much a "pipeline easement" is worth by value allegedly created by Exxon when it crossed the property.

OWEN: You just said he could put other pipelines in there. Could he do that without Koch's permission?

CARROLL: I think Exxon Pipeline Co. had to pay the Zwahrs for putting a pipeline across their property wherever they put it. The Zwahrs owned the right to use that property covered by the Koch easement for a number of purposes, such as growing cotton. Exxon could not have simply paid Koch and not paid the Zwahrs.

OWEN: After laying the Exxon pipeline, the Zwahrs could still come in and give a third party the commission to put in another pipeline. Could they do that without Koch's permission?

CARROLL: Under Mr. Kangieser's testimony, they could not.

OWEN: What's your position?

CARROLL: I don't think that the Koch easement prohibited the landowners from selling a pipeline.

OWEN: So it was not an exclusive pipeline easement? Koch did not have exclusivity?

CARROLL: I'm not sure I agree that they did. The testimony in the record is it was exclusive. That's what Mr. Kangieser testified to. Exxon's easement specifically was exclusive for 20 ft., but not for the \_\_\_\_\_.

OWEN: I'm just talking about Koch's easement.

CARROLL: Yes, the Koch's easement.

HANKINSON: Let me ask you about the disposition of this case. In Sharboneau we remanded to the TC, and I know part of your relief in this case is for a new trial if you were to win. Exxon offered two experts who had different opinions about the value of the loss. In light of all those circumstances, what is the appropriate disposition should we agree with your legal arguments?

CARROLL: I believe the appropriate disposition is to reverse and render in the amount of the special commissioner's award.

HANKINSON: And what authority do you have for our doing that?

CARROLL: The authority is, that it is the landowner's burden to present evidence of loss and value. In this case, the landowner presented no admissible evidence before the court on what the value was. And accordingly, I think the appropriate decision is to then revert to what the special commissioners awarded.

HANKINSON: But what authority do we have to do that when there's been an appeal from that decision, which it in fact had \_\_\_\_\_ vacating that award and putting the issue before the DC?

CARROLL: I don't have specific authority on that. I think it's kind of up in the air. The court could either reverse and render or reverse and remand.

HANKINSON: And in fact, if we reverse and remand we do have disputed evidence even from Exxon about what the value of the loss is.

CARROLL: We have two different values. One of about \$1,400. One of about \$1,800.

HANKINSON: But you have no legal authority for your position that we should go to the commissioner's award?

CARROLL: I do not.

OWEN: I'm thoroughly confused about who had the right or the rights to grant a pipeline easement over this tract. What is the record? Is the Koch easement in the record?

CARROLL: It is.

OWEN: And is it exclusive or not? We need to know the answer to that.

CARROLL: Mr. Kangieser testified it was exclusive that Exxon could not lay a pipeline across the property without getting Koch's permission. Exxon as a courtesy told Koch it was going to lay a pipeline and wanted to overlap Koch's easement with its easement and Koch said fine. And Mr. Kangieser testified that that caused the value to increase.

Now whether the Koch easement is exclusive or not - I mean you can read it. It gives Koch the right to put a pipeline in there. It does not address whether or not other pipelines can be put in the easement.

OWEN: So if it doesn't address that it's not an exclusive easement?

CARROLL: I would think it's not exclusive.

BAKER: If Koch had said no you can't use part of ours, then would Exxon have said well we will just ask for more from the Zwahrs and have one adjacent to yours, and not even use it at all. Is that a...

CARROLL: I would expect that would be the case if Koch had the right to prevent Exxon from overlapping Koch's easement with Exxon's easement. If they had said no, I imagine Exxon would then have laid its easement adjacent to but not overlapping.

BAKER: But ask for more property from the landowner which would have changed the whole complex is what we're talking about.

CARROLL: Could have.

BAKER: So that's why it's important to have Koch's permission whatever it was.

CARROLL: It is a benefit to the landowner to have the easements and the pipelines as close together as are possible. It's a benefit to the condemnor to do that. And that's in the record. But the question is, does that change the value of the land, and I think the answer is no.