

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'clock ____M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**VERIZON NORTHWEST, INC. a foreign
corporation,**

Plaintiff,

vs.

**RIVERSIDE DEVELOPMENT COMPANY, an
Idaho Corporation,**

Defendants.

Case No. CV 2005 4058

**MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTION IN LIMINE**

I. INTRODUCTION.

Prior to the filing of this suit, Verizon had the property in dispute appraised for damages purposes by Ed Muehlbach, a local real estate appraiser. The appraisal report was submitted to Riverside, and the parties were not able to reach an agreement, resulting in the subject lawsuit.

On February 13, 2006, Verizon filed a motion for order allowing expert rebuttal testimony of Riverside's expert, Ed Morse. On February 16, 2006, Riverside filed a Motion in Limine asking that the opinion of Verizon's appraiser, Muehlbach be excluded.

On February 27, 2006, a hearing was held on both motions and the Court granted Verizon's motion for order allowing expert rebuttal testimony of Morse's opinions, but the Court stressed that the examination must be true rebuttal testimony limited only to

the claims that Morse made in his appraisal. The Court took Riverside's Motion in Limine under advisement for further clarification on the correct methodology and law that must be used in formulating an expert appraisal report and to look at the appraisal reports in depth. The Court has reviewed the briefing, case law and appraisal reports. Accordingly, the matter is now at issue.

II. ANALYSIS

Riverside seeks an order excluding the opinions of Verizon's appraiser, Ed Muehlbach, on two grounds: (1) that his appraisal is defective, invalid, and unreliable, and (2) that any supplemental of his appraisal report would be in violation of the Court's scheduling order. Riverside relies on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 125 S.Ct. Ed. 2d 469 (1993), stating that Muehlbach's report does not meet the *Daubert* test and therefore should not be allowed in as expert testimony. In addition, Riverside's counsel stated at the February 27, 2006 hearing that Verizon did not follow Idaho law and that Muehlbach's report was deficient because of the methodology he used in his report. Riverside argues Muehlbach should have used the "before and after" methodology in appraising the land for easement acquisition and that since Muehlbach did not use that methodology he was in direct contradiction to Idaho law because he did not include the severance damage to the remaining property.

Verizon argues Muehlbach's methodology in arriving at the value of the portion to be condemned is not defective and that the "before and after" analysis is not required by Idaho law. Rather, Verizon argues Idaho law requires the appraiser value the portion taken and severance damages to the remainder, if any. The analysis used by Muehlbach's report used a highest and best use of the parcel and a valuation based upon the sales comparison approach and then determine a value per square foot for the

part taken. Verizon contends that just because Muelbach did not report any severance damages in his appraisal does not make this methodology deficient. Verizon believes that regardless of which approach is used, the analysis would result in the same end figure, as the damages would still include the market value of the portion taken and the value of the severance damages. Verizon contends that they merely would be presented in a different manner.

Idaho Code Section 7-711 provides the framework for assessing damages in eminent domain cases. It provides in relevant part:

ASSESSMENT OF DAMAGES: The court...must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate of interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed. For purposes of ascertaining the value of the property, the assessed value for property tax shall be used as the minimum amount of damages unless the court...finds the property has been altered substantially.
2. If the property sought to be condemned constitutes only a part of a larger parcel: (a) the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff....
3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be specially and directly benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subsection 2. of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value...
5. As far as practicable, compensation must be assessed for each source of damages separately.

There is no case law in Idaho that requires an appraiser in a condemnation case utilize a “before and after” analysis. Idaho follows the taking plus damages, or state rule, where the appraiser will be required to estimate the value of the easement interest acquired plus damages to the remainder, if any. Riverside claims Idaho law requires the condemning agency pay for the part taken, plus damages to the remainder. Riverside claims that case law and appraisal authority is clear that the larger parcel is *always* appraised. In addition, Riverside claims that in order to determine damages a “before and after” methodology is universally *recommended* for a partial taking easement acquisition.

This Court can find no Idaho case law or statute that asserts such absolutes. Idaho Code § 7-711 sets out the framework for what the Court must ascertain and assess when assessing damages not what the appraiser in his report must do in assessing damages. This Court can find no Idaho case law that says that the larger parcel is *always* appraised and while the USPAP and the industry standards may *recommend* the “before and after” methodology, Idaho case law seems clear in that it follows a taking plus damages approach where the appraiser estimates the value of the easement interest acquired plus damages to the remainder, if any.

Furthermore, the Court does not believe Muehlbach’s report is deficient under the *Daubert* test. Just because the analysis is analyzed under a different approach does not make it deficient or junk science and therefore the Court finds Riverside’s argument that the report does not meet the *Daubert* test unpersuasive.

This Court is aware that Muehlbach did not report any severance damages in his appraisal report. The Court has instructed plaintiffs that rebuttal testimony will be allowed only to the extent that it is true rebuttal testimony and Verizon will not be

allowed to amend their experts report to address severance damages. However such omission does not make his methodology deficient.

III. CONCLUSION

While Muehlbach's did not include severance damages in his report, he did give an estimate of value of the easement acquired which is consistent with the state law approach that requires the appraiser value the portion taken. Just because Muehlbach did not report any severance damages in his appraisal does not make his methodology deficient and does not make him not qualified to testify as an expert.

IT IS HEREBY ORDERED Riverside's Motion in Limine is **DENIED**.

Entered this 1st day of March, 2006.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 1st day of March, 2006, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:
Susan Weeks 667-1684 Craig Wise 667-4930

Deputy Clerk