

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF JACKSON

FIFTH JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. 32-CV-18-146

Hon. Darci J. Bentz

In re the Appeal from the Final Order
of the Heron Lake Watershed District, Acting as
Drainage Authority for County Ditch No. 3
Establishing Drainage Project, Adopting and Confirming
Viewers' Report of Improvement Benefits and Damages,
Authorizing the Application of Separable Maintenance,
and Directing Construction of the Project

APPELLANT'S DISCLOSURES

TO: LOUIS SMITH, COUNSEL FOR RESPONDENT HERON LAKE WATERSHED
DISTRICT, 400 2ND AVENUE SOUTH, #1200, MINNEAPOLIS, MN 55401

Appellant hereby makes the following disclosures pursuant to Rule 26.01(a) and (b) of the Minnesota Rules of Civil Procedure. These disclosures are made for purposes of Phase I, the establishment appeal, only.

(A) The name, and if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment:

Horace Thompson, P. O. Box 22, Okabena, MN 56161. Mr. Thompson is the President and Treasurer of Appellant Alba Grain, Inc. Mr. Thompson is familiar with the property owned by Appellant which is the subject of this appeal. He also is familiar with the condition and function of County Ditch No. 3 located on the property owned by Appellant. Mr. Thompson attended the final hearing on the improvement proceedings. He had discussions with some of the improvement petitioners, counsel for the petitioners, the project engineer, managers, and other landowners concerning the design of the proposed improvement, costs and benefits of the proposed improvement and its impact on affected properties.

Klay Walinga, Fairland Management Company, 339 11th Street, Windom, MN 56101, Phone: 507-831-2808. Through his employment with Fairland Management Company, Mr. Walinga is involved in the operation and management of the property owned by

Appellant which is affected by County Ditch No. 3. He is familiar with the soil types, productivity, and farming history related to the property owned by Appellant and affected by County Ditch No. 3. Mr. Walinga also is familiar with the County Ditch No. 3 drainage system, including that portion located on Appellant's property. Mr. Walinga attended the informational meetings and public hearings regarding the improvement project and discussed it with other affected landowners and managers of the Heron Lake Watershed District. He also discussed the proposed project with counsel for the petitioners and the project engineer.

Various other persons with discoverable information would include other landowners, witnesses, viewers, the project engineers, Heron Lake Watershed District managers and staff who were involved in the improvement proceedings. The identity of these individuals should be disclosed by their record of the drainage proceedings, all of which Respondent already has.

- (B) A copy—or a description by category and location—of all documents, electronically stored information and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment:

The documents Appellant currently possesses include meeting minutes, meeting notices, the engineer's various reports, the viewers' reports, property owners' reports, and other materials generated during the course of the improvement proceedings. Any such documents or records currently in Appellant's possession came from the records of the drainage proceedings, all of which Respondent has or should have.

- (C) A computation of each category of damages claimed by the disclosing party:

Not applicable to the Phase I establishment appeal.

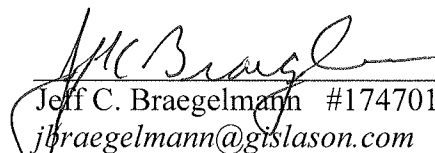
- (D) For inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Not applicable.

- (E) Appellant anticipates calling Paul Jurek and Scott Kuhlman to provide expert testimony at trial. See their report dated December 28, 2018, a copy of which is attached hereto.

The undersigned hereby acknowledges that sanctions may be awarded pursuant to Minn.
Stat. § 549.211.

Dated this 28th day of December, 2018.



Jeff C. Braegelmann #174701
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Phone: 507-354-3111
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12/28/2018

Gislason & Hunter LLP
C/O Jeff Braegelmann
2700 S. Broadway
PO Box 458
New Ulm, MN 56073-0458

RE: Jackson County Ditch 3

Dear Mr. Braegelmann:

We have been asked to review and provide our professional opinion on the engineering reports and estimates that were used for separable maintenance on the improvement project for Jackson County Ditch 3. This is our report on those topics.

Topics

Separable maintenance repair methods
Separable maintenance costs in excess of improvement costs

Basis & Materials Examined

Final Engineer's Report (FER) and Amendments 1 through 5
MN Statutes

- 103E.701 Subd. 1 – Definition of drainage system repair
- 103E.215 Subd. 6 – Separable maintenance

Opinions

Separable maintenance repair methods

There are a number of locations in the existing system where two or more pipes run in parallel. The FER identifies these areas as being in disrepair. In these areas, the costs presented in the FER for repairs, for use as separable maintenance estimates, include replacing each individual parallel pipe. The proposed improvements in these same areas use a single pipe. In our opinion, using the replacement cost for parallel pipes is not an appropriate method to estimate separable maintenance costs for this improvement project, for at least two reasons:

1. Standard engineering practice for a repair in this case would use a single pipe, not multiple parallel pipes.
2. Multiple parallel pipes are not reflective of the proportionate estimated cost of the proposed improvement, and therefore do not meet the statutory requirements for establishing separable maintenance costs

The term "repair" means to restore all or part of a drainage system as nearly as practicable to the same hydraulic capacity as originally constructed and subsequently improved. Replacing individual parallel pipes (or even just failed portions of individual pipes) is a method that may be appropriate for a repair if only a portion of the parallel pipe system is in disrepair. The FER identifies the parallel pipes portions of the system as being fully in need of repair. When multiple parallel pipes are in need of repair, standard

engineering practice is to replace the faulty pipes with a single pipe of equal capacity, if site conditions allow. This is evidenced by the proposed project design, which includes a single pipe, rather than multiple parallel pipes.

To use the concept of separable maintenance, MN Stat. 103E.215 Subd. 6 calls for "...a statement showing the proportionate estimated cost of the proposed improvement required to repair the separable part of the existing system and the estimated proportionate cost of the added work required for the improvement..." It is our opinion that the repairs (and associated costs) presented for consideration as separable maintenance should be reflective of the nature of the proposed improvement project. As a single pipe is proposed for the improvement project, a single pipe of capacity equal to the existing parallel pipes would be an appropriate method of estimating the proportionate cost of the proposed improvement required to repair the separable part of the existing system.

The engineer should consider costs that are reflective of the nature of the proposed improvement. There are many possible configurations that could hypothetically be constructed in order to provide capacity equal to the design capacity of the existing system: The capacity could be achieved by using many small pipes, which would generate a higher cost. The capacity could be achieved by using different, more costly pipe materials, which would generate a higher cost. The capacity could be achieved by a pumped drainage system, which would generate a higher cost. Any of these methods could be appropriate to consider for a repair project; however, none of these possibilities meets the established requirement for the costs to be a proportionate estimated cost **of the proposed improvement**.

Costs for these specific branches appear to have been calculated more correctly in FER amendment #4 option #3 summary – Combined Tiles. This approach was abandoned in the subsequent amendment #5. FER amendment #4 concludes (incorrectly, in our opinion) that separable maintenance should be considered as replacing individual parallel pipes, rather than combining to a single pipe, because it is an accurate assessment of potential repair costs. The statute does not simply require that *potential repair costs* be considered – it requires a proportionate estimated cost **of the proposed improvement** required to repair the separable part of the existing system. The difference in separable maintenance costs between FER amendment #4 option 3 (combined tiles) and amendment 5 is approximately \$1 million. Therefore, using the correct method estimating repair costs in this case would reduce the separable maintenance amount by approximately \$1 million.

Separable maintenance costs in excess of improvement costs

As a result of selecting an inappropriate separable maintenance repair method, the separable maintenance costs for several parallel pipe portions of the existing system exceed the estimated improvement project costs in these areas. For these areas, the engineer subtracts the separable maintenance cost from the cost of the proposed project and ends up with a negative number for the improvement cost. These negative improvement costs are combined with the (positive) improvement costs from other portions of the system, and the net improvement costs are considered as a whole for the entire project. It is our opinion that this is an inappropriate method to use when considering the project costs. The approach is problematic for at least two reasons:

1. The project net improvement cost (actual cost minus separable maintenance equals net improvement cost) is not calculated correctly and may not equal or exceed the benefits determined by the viewers.
2. The allocation and assessment of project improvement costs and project separable maintenance costs to individual benefitted parcels within the drainage system is incorrect.

The statute sets up the allocation and assessment of project costs in the same way as the engineer has presented the costs: first, separable maintenance repair costs are allocated and assessed against all property benefitted by the entire drainage system; second, the balance of the cost of the improvement is allocated and assessed against the property benefitted by the improvement. The statute operates under the premise that the cost of an improvement is greater than or equal to a repair – that added capacity (larger pipe) is more expensive than existing capacity. This premise and the accounting methods operate correctly, so long as the repair costs have been determined correctly – as the proportionate estimated cost of the **proposed improvement**, not as some other hypothetical, more expensive repair method. It is apparent that the engineer's selection of an inappropriate repair method results in an incorrect amount of repair cost and causes an incorrect calculation of improvement benefit.

The use of separable maintenance costs in excess of the cost of the proposed improvement creates an incorrect allocation of cost on several levels.

At the entire system level, the overestimation of the repair costs, stemming from selecting an inappropriate repair method, results in too much cost being assessed to all properties benefitted by the entire drainage system (per the requirements of 103E.215 Subd. 6(b)(1).) As stated above, this is a discrepancy of approximately \$1 million.

At the parcel level, if the drainage authority assesses improvement costs at the same level of detail as the cost estimates have been prepared in the FER (branch by branch), then net improvement costs are assessed incorrectly for all branches with repair costs in excess of the proposed project cost (and for any branch where an inappropriate repair method is used in the estimate, regardless of whether or not the repair cost exceeds the improvement cost). FER amendment #4 includes a summary cost table that explores limiting repair costs to the improvement costs, resulting in no negative net improvement costs for any branches; i.e. "capping" the separable maintenance. This approach was requested by a landowner but was not recommended by the engineer and was not included in the subsequent amendment #5. The engineer provided no reason for not using this approach. This approach should have been used. If it had been used, that alone would have reduced the separable maintenance estimate by approximately \$673,000. If both the correct repair method had been used and the separable maintenance been capped, then the separable maintenance estimate would have reduced by approximately \$1 million.

The construction and other estimated costs of the improvement total approximately \$7.3 million. The engineer's separable maintenance estimate totals approximately \$5.76 million. Using the correct method of estimating repair costs under the separable maintenance statute, the separable maintenance estimate would total approximately \$4.76 million. Therefore, if the correct method had been used for the separable maintenance estimate, the improvement assessment would total approximately \$2.54 million. (\$7.3 million estimated improvement cost - \$4.76 million separable maintenance = \$2.54 million improvement assessment)

Jeff Braegelmann
12/28/2018
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All opinions stated in this report are held to a reasonable degree of certainty, based on our education, training and experience.

We have not testified as an expert in any other cases in the past 4 years.

For our services in this matter, we have billed at the following hourly rates:

Paul Jurek \$148.00

Scott Kuhlman \$115.00

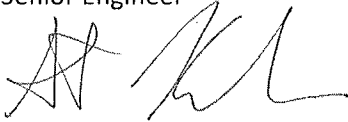
See attached résumés for our qualifications.

Sincerely,

BOLLIG INC



Paul Jurek, P.E.
Senior Engineer



Scott Kuhlman, P.E.
Project Engineer

Attachment

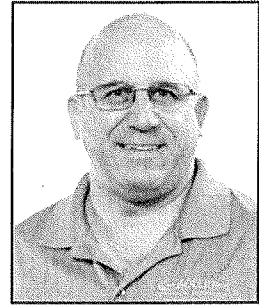
Paul Jurek, P.E. – Senior Project Engineer

Education

Bachelor of Science Degree, Civil Engineering
North Dakota State University

Background

With more than 19 years of engineering experience, Paul is skilled in planning, design, approvals, construction management, and consultant management coordination. Paul has completed over \$200M in roadway, bridge, and utility projects ranging in size from \$0.35M to over \$45M with more than 28 successfully-completed state, county, and local road and utility implementation projects throughout his career. Paul worked for MnDOT District 8 as a Construction/Design Engineer and a Lead Design and District Hydraulics Engineer for 12 years.



Scott Kuhlman, P.E. – Project Engineer

Education

Bachelor of Science Degree, Biosystems and Agricultural Engineering
University of Minnesota-Twin Cities

Background

Scott has a high aptitude for efficient design, organization, and critical path thinking and is well versed in planning, design, permitting, regulatory review, and construction administration for municipal and private clients. With over 5 years of experience, Scott has taken the lead on projects interfacing with clients, contractors, funding agencies, and regulatory agencies.



Project-Related Work Experience

While at Bollig, Paul and Scott have been involved in various capacities from planning through construction in the following drainage repair and improvement projects:

- Chippewa County JD 67
- Chippewa County CD 22
- North Fork Crow River Watershed District – JD 1
- North Fork Crow River Watershed District – CD 7
- Renville Co SWCD – Streambank Stabilization
- Renville County CD 63, Laterals N & N1
- Renville County CD 66
- Renville County CD 70
- Renville County CD 133