

A Reprint from *Tierra Grande*

ZWAHR WARS

EPISODE II

PIPELINE CORRIDORS REVISITED

BY JUDON FAMBROUGH

The July 2001 edition of *Tierra Grande* contained an article entitled "Pipeline Corridors, Economic Units and Condemnation." The article reviewed a November 2000 decision of the Houston Appellate Court (*Exxon Pipeline Co. v. Zwahr*, 35 SW 3d 705). The importance of the case rested in the novel approach the appellate court approved for evaluating property for condemnation purposes.

The Zwahrs purchased 49 acres in 1989. Koch Gateway Pipeline Company owned a 50-foot easement across the property in which a 30-inch natural gas pipeline was placed. The Zwahrs were permitted to grow cotton on the right of way.

In 1995, Exxon began condemning another 50-foot easement alongside and within Koch's easement. The easement included 1.01 acres of the Zwahrs' property, 82 percent of which lay within the existing easement.

A special commissioner awarded the Zwahrs \$2,265 for the taking. Exxon deposited the funds with the court, took possession and laid the pipeline parallel to and within 25 feet of Koch's pipeline. The Zwahrs appealed the special com-

missioners' award to County Court at Law No. One in Fort Bend County.

At trial, the Zwahrs' expert witness testified the portion of the 1.01 acres that fell within Koch's existing easement was a self-contained, separate economic unit (the established pipeline corridor) and that its value should be ascertained alone and independent of farmland owned by the Zwahrs.

This method of valuation is proper, as long as the use is physically possible, legally permissible, financially feasible and maximally productive (*State v. Tigner*, 827 S.W.2d 611).

Furthermore, Texas case law dictates that a presumption exists in favor of valuing the land based on its current use (*McAshan v. Delhi Pipeline Corp.*, 739 S.W.2d 130). In this instance, 82 percent of the 1.01 acres was currently used for locating pipelines. Comparable sales for existing pipeline easements were \$26,398. The right to assign an area within an easement sold for \$9,679.

The jury awarded the Zwahrs \$30,000 for the easement plus \$10,000 for the right to assign the easement. Exxon appealed to the First District Court of Appeals.

Exxon contended the expert's opinion was based on sheer speculation and flawed methodology and thus inadmissible under Texas case law. Exxon further claimed the trial court abused its discretion by admitting the testimony because it lacked relevance and reliability regarding the pipeline corridor as a separate economic unit.

Exxon lost on all points and appealed to the Texas Supreme Court. On May 23, 2002, the high court agreed with Exxon and reversed both the trial court and the appellate court decisions. The ruling indicated that the trial court had abused its discretion by allowing expert testimony involving economic units and highest and best use of the property.

The court reviewed the general rules for valuing property for purposes of condemnation. Compensation is based on the fair market value of land at the time of the taking. The general rule for determining fair market value is the before-and-after approach that requires measuring the difference in the value of the land immediately before and immediately after the taking.

When, as in this case, only part of the land is taken for an easement, the before-and-after rule still applies, but compensation is based on the market value of the part taken

plus any damages to the remainder of the land. Because the Zwahrs do not allege any damage to the remainder of their 49-acre tract, only the market value of the 1.01-acre taken for the easement is at issue.

On the other hand, the fact finder (the jury or judge) may consider the highest and best use to which the land can be adapted, not necessarily its current use. The existing use of the land — in this case, cotton farming — is presumed the highest and best use. The landowner can rebut this presumption by showing a reasonable probability that, when the taking occurred, the property was adapted and needed or would likely be needed in the near future for another use.

The court went on to say that the before-and-after rule does not apply when the landowner can show that the condemned land is a self-sufficient, separate economic unit. The evidence must show that the unit is independent from the parent tract, possesses a different highest and best use and a different value from the remaining land. In this situation, the market value of the severed land must be determined without referencing the remaining acreage.

The key to the decision, though, rested with the court's analysis of the project-enhancement rule. In determining market value, the fact finder may **not** consider any enhancement to property value that results from the taking. The object of compensation in condemnation cases is to make the landowner economically whole. To permit compensation for value attributable to the condemnation project, and occurring subsequent to the taking, would place the landowner in a better position than he or she enjoyed before the condemnation occurred.

The Zwahrs' expert witness did not use the before-and-after approach but concluded the pipeline easement was the highest and best use for the 1.01 acres. This conclusion was based, in part, on the existence of the Koch pipeline. Using the market prices for comparable pipelines, he estimated the value of the 1.01 acres at \$35,077.

The court concluded, "As a whole, he (the Zwahrs' expert witness) premised the valuation on the fact of Exxon's condemnation, thus improperly including project enhancement in that valuation. He repeatedly stated that Exxon's condemnation 'created the economic unit,' and that the 1.01 acre (economic unit) did not exist until after the condemnation." Prior case law holds that the testimony establishing a separate economic unit is admissible when the separate unit existed **before** the condemnation project and had defined **parameters** different from, and not because of, the condemnation project itself (*Bauer v. Lavaca-Navidad River Authority*, 704 SW2d 109.)

The Zwahrs' expert testified that before Exxon's project began, the Zwahrs' interest in the .82 acres within the easement owned by Koch was of

interest in the easement, not against the Zwahrs' interest in the land. The only property the Zwahrs owned that should have been in contention was the land needed by Exxon lying outside Koch's easement. Based on this decision, Koch could have charged Exxon \$35,720 for laying the line in the .82-acre segment of the easement.

Texas case law clearly states that a person cannot convey a greater interest in property than he or she owns. In this case, the Zwahrs could not lay a pipeline in Koch's exclusive easement. Consequently, they could not give Exxon permission to do the same.

Does this case contain any wisdom or direction for landowners confronted with pipeline condemnation? The answer is *yes*, for both those who negotiate future pipeline easements and those who already have them on their land.

Landowners who negotiate future pipeline easements may require their consent to lay additional pipeline(s) within the easement and share in any compensation received for the assignment. Of course, this provision will not come easy and can be negotiated only if the condemnation process does not proceed to the special commissioner's court.

(See Center publication

394, "Understanding the Condemnation Process in Texas" for details.)

For surface owners whose land is burdened by existing pipelines, the case outlines a possible future course of action. The Texas Supreme Court describes two requirements for establishing separate economic pipeline units. At one point, the court announced the unit must exist **before** the condemnation begins and have defined **parameters** different from, and not because of, the condemnation project itself. Later, it reiterated the need for boundaries when it proclaimed the evidence was inadmissible because the expert witness could not define the parameters of the economic unit until Exxon revealed the acreage needed for the easement.



COMPENSATION in condemnation cases is intended to make landowners "economically whole," not put them in a better financial position than before condemnation.

"negligible" or "nominal" value. However, once Exxon received Koch's consent to lay another pipeline, the value soared to \$35,720, making the 1.01-acre easement worth \$36,077.

Texas case law holds that once the condemner manifests a definite purpose to take a particular land, market value may not include any enhancement resulting from the project itself (*City of Fort Worth v. Corbin*, 504 SW2d 73).

The case emphasizes a point made in the Center's earlier review of this case. The condemnation award for laying Exxon's pipeline within Koch's easement should have gone to Koch, not the Zwahrs. If Koch had not consented to laying the line, then the condemnation should have proceeded against Koch's

Landowners may fulfill these requirements **before** any future condemnation commences by placing 30- to 50-foot restrictive covenants (sometimes referred to as deed restrictions) on either side of existing pipeline easements. The covenants would limit the use of the land to pipelines, or possibly electrical lines or fiber optic cables. This would establish the economic units with defined boundaries or parameters before subsequent condemnation commences.

Why would the restrictions be placed along either side of the existing easements? As pointed out by the Zwahr's expert witness, the highest and best use of land alongside an existing pipeline easement is for another pipeline easement. The problem was that the witness could not establish the parameters.

This plan contains several benefits. First, in most instances, it will not

change the current use of the land. It only affects future use. Second, it may cause less land to be taken for pipeline purposes.

This case illustrates that the expense of condemning within an existing easement greatly exceeds the expense of condemning outside of one. Thus, successive parallel pipeline easements occur. Placing deed restrictions on either side of existing easements may make it more financially viable for pipeline companies to secure assignment rights in existing easements rather than condemn new ones. And finally, if a company attempts to condemn the land within the area designated for pipeline purposes, the landowner can hope the court will accept its valuation as a separate economic unit based on the standards established by the Texas Supreme Court in this case.

This procedure could backfire, however. The company seeking the easement could simply move over and condemn the next 30 to 50 feet on the other side of the restricted area, causing pipelines to be disbursed further across the property.

Some landowners may oppose the method because restricting use of subsurface usually lowers property value. However, restrictive covenants can be removed as easily as they were placed on the land as long as ownership has not changed.

Exxon Pipeline Co. v. Zwahr, 2002 WL 1027003, Tex 5/23/02, has not been released for publication in permanent law reports. Until released, it is subject to revision or withdrawal. ♣

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