

1 IN THE UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 BROWNSVILLE DIVISION

3 _____)
4 UNITED STATES OF AMERICA)

5 VS.)

6 1.16 ACRES OF LAND, ET AL)
7 _____)

) CIVIL ACTION NO.
) B-08-169, 276, 330,
) 348, 377

8 HEARING
9 BEFORE THE HONORABLE ANDREW S. HANEN
10 MAY 22, 2009

11 APPEARANCES:

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1 THE COURT: Be seated, please.

2 All right. We're here in B-08-169, United States of America
3 versus Borzynski Brothers; B-08-276, United States of America
4 versus the Loops, et al; B-08-330, United States of America
5 versus Frank Loop, et al; B-08-CV-348, United States of America
6 versus White Wing Ranch et al; and B-08-377, United States of
7 America versus Dorothy Irwin, et al.

8 All right. Mr. Hu, who is here with you for the government?

9 MR. HU: Your Honor, Daniel Hu for the United States.
10 Mr. Paxton Warner, AUSA Warner is here along with Justin Okun
11 from the U.S. Department of Justice.

12 With the court's permission, may Mr. Okun argue these cases,
13 at least the legal issues?

14 THE COURT: Okay. Yes, although we'll cross that bridge
15 when we get to it.

16 All right. Ms. Deagen, who's here with you?

17 MS. DEAGEN: For landowners, Mr. Norton Colvin is here.
18 Stephen Adler and Roy Brandys and myself.

19 Let me start with the issue that was raised, the taking
20 private property for private use issue, the Kelo issue, if you
21 may. And let me talk about something procedurally as opposed to
22 something substantive, although there probably couldn't be a
23 hotter substantive topic than that in the last five years here.
24 And, Ms. Deagen, this really goes to you and your side of the
25 "V," if you will. Do you have a conflict in raising that issue?

1 MS. DEAGEN: Judge, I'm going to have Mr. Adler address
2 specifically that issue. He's prepared to argue that.

3 THE COURT: It occurred to me --

4 MS. DEAGEN: Not to pass the buck, but --

5 THE COURT: It occurred to me that if you were
6 successful in arguing that, you would be hurting one of your
7 clients while helping two.

8 MR. ADLER: I think we would have a conflict, Your
9 Honor, if the Borzynskis wished for the condemnation of the road
10 to go forward. Because they don't, there's not a conflict.

11 THE COURT: Okay. Well, if they -- let's assume that
12 the condemnation goes forward. How would they get to their
13 property?

14 MR. ADLER: If the condemnation does not go forward.

15 THE COURT: Well, the condemnation of the land, but not
16 the road.

17 MR. ADLER: I think at that point, Your Honor, their
18 land is landlocked, and the government has to buy it.

19 THE COURT: Okay. Although they're supposed to have an
20 easement somewhere down the road somewhere that they don't know
21 where it is.

22 MS. DEAGEN: There is an actual other easement. And
23 they did have road frontage prior, but there is no current
24 access point planned for that.

25 MR. ADLER: Before the taking, they could come off

1 Oklahoma. After the taking, there is an easement that's poorly
2 located, and it only serves half the property. So that
3 easement -- there's no right to cross that easement to reach
4 half of the property.

5 THE COURT: Okay. So that easement only gets them
6 halfway home, even if it was workable?

7 MR. ADLER: Correct.

8 THE COURT: So I don't have to worry about a conflict
9 problem?

10 MR. ADLER: Yes, sir.

11 THE COURT: All right. I just didn't -- we had a case,
12 as Mr. Warner knows from the U.S. Attorney's office standpoint,
13 that we got in the second or third day of trial where we
14 discovered the conflict and had to declare a mistrial, and I
15 don't want that to happen again.

16 MR. ADLER: Yes.

17 THE COURT: Okay. Let's then talk about the Kelo issue
18 then. And it's more or less the landowners' motion, so I'm
19 going to let them go first.

20 MS. DEAGEN: Mr. Adler is going to respond to that,
21 Judge.

22 THE COURT: And, Mr. Hu, you're welcome to sit or stand,
23 depending on your preference.

24 MR. HU: Mr. Okun will be addressing that legal issue.

25 MR. ADLER: Your Honor, I think with respect to the Kelo

1 issue, it's pretty simple. Black letter law in condemnation,
2 you can't condemn property from A to give it to B. You have to
3 have an otherwise public use in order to be able to do that kind
4 of condemnation.

5 In this case, the power to condemn is to build the border
6 wall. The only reason that this road is being condemned is in
7 order to mitigate the damages that the government would
8 otherwise have to pay for, leaving property effectively
9 landlocked.

10 You know, I think that the best way to understand this is by
11 looking at an analogy or another situation. If the taking of
12 the Borzynski's property left their farm insufficiently large so
13 as to be economically inviable farm, could the government come
14 in and condemn some of the Loops' farm to give it to the
15 Borzynskis so that after the taking, they were once again
16 restored to an economically viable farm. Could they give the
17 Loops' farm or the White Wing farm, part of it to the
18 Borzynskis? And I think the answer, looking at that, is real
19 clearly no.

20 In essence, that is exactly the same thing that's happening
21 here. But instead of mitigating the impact of the condemnation
22 by turning over some of the Loops or the White Wing farmland to
23 the Borzynskis, the government is condemning a road. When you
24 look at the Kelo opinion, both the majority opinion and the
25 concurring opinion as well as the two dissents, it's real clear

1 that in the Kelo case, by a five, four -- by a real bare margin,
2 the court said that we're going to find economic development as
3 a viable public use to condemn property. But everybody talked
4 at length about the dangers of that holding, the majority
5 believing that they could control that holding and limit that
6 holding, and the dissenters believing that once you cross that
7 line, there was no going back.

8 THE COURT: Does it change things if the Border Patrol
9 uses that road as well? Because they do, don't they, as a
10 practical matter?

11 MR. ADLER: They're -- the public -- the road across the
12 Loops' property? I think that what the Border Patrol uses now
13 is the -- I don't know the road the Border Patrol uses now.

14 THE COURT: Okay. But I meant from a legal standpoint.
15 Let's assume they do hypothetically.

16 MR. ADLER: I don't think it does because there's a
17 difference in a servitude that would be available to the Border
18 Patrol. And I don't know why the Border Patrol would have any
19 legal right to use that road. But if they do, it's only limited
20 to the occasional Border Patrol functions and their mission as
21 opposed to a road which now is going to encumber the Loop
22 property in favor of the Borzynskis for farm equipment of the
23 farmers; or if there was a mining operation there as there is on
24 a nearly adjacent parcel with equipment and trucks. I think
25 there's a difference in the servitude.

1 THE COURT: Okay. But I guess I was taking it a step
2 further. Let's say the declaration of taking, instead of
3 phrased like it is phrased, was phrased that the Border Patrol
4 is going to take it so it can get to the wall or the fence or
5 whatever in furtherance of its mission.

6 MR. ADLER: Well, it could be --

7 THE COURT: Couldn't -- I mean, assuming they could take
8 anything, couldn't they take that as well?

9 MR. ADLER: Your Honor, this is a drawing that's a
10 little bit different than the exhibit that you had, in that this
11 one now shows the condemned private road. In essence, this is
12 the Borzynski property, which prior to the taking, has access
13 from Oklahoma. They've now run the fence across so you no
14 longer have access to the Borzynski remainder from Oklahoma.

15 So what the government is doing is they're condemning a road
16 across adjacent property owners where they have a gate or where
17 they -- or presently their plans currently call for that gate so
18 as to create a road so that the Borzynskis can access their
19 property.

20 So your question is the Border Patrol --

21 THE COURT: My question is they're building a fence.

22 MR. ADLER: Right.

23 THE COURT: And the Border Patrol itself -- and I think
24 it's true, but let's talk hypothetically.

25 MR. ADLER: Okay.

1 THE COURT: They want access, one, to the wall; and,
2 two, to the other side of the wall in furtherance of their
3 mission to protect the borders of the United States. So assume
4 with me hypothetically that they have the right to condemn it at
5 all. And I know some of the landowners and I know -- have
6 objected to that. But assume with me again further that legal
7 fact, that they have that right.

8 MR. ADLER: Then I would say the government had the
9 right to condemn from Oklahoma to the gate, and then they would
10 have the right, I guess, to travel across the land they're
11 otherwise condemning, this 40 feet that they're condemning for
12 the fence, and now they're on this side of the fence.

13 THE COURT: Okay. Now --

14 MR. ADLER: Your question is would they have the right
15 to condemn this?

16 THE COURT: Would they have the right -- I mean,
17 wouldn't they basically have the right for governmental use --

18 MR. ADLER: Yes.

19 THE COURT: -- assuming they have the right to do it at
20 all --

21 MR. ADLER: Okay.

22 THE COURT: -- to condemn whatever they wanted to as far
23 as a road or access?

24 MR. ADLER: I think that probably within the discretion
25 of the United States Government, if they felt that there was a

1 need for them to condemn this road in order to be able to police
2 this area for national security reasons, they might be able to
3 do that.

4 THE COURT: All right. Now, let's take the next step.
5 Let's assume with me they say, okay, we're going to condemn
6 this. And again, I -- I've read the declaration of taking
7 language, and this is not it. But assuming that it was, we want
8 it in furtherance of our mission to go do -- secure the borders
9 of the United States, blah, blah, blah, you know. And, oh, by
10 the way, we're going to let the Borzynskis drive on it too. Can
11 they do that?

12 MR. ADLER: No.

13 THE COURT: Okay. Why?

14 MR. ADLER: Because there's no public use associated
15 with that.

16 THE COURT: Well, no. They're going to use it in
17 furtherance of their mission in my hypothetical.

18 MR. ADLER: And they're entitled to take it for that
19 purpose.

20 THE COURT: But then once they've taken it, can't they
21 let whoever they want drive on it, drive on it? I mean, once
22 they take it, it's their property, isn't it?

23 MR. ADLER: It is their property; so, yes, I would say
24 that once they've taken it in fee, assuming that they've taken
25 it in fee as opposed to an easement for a purpose, if they've

1 taken that property in fee, then it's probably theirs to be able
2 to control.

3 THE COURT: Okay. Here's -- the reason I'm asking it
4 is -- and, you know, you guys are all smart guys, smarter than I
5 am. I just happen to have good law clerks that keep me from
6 running astray too much. Is tell me, Mr. Adler, why -- let's
7 say I agree with y'all 100 percent: They can't do it the way
8 they're doing it. And I say: Sorry, government, you're out.
9 You cannot take private land from A to give it to private
10 citizen B. I mean, don't they -- I mean, aren't they just going
11 to turn around and do it the right way?

12 MR. ADLER: No. And I think this is the answer. I
13 think that the answer is is that while the government has the
14 discretion to be able to decide the scope of its taking, while
15 it has the discretion to decide that it's necessary for us to
16 condemn this portion of the road in order for the security, for
17 the Border Patrol to police it, that discretion does not come
18 without limitation. There is a limitation. And even
19 governmental discretion.

20 If they came into the court and said: You know something?
21 Because they really want to take this in order to be able to
22 mitigate damages here, but they know that they can't do that, so
23 they're going to come in and claim that there's a public purpose
24 to be able to do this in order to be necessary to police, this
25 court still has the ability to look at that and decide whether

1 or not that determination is arbitrary and capricious, because
2 the discretion that the government has is not unlimited.

3 Now, that's a high threshold to meet. But I think that if
4 the government came in here and tried to suggest to this court
5 that it had to condemn this portion of the road in order to
6 enable the Border Patrol to be able to secure the area and this
7 is the only place that they were doing this kind of road, we
8 could make out a very good case that that was abusive, that it
9 was arbitrary and it was capricious and it was an abuse of
10 discretion, and this court would then have the responsibility to
11 look at the government and say: The discretion you have to
12 decide something is a public use is not without limit. And you
13 as the gatekeeper have the ultimate responsibility to look at
14 the government in that instance and say no.

15 THE COURT: All right. Now, let's move to a
16 hypothetical or an argument which I think is more likely to be
17 made by the government. And, Mr. Okun, you can make it or not
18 make it.

19 The entire project is a public use. Securing the borders of
20 the United States is a public use, and Kelo says that. I mean,
21 we're not ever going to find a case that says securing the
22 borders, protecting the citizens of the United States is not job
23 No. 1. It is. I think we all have to agree with that. We may
24 not like the way it's being done. We may not think it's going
25 to be effective. I mean, you know, there's a checklist of

1 things that both citizens down here and citizens other places,
2 that we could argue about. But I think from a legal standpoint,
3 we're all going to have to agree that protecting the United
4 States and the borders of the United States is obviously
5 probably the No. 1 function of the federal government.

6 That being the case, let's assume the argument, Mr. Adler,
7 is really just what you said it is; that the only reason they're
8 doing this is because it's cheaper, I mean, which is -- you said
9 it more eloquently than I did, but they want this road because
10 if they don't get it, in all likelihood -- and again,
11 hypothetically, but in all -- you know, hypothetically, they're
12 going to have to take the entire property because that means the
13 Borzynski's interest cannot get to that piece of property. And
14 so rather than take the whole shebang, we're just going to
15 condemn this little road and say: Okay. Now you can get to
16 your property because it only costs me \$100 to take the road.
17 It's going to cost me \$300 to take the property, and we're going
18 to do it because it's cheaper.

19 Okay. If they do it in connection -- if that's the reason.
20 Let's assume it is.

21 MR. ADLER: Okay.

22 THE COURT: But they're doing it in connection with a,
23 you know, overall -- part of an overall project to protect the
24 citizens of the United States, can't they do that?

25 MR. ADLER: I think, Your Honor, what -- and I would say

1 no in this case because the facts of this case are different
2 than the cases where they talk about overall projects. In the
3 Kelo case, they talked about an overall development plan, and it
4 was necessary -- and in the case that Kelo relies on, the
5 Washington, D.C. case where they were condemning for the urban
6 renewal project and they were taking the commercial building in
7 the middle that was not blighted, and that owner came back and
8 said: Why take me? I'm not blighted.

9 THE COURT: Right.

10 MR. ADLER: And the court said in those situations when
11 there is, in fact, an overall plan and the taking of this
12 property is necessary to achieve the ends of that overall plan,
13 then we're not going to look at every specific parcel.

14 In this case, this case is the very case that the dissent
15 was arguing, is the danger in announcing that rule and applying
16 that rule too broadly. Because this was not the case where they
17 didn't know who the property was coming from because it's one
18 individual. They didn't know -- all the indicia that the Kelo
19 case talks about in saying that you can apply that general rule
20 don't apply here.

21 This condemnation went forward without ever even thinking
22 about condemning this road. This -- you can't justify a taking
23 that's not for a public use by saying that it's associated with
24 what is a public use. It has to be part and parcel of that
25 public use. And condemning the road in order to minimize the

1 expense by giving to the Borzynskis some of the Loop farm, the
2 White Wing farm, is not necessary for the building of the wall.
3 It's not necessary for security interests. It's not arguably
4 part of the overall border fence plan or the overall security
5 arrangements associated with that. This is an anomaly. And
6 this is an anomaly, and the court has been given the ability
7 and, in fact, ultimately has the ability to say to the
8 government: This is not part and parcel of an overall security
9 plan. This is -- it just isn't.

10 THE COURT: Now, is the road already there?

11 MR. ADLER: No. Well, there is a road -- there is a
12 path there. Right now this property is farmed by the White Wing
13 folks, and this farm is under lease by the White Wing folks. So
14 the White Wing people effectively have this whole property, and
15 they drive across here, as they can, because they either own
16 this or they lease this.

17 THE COURT: All right. Should I -- is that a factor
18 that I can or should take into consideration that, look, it's
19 being used as a road right now, and that's not going to change?

20 MR. ADLER: Well, if the Borzynskis tomorrow could
21 decide that they didn't want to lease the property to the White
22 Wing anymore, or the White Wing tomorrow could decide they don't
23 want to lease the property from the Borzynskis anymore, and then
24 you don't have the same person owning and leasing.

25 No. I think this court has to focus on what the legal

1 rights are of the respective property owners and whether there
2 is a path that's in place that's currently being used by
3 somebody who has the right to drive continuously on that to get
4 here.

5 In fact, part of this road goes over the Perez property by
6 permission. I mean if the Perez had wanted to, they should be
7 entitled to fence their property line and prevent either White
8 Wing or the Borzynskis from being able to do that. The Perez
9 people have already settled their condemnation case. They're
10 done. They have the right to walk out tomorrow and fence their
11 property.

12 Why should you be able to remove from the Perez people
13 whatever market leverage or whatever marketability or whatever
14 market position that they have that exists today in order to be
15 able to give it to one of their neighbors? I would argue that
16 the fact that that's a path that's in the ground now is
17 absolutely legally irrelevant.

18 THE COURT: All right. Mr. Okun?

19 MR. OKUN: Your Honor, I would argue that it is
20 relevant. This is part of an overall project. Part of that
21 overall project is allowing the situation to remain after the
22 taking the same as it was before.

23 Now, before the taking, Borzynski Brothers Properties has
24 been using that access point. They weren't using their frontage
25 because the IBWC levee was there, and they didn't have

1 permission to go over there.

2 THE COURT: Wait, wait, wait. Say that again.

3 MR. OKUN: I'm sorry. Their frontage on Oklahoma Road,
4 there's the IBWC levee. They didn't have permission to go over
5 that levee. That's why they weren't using that frontage to
6 access Oklahoma Road. They were using the private road.

7 THE COURT: Okay. But I think Mr. Adler's point may be
8 that -- or at least one of them is that the Borzynskis and the
9 White Wing folks and the Perezes, they've been out there for
10 years. They like each other. They know each other. They get
11 along fine. Wonder if it gets sold to the Smiths and the Smiths
12 decide instead of having the subject property be farmland, they
13 want to put a Stop and Go in there with people going in and
14 buying beer and, you know, big gas trucks and whatever.
15 Obviously that's an absurd example. But all of a sudden the use
16 changes, the owners change. They don't get along as well.

17 In private -- any kind of private situation, they'd say:
18 Look, we don't want you to use our road anymore. You know, find
19 another way. We don't want those beer trucks driving around
20 over our property.

21 MR. OKUN: And, Your Honor, again, the future situation,
22 trying to make the government here as part of that overall
23 border project allow the property owners to continue to access,
24 whether that's assignable in the future to another property
25 owner.

1 And in this situation, Your Honor, this is a levee -- flood
2 plain where that is not even allowed. This is not a situation
3 where they could go in and create Stop and Go or some type of
4 industrial development.

5 THE COURT: Well, they could -- they could put an oil
6 well out there, assuming there was oil, or they could put a
7 mine, or they could put anything that didn't require a building
8 with insurance. I mean, it's not impossible to dream that there
9 might be a use there that the landowners don't like.

10 MR. OKUN: That is true.

11 THE COURT: They may not dislike the individual
12 landowner. I mean, you know, we've all had neighbors we've
13 liked a lot and neighbors we didn't care so much for perhaps.

14 MR. OKUN: That's true, Your Honor.

15 THE COURT: I'm sure my neighbors would appreciate my
16 dogs staying in my yard more than they do.

17 MR. OKUN: But again, that goes to the power of the
18 United States Government to condemn land as long as it is
19 associated with a public project. And the public project, again
20 here, was to allow access of those same areas historically as it
21 always has been to create a situation beforehand as it is after.
22 Not perfect, but to create that situation.

23 And again, the court's ability, as this court has said, to
24 analyze that public purpose is limited to the sense of the
25 overall project. That the United States has tried to -- has

1 created gates or is going to put in gates in those areas where
2 there's historical access points, wherever those are, and
3 recreate that situation in the after situation after the taking.

4 THE COURT: I think their point is, though, this is --
5 this is different than a public road or different than some of
6 the access points to the levees which the entire South Texas
7 community has used and the Border Patrol has used historically
8 to come in and out of. This is, for lack of a better term, a
9 lane that the only people that go on it are these three
10 landowners.

11 MR. OKUN: Correct, Your Honor. And it's --

12 THE COURT: So it's not an historical -- it may be
13 historically the access for the Borzynskis onto their property,
14 but it's their access historically at the pleasure of the two
15 landowners.

16 MR. OKUN: Correct, Your Honor. And the United States,
17 in order to create a situation, again, as it was beforehand, was
18 limited by the levee. Was limited by the IBWC levee, I'm sorry,
19 Your Honor, and the fact they did not know where the southern
20 access point is. Then it was determined, well, they're getting
21 that access point in the north. Actually the landowners have a
22 right to cut that off.

23 So in order to create a situation just as it was beforehand
24 as part of this overall project, whether it's gated, public
25 road, private road, that we're going to give that access as part

1 of the fence in order to allow landowners to get over there.

2 And we did take cost into account, and that's allowed under
3 US V Welch. That the United States -- in that case the
4 landowners were landlocked. The government went in and
5 condemned a road to allow access. The United States is allowed
6 to do that as part of its condemnation power; to take into
7 account its costs; not proceed oblivious to costs.

8 THE COURT: And it would be cheaper to do that than to
9 take the subject property?

10 MR. OKUN: Correct, Your Honor.

11 THE COURT: And in Welch, was there a larger government
12 purpose at use?

13 MR. OKUN: There was. It was a flood control project,
14 part of the Tennessee Valley Authority, Your Honor.

15 THE COURT: Okay. Mr. Adler, anything you want to say
16 in response?

17 MR. ADLER: Just real quick. In the Welch case that was
18 the TVA case, there were isolated families. The families wanted
19 to have a road built to them that was going to be a huge
20 expense, and the government said we don't want to build the road
21 in order to be able to cure that problem. The landowners -- the
22 question is whether their property could be taken since the
23 government wasn't going to build them a road. And if the
24 property wasn't taken, they would have been isolated property
25 owners out there without any kind of police protection or fire

1 protection or anything like that, and the court said we're just
2 not going to let that situation happen, nor are we going to
3 require the government to build a road.

4 Your Honor, the government is allowed to take cost into
5 account when they're doing a project, which means that the
6 government can decide whether to put its fence right up against
7 the river if it wants to. It can also decide it wants to put
8 its fence far away from the river and create landlocked pieces
9 of property. We recognize that the government gets to make that
10 choice. And in making that choice, you hope and expect as a
11 taxpayer that the government is looking at the associated costs
12 and weighing those with the national security obligations it
13 has. But ultimately the government gets to make that choice.

14 But it has to live by the choice that it makes. And having
15 made the choice that it's not going to put its fence up by the
16 river, and, in fact, is going to put its fence further away,
17 then it has to assume the obligation and the responsibility and
18 the cost that comes with that. The government is in a wonderful
19 position in that they get to decide what they're going to take.

20 I would point out to Your Honor that condemning this road
21 does not put these people back into the situation they were in
22 before because now Loop has a road that cuts across his property
23 that he can't cut off. And before the taking, he had people --
24 a road that he could say to his neighbors: I don't want you to
25 use it anymore because he has a valid reason or because he just

1 doesn't like them anymore.

2 THE COURT: Do the Borzynskis -- I'm sorry, Mr. Adler.

3 MR. ADLER: That's okay.

4 THE COURT: Do the Borzynskis have a non-contiguous
5 piece of property other than the subject property? Do they have
6 another piece that way?

7 MR. ADLER: The Borzynskis do not. The Borzynski
8 property is all contiguous.

9 THE COURT: That's it?

10 MR. ADLER: There's another property owner here that
11 they have an easement that comes across. That's the one that
12 only serves half their property and really is not a
13 transversible easement.

14 But, Your Honor, they have the right. There is no evidence
15 that they wouldn't be able to get from Oklahoma to their
16 property across the levee. The IBWC grants people the ability
17 to cross that levee up and down this road. And there's no one
18 that's taken the stand to suggest that they wouldn't be able to
19 get access if they couldn't rely on the kindness of their
20 neighbors in the before situation. And if there is, Your Honor,
21 if this property is landlocked before because they can't get
22 from Oklahoma, then when the government buys it, they don't have
23 to pay very much because it was landlocked even before they took
24 it. They're not going to be able to make that proof.

25 And then I would point out to Your Honor just because these

1 things may be relevant later on, the Loop house is right here.
2 I mean, the Loops built their home on this side of the levee, so
3 there is no prohibition from building here. You have to go and
4 get it permitted or check with the IBWC.

5 THE COURT: Is this the house we went to, Ms. Deagen?

6 MS. DEAGEN: It is, yes.

7 THE COURT: All right.

8 MR. ADLER: Your Honor, at some point, the public use
9 clause in the constitution has to mean something. If this
10 property owner went to the government and said as part of their
11 overall project: You know, my property is worth a lot. There's
12 this piece of property across the way that I've always wanted to
13 have, and I can't get the seller to sell it to me, but you can
14 condemn that and pay half for that which you would otherwise
15 have to pay me, but I can't get this guy to sell it to me. Why
16 don't you condemn that and give it to me. And if you give it to
17 me, then I'll give you this. At some point there has to be a
18 limitation on what the government can condemn in order to offset
19 its costs.

20 In this case there would be no difference between condemning
21 this road and condemning part of the Loop -- the White Wing farm
22 to give it to these folks if, rather than being a landlocked
23 case, we were talking about the land being too small to be
24 economically viable. At some point the public use clause has to
25 mean something, and this is -- this is the case that the Kelo --

1 both the majority and the dissent pointed to and said watch when
2 this case comes up.

3 THE COURT: Well, of course, part of the problem with
4 the Kelo case was the questionable taking for an economic
5 development. I mean, if the -- would the Kelo case have come
6 out any differently if it had been national defense at issue?

7 MR. ADLER: I think clearly national defense would have
8 been an acceptable public use. But the question is, is this
9 needed for national defense? And that's the -- we say they're
10 abusing their discretion in suggesting that that's necessary for
11 national security.

12 THE COURT: Okay. Mr. Okun, I'll give you the last
13 word.

14 MR. WARNER: Judge, if I may, can I -- I apologize. We
15 didn't get a chance to address this when Mr. Hu stood up. If it
16 would please the court, I was going to address the factual
17 issues as they applied, and I would like a chance before
18 Mr. Okun wraps up the law just to clear up some factual matters.

19 THE COURT: Go ahead, Mr. Warner.

20 MR. WARNER: Judge, if we -- this isn't going to show up
21 real good, but if we could look at the actual property.
22 Borzynski's property line comes in here, Your Honor, and we've
23 got the road that is at subject coming right across here. And
24 we have the Perezes owning this land. We have the Loops owning
25 this land, and then Borzynski's piece coming in here, and then

1 Borzynski's piece continues around and is the remainder of the
2 blue there, Judge.

3 Then looking on the larger map, what we found, Your Honor,
4 as we were going through, because obviously access was important
5 to the United States in this project and making sure that
6 landowners could continue to access their land in the after. So
7 in looking at this --

8 THE COURT: Let me interrupt you just for a minute,
9 Mr. Warner.

10 MR. WARNER: Yes, Judge.

11 THE COURT: Where the blue hits Oklahoma -- I assume
12 that's Oklahoma Road there.

13 MR. WARNER: Yes, Judge.

14 THE COURT: Do they have access that way?

15 MR. WARNER: They do not, Your Honor. Not once the
16 fence goes in, they do not. And this is where Mr. Okun was
17 telling you while they may have had frontage there, they did not
18 have a license from the IBWC to use that as access at the time
19 of the condemnation.

20 THE COURT: Okay. So there's no -- no gate -- so they
21 can't -- the only way they access -- how do they access the blue
22 area?

23 MR. WARNER: Judge, we determined, and it's in our
24 response, that -- from their depositions, they've always come in
25 through here. They've always used --

1 THE COURT: For both pieces of land?

2 MR. WARNER: Yes, Your Honor.

3 THE COURT: Okay. That's what I was unclear of.

4 MR. WARNER: And so in looking at this larger version of
5 that, Judge, what we found out after the condemnation was as you
6 come up to the levee, well, that piece was owned by -- by White
7 Wing, by the Loops. And then as you cross over the levee, Your
8 Honor, suddenly it started shifting, and then this back piece
9 was owned by the Perezes. And this is the common road, dirt
10 road, path, whatever you want to call it, that's been used now
11 for years and years and years. And then, of course, you've got
12 the Borzynskis back here.

13 And in looking at this, Your Honor, the United States
14 determined that -- well, first off, the Loops could block off
15 the Perezes from using this common access point. The Perezes,
16 once the Loops got over, could block the Loops off. And
17 furthermore, we had testimony from the Borzynskis that this is
18 the road that they've used since they bought this piece of
19 property. So the United States not only condemned this for
20 Borzynski Brothers' access, Your Honor, but also for Perez
21 access, because obviously the Loops could cut them off, and for
22 Loop access, because obviously the Perezes could cut them off.

23 So the United States is not just simply trying to cure for
24 Borzynski. The United States is trying to cure an access point
25 for three different landowners who have been involved in these

1 condemnations.

2 THE COURT: In the exhibit you're holding up there, is
3 the light -- is the light green field there at the bottom --

4 MR. WARNER: This one?

5 THE COURT: No, the next one.

6 MR. WARNER: This one?

7 THE COURT: No, to your right.

8 MR. HU: Oh, right here. This is Borzynski, Judge.

9 THE COURT: Okay. And what is to the right of it?

10 MR. WARNER: It just continues out.

11 THE COURT: Okay. So where it's brown -- where it's
12 brown, it's still Borzynski's property?

13 MR. WARNER: Borzynski comes to right here, Judge.

14 THE COURT: No, but the other.

15 MR. WARNER: Yes, this is also still Borzynski. Yes,
16 Your Honor.

17 THE COURT: That's what I was asking.

18 MR. WARNER: So I wanted to clarify that, Judge, so that
19 the court understand -- understood the reason factually why the
20 United States went in and condemned this access point. We
21 determined that we had -- that we needed to get access for three
22 different parties. It wasn't just Borzynski. It was the
23 Perezes and the Loops as well or White Wing. And so I wanted to
24 clarify that to the court before Mr. Okun finishes.

25 MR. ADLER: Just by way -- if I could just respond to

1 this real quickly. The testimony in this case and IBWC is that
2 they have never denied someone the right to be able to come off
3 Oklahoma and cross over the levee to get to their property.
4 Now, it's true, the Borzynskis haven't gotten that license
5 heretofore, but then they haven't needed to because all the
6 neighbors have gotten together and said, hey, we'll use it --
7 how about if we use this other road?

8 And while it is laudable perhaps -- so the property has
9 access off Oklahoma, effectively has access. Has the ability to
10 get access. In the marketplace, a purchaser of that property
11 would buy that property knowing that they could get access off
12 of Oklahoma before the taking. And while, Your Honor --

13 THE COURT: After the taking, they're not only going to
14 have the levee problem, they're going to have the fence problem.

15 MR. ADLER: Yeah. Now they can't get in from Oklahoma.
16 There's a wall that is between them now and their property.

17 And, Your Honor, I would say that while it is laudable for
18 the government to want to come in and try to fix a road problem
19 that the White Wing and the Perez and the Borzynskis have
20 because there's a road that they all use that meanders back and
21 forth across all the properties, thank you very much, but no
22 thank you. The Perez don't -- these are neighbors out there.
23 They've been living with this. It's not the purpose of the
24 government to come in and try and fix that.

25 THE COURT: Okay. All right. Mr. Okun, you want to

1 wrap up?

2 MR. OKUN: Your Honor, I think the more analogous case
3 would be Hawaii Housing Authority in which the State of Hawaii,
4 in order to achieve the end of breaking up a land oligopoly
5 broke up and got rid of the few landholders who own land and
6 gave it to the lessees, the tenants, the smaller ones. So they
7 took the property from one -- the government didn't take it --
8 and give it to these other landowners in order to achieve that
9 end of breaking up the large land holdings in Hawaii.

10 THE COURT: Some jurists, Mr. Okun, have a harder
11 problem with that case than they do with Kelo.

12 MR. OKUN: Yes, Your Honor, but that is the more
13 analogous case here. And that's what the United States is
14 doing. It's the overall project is to secure the border. As
15 part of that project, they want to make it so the after
16 situation is same or similar as can be. And to achieve that
17 end, the means was to condemn that road.

18 THE COURT: Okay. All right. Thank y'all.

19 All right. Let me -- let me shift gears then. I mean,
20 obviously from the court's standpoint, the Kelo issue is
21 intellectually interesting, and it's something that I will take
22 under advisement clearly.

23 But the next issue I want to talk about is of a more
24 practical nature, and it has to do -- it's being brought up in
25 the context of how are we going to try this case or cases, but

1 it really has brought to head something that's going to affect
2 all these cases and something that, as a practical matter, is
3 important, I would guess, to both sides of the "V," if you will.
4 And that is the issue of the fence -- the fence, the gate
5 locations, and the access in the future.

6 And it really -- it really concerns me as a practical
7 matter, but I'm sure it concerns the landowners, and it concerns
8 the lawyers as they prepare to go to trial. It should be on
9 both sides of the fence, no pun intended. Is when we have held
10 these hearings here to date, I mean, one of the big issues is,
11 okay, you're condemning the back 40, but you're really not.
12 You're only condemning the strip between me and the back 40.
13 And the reason you're not condemning the back 40 is because
14 there's a gate right here. And it may be inconvenient, and it
15 may diminish the property value a little bit. But, you know,
16 instead of driving my tractor in a straight line, I've got to go
17 around to the gate and come in. All right. It may be a pain.
18 Certainly doable. But it's only doable if there's a gate.

19 And I guess, Mr. Okun, I'm going to start with you or Mr. Hu
20 or Mr. Warner or whoever wants to weigh in on this. It's kind
21 of been raised in the terms of a motion in limine, but it's more
22 than that. And that is, if the landowners don't have some kind
23 of guarantee of permanency of these gates, what is being taken?
24 I mean, if I was the lawyer representing the landowner, I'd be
25 saying: Look, if you don't promise me that gate is going to be

1 there, you're taking the whole thing. You're taking everything.
2 Because that land -- how am I going to sell that land? You
3 know, it's going to be -- title company, it's going to be
4 interesting if they try to -- try to sell that land, and, you
5 know, what's a title company going to do? Well, you may or may
6 not be able to get to it. How tall are you?

7 I mean, and this is a real problem because we -- I mean,
8 even in the last two weeks, and obviously this isn't evidence in
9 this case and it's not something I will consider in any way, but
10 just in the lay news, I mean, you can see the administration
11 backing off the building of the rest of the fence. They're not
12 going to fund it. Now, that also depends on what -- who you
13 read and what source you read; so, I mean, there's a big caveat
14 there.

15 But, you know, if you're the landowner and you're worried:
16 Okay. I've got my gate here, and it's going to be
17 electronically, and I can go to the key pad and I can punch it
18 in and it will open and I'll drive my pickup through and I'll
19 get to the back. But if the administration decides, whether
20 it's this administration or the next administration or the
21 administration after that says, well, you know what? We've
22 decided we don't want to fund gates anymore. So, Mr. Landowner,
23 you're, you know, up the creek in a canoe without a paddle.

24 And that's why I think it's a broader issue. I mean, it's
25 a -- now, it is going to be an issue of what am I going to allow

1 experts to testify to. I mean, if they get up and say: We've
2 got a gate right here. Yes, it's a pain. This was good
3 farmland, and it was worth \$100 an acre as good farmland. Now
4 it's harder to get to, so it's only worth \$75 an acre, so you
5 diminished the value of the land by \$25. That's one thing.

6 It's good farmland. It's \$100 an acre. But, oh, by the
7 way, there's no guarantee you can ever get to it. I mean, I can
8 see a jury going, well, if you're not promising me I can get to
9 it, maybe instead of \$75 an acre, it's only worth \$5 an acre.
10 And, I mean, I think that would be a reasonable conclusion.

11 So I guess I want to kind of flesh out -- and I don't know
12 that we have to come to a decision today, but I want to put this
13 issue out there. I mean, we don't have anything that's on the
14 trial docket imminently, but I think it's a concern not only for
15 these landowners, but for every landowner we have in these
16 cases. You know, the couple properties that the court's been
17 out on that we've looked at, I mean, we walk out there. We
18 look. You know, obviously one of the first questions I've asked
19 is, well, how do you get into it? Now, so the gates are an
20 issue.

21 The second issue, I guess, is the ability to get to the
22 gates, because every time -- and I guess -- and I'll throw
23 myself on my sword that I hadn't focused on this, because every
24 time we've been out -- for instance, we went out to the Tamez
25 property, and we were with Dr. Tamez, and she was nice enough to

1 host us at her property. And we walked out -- you know, out her
2 backyard up to the gate and we said: Okay. How do I get to the
3 fence? There will be a road right here. You can just go on
4 down to the gate, come back on the other side, and there's
5 either going to be a road on the other side of the gate, or you
6 can -- the levee is right there. Get on the levee. In fact,
7 when we walked it, we walked on the levee.

8 So I guess the issue then becomes -- and it's one that
9 greatly concerns me and, I'm sure, greatly concerns the
10 landowners is: Wait a minute. Are you telling me there's no
11 guarantee there's going to be a road here that I can get to the
12 gate? Or what right do I actually have to drive on the levee?

13 I mean, there are some issues here that I think we need to
14 flush out -- flesh out. Flush may be a better word, but flesh
15 out is what I meant to say -- before we get too far down the
16 line, because these are going to be big issues. And, I mean,
17 just from the legal standpoint, not having a dog in this fight,
18 I can see, you know, a jury being over here if there's good
19 access and permanent access and guaranteed access. But if
20 there's not, they're going to be over here, and the verdicts are
21 going to -- I mean, what we're going to look at are going to be
22 two different ball parks completely if there's no guaranteed
23 access.

24 That's my intro. So, Mr. Okun, help me here. Help the
25 landowners. They're going to want to say: Do I have a gate or

1 don't I have a gate? If I go to transfer my property, does the
2 person I try to sell the property to, you know, they're not
3 going to buy it or they're not going to pay what it's worth
4 to -- you know, or what it ought to be worth if I can't get to
5 it. Help me.

6 MR. OKUN: Your Honor, there's an interplay between the
7 estate taken and the factual situation. The estate taken tells
8 what the rights are. The factual situation, the border barrier
9 explains how those rights are going to be utilized and, thus,
10 how the remainder property should be valued. So it is a jury
11 question.

12 The landowner can argue: We don't have the rights; thus, it
13 needs to be valued as landlocked. But the government can
14 present evidence in the form of plans, in the form of
15 specifications, witnesses who are authorized to say: No, there
16 will be gates there. And the situation will be in the future as
17 if a levee was there or any road was there, and it will be
18 valued in the future with that in mind with that access there.

19 THE COURT: And so it's -- I mean, think about what
20 you're suggesting. And I'm not saying you're wrong necessarily.
21 And as I said, I'm not -- we're not going to decide this today
22 because I think this is the tip of the iceberg, but it's a big
23 iceberg.

24 Am I going to allow the jury to decide whether or not
25 there's access? And if they decide there's not access, come

1 back with a verdict commensurate with that?

2 MR. OKUN: Yes, Your Honor. As 60,000 square feet and
3 9.94-acres, which the defendants pointed out, those were
4 questions for the jury. That government -- in that case, the
5 government was saying: This is our promise. It has to be
6 valued in the after situation based on our promise. And the
7 judge said no. While we -- you can rely, jury can rely on a
8 government promise or government plan, it is ultimately for the
9 jury to determine what that remainder situation will be like.
10 And it is --

11 THE COURT: So the jury would in effect -- and I didn't
12 mean to interrupt you. I'm sorry. But the jury in effect would
13 be deciding how good the government promise is?

14 MR. OKUN: Essentially, Your Honor.

15 THE COURT: Okay. So let me -- I mean, that could open
16 a whole panoply of evidentiary problems for me, and that's why I
17 want to start talking about this now before we get the first
18 case to trial.

19 I mean, for instance, I'll take an easy example close to
20 home. I think my dates may be a little off because I wasn't on
21 the bench then. But in 1990, let's say, may have been '89,
22 somewhere in that time period, Congress passed a law that said
23 judges will get a COLA raise every year. And it's now 19 years
24 later, and we've gotten that raise four or five times. So
25 Congress made us a promise, and three-fourths of those years we

1 didn't get it.

2 So, now, would that be admissible to show how the landowners
3 can rely on Congress?

4 MR. OKUN: It could be, Your Honor. I don't know how
5 relevant that would be, but certainly you can look at other
6 projects to determine, well, did the government follow through
7 with those plans and specifications? And we can come in -- and
8 furthermore, Your Honor, it could be, maybe for some of these
9 trials a year, two years down the road, the gates are actually
10 there.

11 THE COURT: Well, I don't -- I'm not -- I guess I'm not
12 worried -- maybe I should be. Now that you raise that, maybe
13 you're bringing a worry I hadn't thought about. I mean, I
14 hadn't worried about the fact that the gates wouldn't be there
15 in the short-term. When I read the briefing, I began worrying
16 about: Wait a minute. What about five years from now? What
17 about ten years from now? Are the landowners going to be
18 able -- you know, are they going to be -- you know, we've come
19 in -- and you haven't been here, but Mr. Hu and Mr. Warner have
20 been here, and every hearing we have maps like that and aerial
21 photographs. And they've been very helpful to me because I'm a
22 spatial person, and I can -- when I can see a map, I understand
23 things and I feel like I understand the land, although with the
24 river squiggling as much as it does, it's sometimes not easy to
25 know what direction we're looking.

1 But every time we've done that, we've talked about here's
2 the land in question. Here's the nearest gate. And there
3 are -- there's plans, there's drawings. They've all been shown
4 to the landowners. The landowners' experts have looked at these
5 drawings. Their appraisers have looked at these drawings. And
6 I don't want to go so far as to use the word reliance because
7 that has too many -- too much baggage with it legally,
8 judicially or whatever, but basically they've looked at it, and
9 they're going to want to know -- well, let me use the easy
10 example. If the Loops' house is just on the other side of the
11 gate and they come home one day and there's no gate, how do they
12 get to their house?

13 MR. OKUN: Your Honor, I think I refer back to the
14 defendant's quote from *Nichols on Eminent Domain* and that
15 section discussing that. If the United States does not in the
16 future, you know, live up to those plans, for some reason that
17 changes, that gives rise to an inverse condemnation claim down
18 the road.

19 THE COURT: Let me ask you this. So whatever -- when do
20 the plans -- when does the United States become bound by those
21 plans?

22 MR. OKUN: The United States' position is that it's
23 bound by those plans at the time of trial, what it says it is
24 bound by. That's -- that's the situation that is going to be.
25 There's going to be gates. There's going to be access. Here's

1 where the gate is. It's going to be 24/7 access unless there's
2 an emergency which they assume invoke the police powers. This
3 is where it's going to be. And the property should be valued
4 based on that. Doesn't mean the defendants can't argue, no,
5 they have the rights to close it. It should be valued as
6 landlocked. But it is a jury question to determine what that
7 value is for the remainder property, what the fair market value
8 is.

9 THE COURT: Okay. All right. If -- let me -- and I
10 want y'all to think about this. And I'm looking at the
11 government table right here because it's going to affect y'all
12 more than I think it will affect the landowners. All I want you
13 to do is keep -- I want you to give that some real strong
14 thought, if you will, not from a practical standpoint which,
15 quite frankly, is what the landowners were worried about.
16 They're worried about how they're going to get home at night.

17 But just from y'all's standpoint, look at it from a legal
18 standpoint. How will a verdict, if that's the standard and
19 that's what the jury considers, how would it ever be reversible?
20 I mean, because what you're basically saying -- and I guess what
21 I'm saying, how would I as a judge -- let's say the verdict
22 comes back, and it's a zillion dollars. And, Mr. Okun, you come
23 in and say: Judge, that's wildly excessive. Wildly excessive.
24 This couldn't -- I mean, this is so far apart from any evidence
25 that was ever admitted at trial that they -- you know, obviously

1 the jury came back, and they just -- they hated the government
2 because they hate the fence and, you know, blah, blah, blah,
3 blah, blah. I mean, you can see that scenario going down.

4 How would I ever judge that, or how would the 5th Circuit
5 ever judge that when what we're telling -- what I think you're
6 suggesting we give to the jury is the right to decide whether
7 the property's landlocked or not?

8 MR. OKUN: Correct, Your Honor. That is a jury
9 question.

10 THE COURT: Okay. Mr. Adler, what's your sense of that?

11 MR. ADLER: I think that there are fact questions for a
12 jury to decide, and then there are legal questions that the
13 court has to decide. And I don't know whether our motion in
14 limine was the right way, but you're right. From the very first
15 time we were in the court on all these cases, we were saying we
16 can't go to trial because we don't know what's going to happen.
17 We don't know what kind of instructions to give to our
18 appraisers.

19 What precipitated this, Your Honor, was there were four
20 months of negotiations out at Dotty's property -- you visited
21 Dotty's property -- about where the gates would be, where access
22 would be. Four months of negotiations, and then we came up
23 with: Okay. These are the things that we can agree to. Let's
24 agree to these things, and let's put them into an order, and the
25 government says no. The government says we are not really

1 willing to commit to these things. These are the things that
2 we'll tell you we're going to do, but certainly don't ask us to
3 really commit to these things.

4 And that's what's precipitated this, because we realize we
5 don't know what kind of instructions to give to our appraisers.
6 And, Your Honor, you're right. It is the tip of the iceberg
7 because it's the gate issue. But it goes beyond the gate issue.
8 It's who has the dominant estate.

9 And we have -- there's language issues in their pleading
10 where they seek to reserve and to grant to the property owners
11 the right of access across the land that they're condemning.
12 There's -- it's not subject to national security needs. It is
13 an out-and-out reservation and grant of access rights across
14 this property, which clearly is not what they meant. But in
15 five years, Your Honor, when we're no longer here and our
16 clients have sold their property to somebody else who were not
17 in the courtroom, and these guys, they've gotten promoted and
18 they're U.S. attorneys in some other cities, and you're on the
19 5th Circuit bench --

20 THE COURT: I don't think you have to hold your breath
21 for that.

22 MR. ADLER: -- the only thing that people are going to
23 be able to look at with respect to what rights they have and
24 don't have is the declaration and the complaint in these cases.

25 I mean, what's to stop -- and I know it's not evidence

1 either because it's common news, but here's the newspaper here
2 today where the governor is still waiting to get word now from
3 the United States as to whether they'll bring troops down to the
4 border.

5 This is the fence that Israel has. It not only has the main
6 fence; but in order to retard movement, it has fences on both
7 sides. It has roads. It has moats. The government, for
8 national security reasons, if they wanted to come in and use
9 that entire 40-foot strip for whatever national security needs
10 are necessary in five years or ten years or 15 years, we may not
11 have the right, even if there was a guarantee of a gate, to be
12 able to come through that gate and travel down either side of
13 this fence.

14 We're just asking the government to decide, because they --
15 they have the ability to decide. They have the control. They
16 can put into their complaint and into their declaration these
17 are the rights that are left to you. They decide that. And
18 there are financial ramifications of the decisions that they
19 make.

20 THE COURT: Mr. Adler, hold on. I have to interrupt
21 you. I've got to go. I'm tagging in for Judge Tagle in
22 something that's going to be real short. Let's take about a 15
23 minute break, and we'll come back and pick it up here.

24 MR. ADLER: All right, sir.

25 *(Recess taken from 10:43 to 11:04)*

1 THE COURT: All right. Be seated. I apologize for
2 that. I promised Judge Tagle I'd handle that.

3 Let me -- let me pose a hypothetical to both of you. We try
4 these cases; and in most instances, I think, maybe not,
5 depending on, I guess, how fast the construction goes. But we
6 try the cases, and at the time we go to trial, the gates are in
7 place. We know -- we know what's there at least now.

8 And so the case is tried. And, Mr. Okun, for a minute, I'm
9 going to -- I'm going to assume that we try them under your
10 suggestion, that basically it all goes to the jury. We're going
11 to let the jury decide. And three years from now, the
12 government decides, well, we don't need gates. What we really
13 need is a solid fence or a solid wall all the way through, and
14 so we're closing the gates. We're going to have a solid fence.

15 Under your scenario -- and again, I'm not saying you're
16 wrong. You may be 100 percent right. But under that scenario,
17 do the landowners have any recourse?

18 MR. OKUN: Your Honor, landowners always have the
19 recourse of an inverse condemnation if something changes.

20 THE COURT: Well, but wait, wait. Let's think about
21 this, though. Let's think about this. If you're saying that
22 the fact that the fences can change or the gates can change -- I
23 guess the fences could change too, but let's concentrate on the
24 access, because I think that's most everybody's biggest concern,
25 and that that issue ought to go to the jury, and the jury can

1 either believe that the fences and gates are going to be there
2 from now to the end of time or from now until -- for all
3 practical purposes, these landowners or whatever, successor
4 landowners can use them for access, or they can disbelieve it.
5 They can say: You know what? This is the equivalent of a total
6 taking. We're taking the whole thing.

7 If we try the cases that way -- and again, I'm not saying
8 you're wrong. That may be the way we need to try them and may
9 be the way the law requires us to try them. If something
10 changes later on, why aren't the landowners barred by res
11 judicata?

12 MR. ADLER: I think we would be, Your Honor. If what is
13 being tried is their right to close the fence any time they want
14 to, then they have taken the right to close the fence anytime
15 they want to.

16 THE COURT: See what I'm saying?

17 MR. OKUN: I do understand, Your Honor. But again, when
18 you're determining the fair market value of a remainder
19 property, you're determining how the market perceives that
20 property in the after situation.

21 So really if I could go back to the seminal case of the
22 United States v Olson, the Supreme Court laid down the
23 evidentiary threshold, which was elements affecting value that
24 depend upon events or combinations of occurrences, which, while
25 within the realm of possibility, are not fairly shown to be

1 reasonably probable, should be excluded from consideration.

2 So the reasonable probability in this case, the government
3 would propose, is the wall will be there. Speculative evidence
4 that it will be gone should be excluded.

5 MR. ADLER: Your Honor, if I can reply to some of the
6 things he said in his first argument, because now my evidence
7 has turned into the speculative part of this case, which isn't
8 the way that it is.

9 Your Honor, there is a difference between plans and
10 specifications, which I believe are admissible at trial in this
11 case because that's a fact. The government can come in and say:
12 This is our plans and our specifications. That's a fact. The
13 jury can go out and look at the property, and they see gates
14 there. That's a fact.

15 But the government should never be allowed to have anyone
16 take the stand and say: We promise those gates will stay. Nor
17 should they allow anyone to go on the stand and say: We
18 speculate or think that they will stay. Nor should the
19 government be able to take the stand and say: It is our intent
20 that those things should stay.

21 The question of whether -- I mean, the question was posed
22 earlier, are we going to put the government credibility on trial
23 here? And I understand how the COLA raises are important to
24 you. There are lots of things that I'd like to raise myself if
25 we were --

1 THE COURT: We've given up on those.

2 MR. ADLER: Right. If we're going to be trying the
3 credibility of the government to make and keep these kinds of
4 promises, I just want no more than three or four days on that
5 part of the case. But we're not entitled to that.

6 THE COURT: Well, let me ask you this. And I don't mean
7 to cut you off, Mr. Adler, and I'll let you do it.

8 If Mr. Okun is right -- and, again, he may be. Assume with
9 me hypothetically he's right. You may disagree with him, but
10 assume with me hypothetically he's right. Won't you -- and I'm
11 not holding you to this, so don't -- don't feel like this is a
12 judicial admission. But won't you and all the other counsel
13 representing all the landowners try every case as a total
14 taking?

15 MR. ADLER: Yes.

16 THE COURT: Because it would almost be malpractice not
17 to.

18 MR. ADLER: It would be. What we will say is, and we
19 would expect the court to instruct the jury on the law because
20 the jury shouldn't be -- we shouldn't be standing up in front of
21 the jury arguing to them about what is the legal rights that are
22 being taken. What is being tried to the jury is how the
23 marketplace will value the rights that are taken. But it's your
24 responsibility to instruct the jury as to the legal rights that
25 are taken. And where that begins, Your Honor, is with what they

1 have in their pleading. I mean, they have -- in this case they
2 have said --

3 THE COURT: Cristi, can you darken it?

4 MR. ADLER: This is E, and I have other copies.

5 THE COURT: That's all right. I can see it fine. I
6 just needed the glare off of it.

7 MR. ADLER: And I think it might be on your screen as
8 well. They are taking -- they say that when they do their
9 taking, they're reserving and granting to the landowner, his
10 successors and assigns a right of way across their land.

11 Now, there's no way to read this but to say that we have the
12 dominant estate. I know that is not their intent because every
13 person that we've deposed and every conversation we have,
14 clearly the national security reasons are the dominant as
15 opposed to the servient estate. But if, in fact, they're going
16 to come out of this trial with a final judgment that says that
17 the national security interest of the dominant estate, I don't
18 want them reading that language to the jury, but they are
19 entitled to read to the jury the language of what they're taking
20 in this case.

21 So when we talk about the tip of the iceberg, the government
22 really ought to take a look at that language and say: Do you
23 really, really mean that?

24 But it's not only that. With respect to the public roads,
25 there are public roads that are perpendicular to our property

1 that enter the trap.

2 THE COURT: Wait a minute. Back up to what you just
3 said there.

4 MR. ADLER: Yes, sir.

5 THE COURT: And then I'll let you go on.

6 MR. ADLER: Yes, sir.

7 THE COURT: If they are granting you the dominant
8 estate --

9 MR. ADLER: Yes.

10 THE COURT: -- and a perpetual right of way --

11 MR. ADLER: Yes. They have a right to do that.

12 THE COURT: -- well, then you have that. And then for
13 them to close -- I'm going to ask you the flip side of the
14 question I just asked Mr. Okun. Then if they close it, isn't
15 that another taking, so you wouldn't be barred by res judicata?

16 MR. ADLER: Yes. If they came in in the future and
17 tried to condemn that, the right to close it, that would be a
18 future taking. If they wanted to put a gate -- if they wanted
19 to put a gate in it -- for example, if they wanted to put a gate
20 in it, they could come back in and say: We're going to -- now
21 we want the right to put a gate in it. We want that to be
22 dominant to your right to be able to tear down the wall in those
23 places where we have to tear down the wall in order to really
24 get access to the nearest gate.

25 They don't mean that. They could, if they wanted to, give

1 us that right, and then all we'd be asking the jury for is the
2 cost to cure, to tear down the wall in those places that we need
3 to tear down the wall in order to be able to get to the gate so
4 that we have access on and off our property. They don't mean
5 that.

6 THE COURT: Well, maybe they do.

7 MR. ADLER: Well, in their pleading and in their
8 briefing, they've told us that they don't. And I don't know.
9 But either way, I don't care. I recognize that I don't have the
10 right -- our clients don't have the right to decide that
11 question. Only they do.

12 But at this point, Your Honor -- and it goes to the
13 practical problems that we have -- they are pleading for
14 something that is different than what they say that they are
15 taking. And the same thing is true with the public roads.
16 There are public roads that come into the property that are
17 platted, dedicated public roads, and they intend to either put a
18 wall against it or a gate across it. So they either intend to
19 permanently block it or have the right to temporarily block it,
20 but yet their takings are subject to existing public roads.

21 Well, they really don't mean that. It's really not subject
22 to those roads. They are condemning the dominant estate so that
23 they can either put a wall across it or put a gate across it.
24 They don't mean that either.

25 So I'm not sure how to try the case. Do we try the case the

1 way that they've pled it in their declaration and in their
2 complaint, or do we try the case the way that they say
3 everybody's told you that we intend to either put walls? I
4 don't know how to try this case.

5 And then the levee issue down here too. It seemed as if
6 they were trying to grant us the right to come across, to drive
7 across the levees, which, of course, they can't. And there is
8 no right, no legal right for me to drive across the levee on my
9 neighbor's property because the levee is a flood control.
10 There's no -- ever has been a grant for anybody else to drive
11 across the levee.

12 THE COURT: Who owns the levees?

13 MR. ADLER: The property owner owns the levees.

14 THE COURT: Subject to the --

15 MR. ADLER: Subject to the easement for flood control,
16 berm purposes that the county had, that the county owns that
17 then became part of the IBWC.

18 THE COURT: All right. Now, as a practical matter, the
19 Border Patrol, for one, but private citizens too here drive on
20 the levees.

21 MR. ADLER: Right, but a property owner has --

22 THE COURT: No, I mean -- let me finish my question. Is
23 it just -- do people do that just out of we're all good
24 neighbors. We let people do that. It's not bothering anybody.
25 I mean, is there any legal right for anyone to drive on the

1 levees?

2 MR. ADLER: I can't speak to the Border Patrol because I
3 don't know if there are national security or law enforcement
4 statutes that let people go onto private property. That may
5 control here. I don't know. But as far as a private property
6 owner goes, a neighbor, it is totally permissive. And there are
7 property owners that put fence across the levee road with locks
8 that the Border Patrol has the keys to or the ability to get
9 through. But there are places where there are fences across
10 there.

11 THE COURT: I didn't know that.

12 MR. ADLER: But, Your Honor, the -- when you were
13 talking about the tip of the iceberg in this case -- and the
14 problem we have is I know that the trial settings are far off,
15 but we have -- by virtue of the scheduling order that you've
16 signed, we have appraisals that are due in mid to late June. My
17 folks have already spent almost \$100,000 in appraisal work and
18 appraisal testimony across all these cases, and I'm looking now
19 in having to pull together an appraisal for a June setting, and
20 then the takings are going to change.

21 And we've already been told that there are going to be
22 subsequent takings that they're going to file to fix the private
23 road issue. So I now have the potential of two and three cases
24 on the same piece of property where we're going to do the first
25 taking on this property, and then there's going to be a

1 different lawsuit. This road taking is the second one in the
2 Loop case. The Loops, White Wing, ought to have one trial where
3 all of the takings associated with this are in that case.

4 THE COURT: Well, I promise you that will happen.

5 MR. ADLER: So --

6 THE COURT: So that we'll cure. I can guarantee you
7 that.

8 MR. ADLER: My folks need, to whenever degree the court
9 can give to us, the opportunity to only do one more set of
10 appraisals because we don't have the money to keep doing
11 appraisals and coming back. We're going to lose this case
12 because we run out of money unless the court sends the
13 government away and says: Government, think about really what
14 it is that you want to do, what you don't want to do. The
15 negotiations with Dotty where they list the things, either
16 commit to them or don't commit to them.

17 But anyhow, Your Honor, back to the argument. There is a
18 difference between this is where you -- there's a difference
19 between putting into evidence the plans and specifications,
20 because those are a fact, and putting in something which is a
21 promise or a future intent, which is not fact.

22 The language in the court's -- and we've given the court in
23 the briefing lots of cases that say -- and in Nicholas, the
24 court said -- Nichols, they all say the same thing. You can put
25 in plans and specifications because those are fact. But we will

1 not let the government take the stand and say what it intends to
2 do or what it promises to do.

3 "In the argument before me it has been said and the
4 government is to be assumed to be fair minded and that over
5 course treat owners fairly. We are not dealing here, however,
6 with speculation of what may happen. The government is operated
7 by officers who necessarily change from time to time. The good
8 intentions of the present officers have no binding effect upon
9 the action of future officers. If the owners are to be bound by
10 the fair statements of those representing the government
11 presently engaged in this case, there would be no necessity for
12 litigation. We all hope to be treated well and to receive
13 compensation," and it goes on and on.

14 You don't put the government's credibility at trial. It
15 doesn't happen. That's not how this case will get tried. The
16 case will get tried by them coming in and the court saying to
17 the jury: They're going to show you the plans and
18 specifications that they have adopted. I am instructing you
19 that they have chose -- chosen to also purchase the right to
20 close those gates any time they want to because you are --
21 that's what they have chosen to buy in this case, if they choose
22 to do that.

23 If they choose not to do that, if they choose not to buy the
24 right to close it, then they can do that too. But the only
25 thing that gets tried to the jury is what they are taking and

1 then the facts. And then the appraisers apply those facts and
2 the legal determinations that the court makes in determining how
3 the market would -- would value those things.

4 THE COURT: All right. What -- let me -- since,
5 Mr. Adler, you and I are currently talking, how would you
6 suggest the court resolve this? And I don't mean end result. I
7 mean, that's between the parties. But, I mean, procedurally, if
8 I said, "Mr. Adler, draft the order," what would the order say?

9 MR. ADLER: This is where I would begin. Your Honor,
10 what precipitated the hearing today was the government filing
11 their declaration and their complaint in Dotty's case. You went
12 to her property, and they asked for a possession order. Rather
13 than sign the possession order, because in the motion that we
14 filed opposing that, we raised all these issues. You looked at
15 it and said: Wait a second. At the very beginning of this
16 process, I recognized there were uncertainties, but I gave the
17 government rope. And I said, you know, I'm going to give you
18 time here to clean this up and to come up with certainties and
19 decide what it is that you want to do and figure all the stuff
20 out that you said you were going to figure out so that you can
21 commit to what it is that you're going to do. And you gave the
22 government some rope. And all that's happened since that time
23 is it's gotten worse.

24 So this is what I would request you do as a first step.
25 One, don't grant possession in Dotty's case because they don't

1 know what they want.

2 Second, Your Honor, I have motion orders here that would --
3 that would end the possession in the other cases that are before
4 you right now.

5 Your Honor, there are -- in the Loop property, we received
6 12 hours notice, less than 24 hours notice this week that they
7 intend to go across the properties and begin to cut trees.
8 There's orchards. There are horses that are out there in the
9 area. There's fencing that's going to be coming down. And
10 still we don't know whether the taking, even the most basic
11 things, the dominant or the servient estate in what they're
12 taking.

13 So what we would ask the court to do is to sign the orders
14 that remove possession at this point. And then I would go back
15 to the government and I would say to the government: You get to
16 decide what's going to be tried in this case, but make sure that
17 what it is that you want is consistent with what it is that you
18 are pleading you're going to take. Because whatever it is that
19 you plead you're going to take is how this case is going to be
20 tried. If you want to suggest to the jury that they can rely
21 upon the fact into the future that there will be a gate or that
22 you can drive down the road or that you can't drive, whatever it
23 is that you want to do, put it in there. Because if you put it
24 in there, then the jury will be -- that's how I'm going to
25 instruct the jury, and that's what they're going to value.

1 But to the degree that you make the decision that you are
2 not going to commit to any of these things or whichever ones you
3 choose not to commit to, then I'm going to instruct the jury
4 that you made the affirmative choice to pay for the right not to
5 commit to those things. And I think if the court would just do
6 that, then the United States Government would sit down and
7 figure out what it is that it wants to do. But so long as the
8 court has given the government the possessory interest in these
9 properties and said go ahead and proceed, the government hasn't
10 been forced to sit down and figure out exactly what it is they
11 want to do because why should they? They have the -- tomorrow,
12 if not this afternoon, they are starting to steamroll through
13 the Loops' property, and they shouldn't be able to on the state
14 of how they have defined or not defined what they're taking in
15 this case.

16 I think, Your Honor, you have to tell the government to go
17 back to the beginning and figure out what it is that they want.
18 And, quite frankly, nobody wants to be the last person to be
19 killed in a war. You don't want to be the last guy to die. And
20 that's kind of like what we feel like here because we've read
21 the same thing about the new policy decision that's been made
22 that says, hey, there are better ways for us to do this than
23 building this wall. And if you would send the government back
24 with that question, say the court there has stopped us from
25 having the possessory interest, we now have to decide what it is

1 we're going to guarantee and not guarantee. And if we're not
2 willing to guarantee it, the jury is going to be instructed that
3 we're not willing to guarantee it, it might very well be that
4 the government looks at this stretch of the border wall and
5 says: You know something? Whatever it is we're doing
6 everywhere else, from now on we'll do that here too.

7 THE COURT: Well, for whatever good or bad it does, all
8 the lay sources that were not considering this evidence all say
9 they're going to finish Brownsville.

10 MR. ADLER: Unless I think you send it back to them that
11 says we're not going to let you -- you have to actually confront
12 these issues before you do. That's why I think there's a chance
13 that if they actually had to sit down and figure out what it is
14 that they want to do in Brownsville, maybe they won't. But even
15 if they decided they wanted to complete Brownsville, don't let
16 them start until they do decide what it is that they want to do.

17 THE COURT: All right. Mr. Warner, Mr. Okun, I am
18 worried. Address this for me. Help me with this.

19 MR. ADLER: Yes, sir.

20 THE COURT: Not -- I want them to help me with this
21 because, I mean, I assume that what Mr. Adler said is right. I
22 mean, you guys want the dominant estate, don't you?

23 MR. WARNER: That is correct, Your Honor.

24 THE COURT: I mean, I thought that was a given.

25 MR. WARNER: Judge, I think that our briefing points out

1 that you -- you read the estate taken along with the public
2 purpose of the plan in general. And when you read both those
3 together, it's just -- it's clear that we are the dominant
4 estate, and they are the servient estate. And, you know,
5 Mr. Adler wants to come in here and tell the court it's not
6 clear. Well, if we start at the top, Your Honor, subject to
7 existing easements for public roads. Well, if it's a public
8 road, we haven't taken it yet. If it's not a public road, well,
9 then, we have.

10 And so what we've been trying to determine is what are
11 public roads and what are private roads. And there are roads
12 along Oklahoma Road, Your Honor, that are platted as public
13 roads, but they've never been accepted into the county's
14 maintained road system. On top of that, Your Honor, we have a
15 levee that went through and severed those roads at some point in
16 the past and may very well have severed the public nature of
17 those roads.

18 So in terms of this "we don't know what they're taking,"
19 well, we think it's pretty clear when it comes to roads, Your
20 Honor. If it's a private road, we took it. If it's a public
21 road, we didn't take it. And we told the court and defendants
22 in our responses that to the extent we didn't take public roads,
23 we will be filing new condemnation actions to take those public
24 roads so that we can put gates there.

25 So I don't -- I don't understand the confusion with that

1 one, Your Honor.

2 Then he wants to come down and say that the federal levee
3 right of way is not clear. Well, if the court looks at that,
4 what we've told them is you can use -- you have a perpetual
5 right of way across our take essentially to get to the nearest
6 border gate to then cross over the levee right to the extent
7 that you have existing rights to do that. Because -- and it may
8 not be a right, Your Honor. Maybe it's a privilege. But there
9 are people who have gone out and they have gotten licenses from
10 the IBWC to get their access across the levee.

11 And if the court wants to go back and look at the historical
12 nature of this, at some point in our past, this land didn't have
13 a levee, you know, a 16 or 18-foot levee coming through it. And
14 then at some point it was determined that we needed flood
15 control, and that levee severed land. Way before this fence
16 ever got here, that levee severed land. And the landowners,
17 what they did was they went in and they started using it. Was
18 it right? Was it good use? Was it legal use? I don't know.
19 But they certainly used it, and that's how the Valley adjusted.

20 And historically landowners have used this levee to traverse
21 sometimes over other people's fees that are underneath the
22 levee, Your Honor. We're not changing that. The whole purpose
23 of this was if you have a right to use it, we haven't taken that
24 away from you.

25 THE COURT: Whoa, whoa, whoa. Let me back up a little

1 bit.

2 MR. WARNER: Okay.

3 THE COURT: You are changing it to this extent. Maybe
4 other extents, but it occurs to me that to the extent that
5 someone's land is over here, but the nearest gate is over here,
6 to get to that gate and then back to their land, I mean, they're
7 going to have to do something to do that. It's not like they
8 can go out and walk over. They may have to walk over the levee,
9 but at least they'd be on their land the whole time.

10 MR. WARNER: Your Honor, I would offer to the court that
11 there are landowners down here who drive over a mile on the
12 levee in some of these segments before we ever put the fence in
13 to get down to land that already was landlocked.

14 THE COURT: And I don't doubt that.

15 MR. WARNER: That's why we don't understand why this is
16 so unclear. Because to the extent that people may have been,
17 for lack of a better word, illegally using the levee, it seems
18 to me that what defendants want this court to declare up and
19 down this river is that all of that use is illegal, and you
20 can't do that anymore.

21 THE COURT: Well, no.

22 MR. WARNER: And I don't know that that's what the court
23 wants to do.

24 THE COURT: I think it's a little different. I think
25 it's a little different, and here's why. At least in my mind,

1 it's different. Maybe I shouldn't impute my motivation to them.

2 No. 1, they're worried about access. No. 2, and this is my
3 worry, although it should be y'all's worry as the lawyers, not
4 necessarily the landowners' worry, but No. 2 is how are we going
5 to try this? What are we going to ask the jury to value? And
6 while -- you know, I'll have to confess, I've probably driven on
7 a levee, and I certainly didn't own the levee I drove on. Maybe
8 I was technically trespassing on somebody's property when I did
9 it.

10 But it's different when we're going to ask jurors to come
11 back with a verdict, because they're going to be asked in some
12 form or instructed in some form, you know, we want you to value
13 X. And as the judge, I'm going to have to describe X to them.
14 It will be their job to tell us what X is worth, but we're going
15 to have to somehow describe to them what X is and if X has
16 access, no access. If it has, you know, access that's a quarter
17 of a mile away, the -- you would suspect at least, depending on
18 where on the river it is, that the verdict would be less than if
19 the access is a mile away because their use of the land is more
20 inconvenient. There's still access, but it's inconvenienced,
21 and it's -- you know, you would think, you know, in real estate
22 parlance, it's more remote. I mean, it wouldn't fall into the
23 location, location, location part of it.

24 But -- so, I mean, I'm really concerned about how we're
25 going to do this, No. 1.

1 And No. 2, how are we -- I mean, I'm troubled by the
2 government's suggestion -- and by saying that, you may be
3 100 percent right, so I'm not saying you're wrong. But I'm
4 troubled about letting the jury decide in some fashion whether
5 or not there's access. And I guess this is maybe my fault, and
6 I'll throw myself on my sword or whatever because, I mean, it
7 never occurred to me that the gates and stuff that we've been
8 showing in the courtroom might not be there tomorrow. And I'm
9 sure for a certain number of landowners, it never occurred to
10 them that they might not be there tomorrow.

11 So it's -- from my standpoint, it's more than just a
12 practical concern. Well, it's both. It's a practical concern
13 of how we're going to try the case. But for the landowners,
14 it's how are we going to use our land, or maybe even can we use
15 our land.

16 MR. ADLER: Or sell it in the future.

17 THE COURT: And that's really what it comes down to. I
18 mean, you know, some of this land has been in the same families
19 for generations, as we've heard. Some of it for hundreds of
20 years. But some of it, you know, for instance, I would guess
21 the Borzynskis, they bought it for a commercial purpose.
22 They're going to own it as long as there is a commercial purpose
23 for it. And if, for whatever reason, their commercial purpose
24 ends, they're going to want to sell it. And if they can't sell
25 it because you can't get to it, you know, then the value of that

1 land is certainly different than the value of land that sits on
2 Oklahoma Road where you can get to it without having to go over
3 the fence.

4 Let me -- let me do this. I'm going to unfortunately put
5 y'all under a short deadline. I'm going to -- first of all, I'm
6 going to suspend for these four cases or the five cases, the
7 existing deadlines as far as final reports from appraisers.

8 Today is the 22nd. Let me ask y'all by the 5th, that's two
9 weeks, and I'm asking both sides to prepare for me what you
10 think the jury instructions should be. I mean, every law school
11 seminar you go to says before you ever file your case, do your
12 jury instructions, but I know no one does that. I never did
13 that. No one does that. It's good advice that no one ever
14 follows. But let's really put some thought, not that y'all
15 haven't, but, I mean, it's -- nothing sharpens the point by
16 actually having to put it in writing of what you think we will
17 ask the jury or what you think I should instruct the jury.
18 Because obviously it's occurred to me during this hearing this
19 morning, just like I asked Mr. Adler a minute ago, that if this
20 is the case, if this is the situation, every -- it never
21 occurred to me that every landowner is going to ask for a total
22 taking. They're going to say you've taken the whole thing. If
23 I can't get there, you've taken it. And the logic will be very
24 appealing to a jury.

25 MR. ADLER: Your Honor, would you also be willing to

1 suspend the possession just for this three-week period of time?

2 THE COURT: I'll do it for the two-week period of time
3 I'm talking about.

4 MR. ADLER: All right.

5 MR. HU: That could pose a serious difficulty for the
6 government, Your Honor. As I understand it, the contracts are
7 already out for the segment of 021, and literally tens of
8 thousands of dollars in costs could be incurred by delay, even
9 two weeks.

10 THE COURT: Well, why don't you -- Mr. Adler, have you
11 given the government copies of these orders?

12 MR. ADLER: Yes.

13 THE COURT: Why don't you look at those orders, Mr. Hu,
14 and come back with me with how you're going to be hurt by it.
15 But here's the issue. Well, we've focused on the one issue.

16 On the second issue, though, and I guess it plays into it,
17 I'd like the government, and I'd like you to do it in writing,
18 to respond to what it is you're taking. And you can do it in a
19 short period. I mean, you can do it in a short, you know,
20 two-page brief as far as I'm concerned. I mean, if -- you know,
21 we're taking the dominant estate and we're taking everything
22 that goes along with the dominant estate for the tract we're
23 taking except, and then list out for me just A, B, C, D, public
24 roads. You know, so, I mean, you know, just make it. Don't
25 write it like a real estate lawyer. Write it like something

1 that everybody can read: This is what we're taking.

2 MR. ADLER: And the guarantees they're willing to make,
3 and there will be a gate here and it will stay or whatever.

4 THE COURT: And if you're -- and that's ultimately what
5 this is all coming down to, though, is what Mr. Adler just
6 mentioned: And that is, if -- is the government -- because if
7 I'm Mr. Adler, the first witness you put on, the first thing I'm
8 going to ask him is: You know, here's a gate you got on this
9 map right here. Do you guarantee it will be here ten years from
10 now, five years from now? And I assume from what y'all told me
11 today, that that person answering honestly as he or she would,
12 I'm sure, would say no, I can't guarantee that. And that's
13 going to open Pandora's box.

14 MR. ADLER: And I don't want them to take the stand and
15 say I do guarantee it unless it's in the petition, because them
16 taking the stand and saying that doesn't get it for me.

17 THE COURT: Well, you know, we're going to -- I mean,
18 it's going to have to be -- it's going to have to be a
19 consistent position, I think, except in those areas where the
20 fence is temporary and y'all have agreed it's temporary. But
21 other than that, I would think that what you're taking down the
22 fence line is the same thing for every landowner. And it may
23 not be, and that may be something we have to cross too when we
24 get to it with the individual landowner. But it's -- the key
25 thing here is, you know, from the cases and from Mr. Okun's

1 suggestion is if the plans and specifications that these
2 landowners have been shown are merely our current plans and they
3 don't have any binding effect on the government, I mean, that's
4 a real big deal.

5 MR. ADLER: Huge.

6 THE COURT: I mean, that, in essence, is why I scheduled
7 this hearing. I mean, the Kelo issue was just icing on the cake
8 for me. But the access, I mean, that's -- to some landowners,
9 that's everything. Because if I can't get through it or I can't
10 get to it without driving 10-miles down the road, I mean, you've
11 taken the back 40.

12 Okay. I know from both sides that you may feel like we
13 haven't accomplished much today, but it's informative for me,
14 because this is something I had to know; and, as I said,
15 something that had not occurred to me, or at least we hadn't
16 focused on it until they filed that motion in limine which --
17 because I had always assumed that, okay, the gate is the gate.
18 It will be the gate now. It will be the gate ten years from
19 now. And, quite frankly, you know, I'm sure that's true for
20 most of the landowners. Okay. The government told me the gate
21 is going to be here. Here's my gate. It's not convenient, but
22 it's not horribly inconvenient. But if that's -- if there's not
23 going to be a gate, then that changes the rules.

24 Mr. Hu, you're looking troubled.

25 MR. HU: Yes, I am troubled, Your Honor, because the

1 motion that they -- I'm sorry, the proposed order they submitted
2 to the court asks that the court order that the order of
3 possession entered by this court back in January is abated until
4 such time as the ambiguities in the pleadings may be resolved.
5 I understand the court's mentioning just a two-week hiatus, but
6 the problem we have with this --

7 THE COURT: Yeah, I'm not signing this order as drafted,
8 or at least -- because, quite frankly, I haven't read it yet,
9 you know, but you don't have to worry about that.

10 MR. HU: Okay. But I guess what I'm worried about is
11 the contracts for what we'll call 021, which is Borzynski, Loop,
12 and all these properties, are already out. Notices to proceed
13 are going on. They're supposed to start clearing land and doing
14 all that actually --

15 THE COURT: Well, let me put it in --

16 MR. WARNER: They're clearing now.

17 MR. HU: Now.

18 THE COURT: Let me put it in your ball park really
19 because this is what -- with regard to these five properties, do
20 what I asked you to do with regard to listing what you're
21 taking. I mean, listing it in plain English: Here's what we're
22 taking. This is it. Give it to them. Give it to me. And if
23 you do it in a week, then you do it in a week. I mean, so in
24 some essence, you don't have to wait for two weeks to now. And
25 if it's real simple, I mean, y'all can go downstairs and say

1 this is what we're taking, and then I'll consider lifting the
2 ban. I just wanted to make it clear --

3 MR. ADLER: And that's fine. That's fine.

4 THE COURT: -- to them that the government's case, this
5 is exactly what we're taking.

6 MR. ADLER: All we want.

7 MR. HU: So as I understand the court's order, if we
8 provide the court with the lists, we need to then wait for a
9 court order allowing construction to proceed on these
10 properties?

11 THE COURT: Yes, but I'm not going anywhere. I'll be
12 here. I'll be here today. I'll be here Monday. I mean, I'm --
13 you know, as soon as you get it to me and get it to them --

14 MR. ADLER: We'll respond immediately if there's
15 anything to respond to.

16 MR. HU: Because, Your Honor, as it -- I filed this
17 declaration in a different case, but that's how I know the
18 numbers. I mean, we're talking, if there's a delay and we have
19 to pay delay costs to the contractors, we're looking at ten to
20 \$15,000 a day. Plus if we have to demobilize because they run
21 out of things to work, the government is looking at something
22 close to half a million dollars of taxpayer money being
23 expended. So that's why time is of the essence from our
24 perspective to getting this started.

25 THE COURT: I will be available as soon as you get it to

1 me.

2 And, Mr. Hu, I appreciate the concern for taxpayer money,
3 being a taxpayer myself. Everybody in here is a taxpayer. And
4 we don't want to be buying \$200 hammers, thousand dollar toilet
5 seats, whatever the government is always famous for buying. I'm
6 hopeful, though, that by focusing on this, that we'll ultimately
7 save the government money. And I'm also hopefully, by focusing
8 on this, not just solving the problem in these five cases. I'm,
9 you know, sure Mr. Adler would gladly negotiate a deal with
10 y'all and go on down the road. But you guys are going to be
11 here and I'm going to be here for the next 200 cases, and this
12 is going to be an issue in every one of them. I mean, maybe
13 that's hyperbole, but close to every one.

14 MR. HU: Could be quite a number.

15 THE COURT: And so I'd like to iron it out on the front
16 end, and this just happens to be the landowners that brought it
17 to the court's attention. You know, so that's why we're here on
18 this. But I will act quickly. As soon as you get it to me,
19 I'll probably give the landowners 24 hours to respond to it.

20 MR. ADLER: That's fine.

21 THE COURT: And then we may move forward. But it does
22 two things. One, it hopefully focuses attention; but two, now
23 they know. The landowners are going to know this is what you're
24 taking. So when I sign the order that's saying government, go
25 ahead, these guys know what you're grabbing.

1 MR. ADLER: Thank you.

2 MR. HU: And then separate and apart from that, the jury
3 instructions will be June 5th?

4 THE COURT: In two weeks. And I can't emphasize to you
5 how important I think those are, because I really want you to
6 put some thought into it. And if it looks like you need more
7 time, tell me you need more time, because as I said, you know,
8 you guys are having to blaze the trail maybe a little bit for
9 the landowners, but we're going to be here in all these cases,
10 and I think it's real important we focus on this, because if
11 we're going to -- here's my worry. And I know the government
12 asked for -- didn't ask for, opposed the fact that I awarded a
13 jury to the landowners, and I'm a firm believer in the jury
14 system, and I think the landowners deserved a jury or I wouldn't
15 have written the order the way I did.

16 One of the things I put in the order, and I'm sure y'all saw
17 it, is that I'm not going to allow bias or prejudice to weigh
18 into these verdicts. We're going to evaluate the land for what
19 it is. We're not going to let people's opinion about the fence
20 or about the government or about eminent domain color what
21 should otherwise be a fair verdict for both the landowners and
22 the government. That's always been one of my concerns. In
23 fact, while the government didn't really emphasize that in
24 opposing the jury, I'm sure that's one of the things y'all were
25 worried about, and rightfully so.

1 Having said that, this issue is going to hinder me, and,
2 quite frankly, hinder the circuit in figuring out was it bias or
3 prejudice, or was it a total taking? And so maybe, I mean --
4 and I'm not suggesting this -- well, I am suggesting it
5 obviously or I wouldn't be saying it. But, I mean, maybe some
6 thought ought to be given from both sides. Maybe this is one --
7 the kind of case where we ought to have special issues instead
8 of one global verdict. Walk down and say this is -- you know,
9 and so you know what went into the jury verdict.

10 MR. ADLER: When we're drafting these jury verdicts,
11 Your Honor, do I draft it assuming that I've been reserved and
12 granted all the access rights, or do I assume that they have
13 intended, despite the wording, to have a dominant estate, or do
14 you want us to --

15 THE COURT: Well, I think by the time you actually get
16 it to me, you're going to have seen what they're taking, and
17 that may help you focus. Maybe I'm not being articulate,
18 Mr. Hu.

19 MR. HU: I believe I understand the court's order with
20 respect to the list. And then on the jury instruction, I
21 understand -- as I understand it, the court wants, I assume, not
22 the usual preparatory stuff, but really the special issues, if
23 we choose to go that way, and the instructions as to -- that are
24 specific to condemnation.

25 THE COURT: Here's my -- think about it, though. And

1 I've given it some thought ever since I read their motion. I
2 mean, if I -- and read the government's response. And,
3 Mr. Okun, you may be 100 percent right. I'm not saying you're
4 wrong. But if we just put it all in a big ball and give it to
5 the jury and ask them one general issue, what was the land
6 worth? They come back with \$50 million, \$100 million. How do I
7 know what went into that? And how would the 5th Circuit know?
8 I mean, oh, this looks like a big number, but we -- we've
9 tried -- we've now tried the issue of total taking. I mean, I
10 can promise you if we go kind of in the -- following the
11 government's theme, the landowners are going to try a total
12 taking case. They've got to. And you guys may say, well, we're
13 just taking this 30 feet, 40 feet. That's not how they're going
14 to try the case. And if we just put it up in a ball and give it
15 all to the jury, you know, we're letting the jury decide what
16 the government is doing. See, that's my concern.

17 MR. HU: I think I understand the court's concern. What
18 may be of some assistance to us, especially in guiding us,
19 because I'm thinking about the 261 other cases, would be if the
20 court could have a status conference sometime the week of June
21 15th. And the reason I mention the week of June 15th is
22 Mr. Warner has a long and well deserved vacation the previous
23 week to take his family out of town with prepaid tickets, and I
24 don't want to interfere with that if at all possible. So
25 perhaps sometime the week of June 15th we could have a status

1 conference, I guess, and perhaps discuss the jury instructions
2 and other -- and any other issues.

3 THE COURT: I'll do that. I'll do that. I don't want
4 to set it yet. Let me see what my jury schedule is going to be.
5 I'll let you know probably by -- well, by next week when we'll
6 do it because I'll have my final pretrial on May 27th, so I'll
7 know then, or 26th. But -- and I'll set this because I think
8 this is something we really need to put some thought in.

9 Now, I should caution the landowners, the individuals that
10 are here. By throwing out 50 or \$100 million, the court was
11 just -- do not take that to the bank. That was just a round
12 number that I thought sounded outrageous, so I was throwing that
13 out for the government to hone in on the point that if we have a
14 general verdict, how would that ever -- how would we ever --
15 other than saying, hmmm, that's a big number, what do we do with
16 it?

17 MR. ADLER: See, and we were ready to move for verdict.

18 THE COURT: Yeah. All right. Counselors, thank you.

19 MR. ADLER: Thank you.

20 MR. HU: Thank you.

21 THE COURT: We stand adjourned.

22 * * *

23 (End of requested transcript)

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I certify that the foregoing is a correct transcript from
the record of proceedings in the above matter.

Date: May 26, 2009

/s/_____
Signature of Court Reporter
Barbara Barnard