

Jackson County Ditch #3  
Adjourned Hearing 2  
Heron Lake Watershed District (HLWD)  
March 29, 2018

1. **Call to order**

Managers present: Harvey Kruger, Wayne Rasche, Jim Buschena, and Gary Ewert

Manager absent: Bruce Leinen

Staff: Jan Voit

Others: Mike Tow, Tow Law Firm, Ltd.; Chuck Brandel and Jacob Rischmiller, I+S Group (ISG); Jeff Braegelmann, Gislason and Hunter; Bruce Sellers, Wendland Sellers Law Office; Bruce Krahmer, Krahmer and Shafer, Ltd., Dave Macek, Kevin Nordquist, Scott McClure, and Jim Eigenberg, Jackson County; Dan Ruby, Tom Mahoney, and Ron Ringquist, Viewers; Klay Walinga, Jim Milbrath, Dwayne Milbrath, Ryan Hill, Cindy Hill Ekedahl, Nila Pederson, Bass Brothers, David Post, Ron Pomerence, John Post, Terry Post, Bob Springman, Gary Madsen, Robert Lange, Marless Lange, Paul Henning, Rodger Hotzler, Dan Milbrath, Dan Cranston, Paul Pietz, Don Stenzel, Chuck Dewanz, Horace Thompson, Royal Larson, Don Gentry, Steve Hussong, Dave Damm, Steve Droll, Dennis Damm; other unidentified individuals may have been in attendance who chose not to sign the attendance sheet

Jim Buschena called the meeting to order at 10:00 a.m. He introduced the managers, staff, viewer, petitioners' attorney, and engineer. He read the following housekeeping items.

- Please turn your cell phones off or to vibrate. If you must answer a call, please take your conversation outside. If your phone rings more than one time and interrupts the meeting, you will be asked to leave.
- When the public comment periods are open, please state your name for the record.
  - Five minutes will be allowed for each person to speak. A timer will be set to ensure that the timeframe is followed.
  - Each person is allowed to speak only once. At my discretion, persons may be allowed to speak a second time to respond to earlier comments. However, comments are limited to new information, not for repeating previous comments.
  - Respect the person that is speaking. Please do not interrupt.
  - Side conversations should be taken outside.
  - When multiple comments on the same topic have been presented, I may request that further comments be limited to new information.
- These guidelines are printed on the agenda for today's hearing. Your cooperation is greatly appreciated.

The Board of Managers (Board) of the HLWD, acting as a drainage authority under Minnesota Statutes, Chapter 103E, held an adjourned hearing on the petition to improve Jackson County Ditch (CD) #3, review the petition, the Engineer's Final Report and Amendments, the Viewers' Report, and take testimony from all interested parties to determine whether to establish the proposed project or dismiss the petition. The hearing was tape recorded and a copy of the recording will be maintained by the HLWD. Jim

Buschena declared the meeting to be open. Harvey Kruger recused himself because he is a petitioner on the proposed improvement project.

The petitioner's attorney, Bruce Sellers was called upon to review the history of the project and proceedings to date. A copy of this information is included with the minutes and incorporated by reference.

**2. Determine sufficiency of petition and bond**

The first item of business was to determine the sufficiency of the petition. The petition was previously determined to be sufficient and the board has received no new information which would change that determination. The current bond on file with the petition has a balance of \$23,086.66, which is deemed adequate at this time.

**3. Engineer's Report**

The next item of business was to receive, review, and discuss the engineer's final report and amendments. Chuck Brandel of ISG is the project engineer. Jim Buschena requested that he present a summary of the final report and to specifically review (1) the total estimated construction cost for the proposed project; (2) whether the proposed project is practical and necessary, and (3) whether the outlet for the drainage project is adequate. The Engineer was asked address the actions requested by the managers at the final hearing including optional additions and separable maintenance as described in Amendment #3. A copy of the presentation is included with the minutes and is incorporated by reference.

Chuck Brandel stated that the project is cost-effective, practical, and feasible. With the updates to the amendments, he recommends approval of the project with separable maintenance as calculated in the engineer's final report. With the inclusion of the pond and the reduction in peak flows in larger events, the outlet is adequate for the system. ISG recommends approval at this time.

Jim Buschena asked if Chuck Brandel had any other recommendations for the board. Chuck Brandel responded that he did not, but if questions arose, he had the bridge plans, the full plans, and costs estimates if details are needed.

Jim Buschena opened the meeting to the public for comments in the engineer's final report. He asked that anyone with questions come to the microphone and state their name.

Bruce Krahmer, representing Grace Kay, one of the landowners in Section 25 of Alba Township, asked questions about separable maintenance. He asked if the engineer had eliminated Options 2 and 3 that were previously presented and was only having Option 1 as a choice for the Board. Chuck Brandel replied that he was recommending Option 1 and that the Board had received testimony on the other options. If there are questions about Options 2 and 3, he could address them. Bruce Krahmer asked if that data was eliminated from the report at this point. Chuck Brandel responded that it was eliminated from Amendment 5. Options 2 and 3 were removed from the amended report based on the decision on the redetermination to use Option 1 separable maintenance, review of the drainage statute, and past projects. He has stated at every hearing that it is his opinion is

that separable maintenance in Option 1 should be used. The Board has discretion to look at other options and they are still part of the record.

Bruce Krahmer asked if redetermination and separable maintenance are two separate items. Chuck Brandel replied that they were, but that separable maintenance was used in the redetermination. Bruce Krahmer asked if a redetermination was determining the benefits to the system as it exists at a given point in time. Chuck Brandel responded that Mr. Krahmer was correct.

Bruce Krahmer asked if Chuck Brandel was present at the December meeting of the Jackson County Board. Chuck Brandel responded that he was not, but that Jacob Rischmiller was. Bruce Krahmer asked if amended report number 5, and perhaps 4, refer to the Jackson County Board as determining that separable maintenance should be Option 1. Chuck Brandel said that was correct. Bruce Krahmer distributed copies of the Jackson County Board minutes and the adopted resolution to the engineer and the Board. Copies of those documents are included with the minutes.

Bruce Krahmer asked if Chuck Brandel understood that the Jackson County Board does not make the separable maintenance determination. Chuck Brandel stated that he did understand that. The HLWD Board makes the decision on separable maintenance. He has put together a report that includes separable maintenance for them to consider. It is his job to give an opinion. And his opinion is that Option 1 is applicable based on his experience, past projects approved by this Board, and other boards. Regardless of the decision of the Jackson County Board, his opinion was the same before that.

Bruce Krahmer said that as he reads the minutes and findings of Jackson County Board, their maintenance supervisor made comments. The method used by the county for repairing ditch tiles is to only repair or replace the area that is no longer working. So, a three parallel line tile system overtime would be repaired or replaced as a three tile line system. He did not see anywhere in the minutes or findings how it would be treated if it was an Improvement project and they were replacing three tile with one tile. Chuck Brandel responded that when we get out of the redetermination and into the improvement, the engineer may include a proportionate cost for repair. That is what he is doing and that is what he is recommending. Bruce Krahmer said that is part of the improvement project, not the redetermination of benefits (ROB) as they exist at a given moment. Chuck Brandel replied that it is his opinion, which hasn't changed from the preliminary hearing or the subsequent hearings.

Bruce Krahmer stated that the engineer had referred to the statute about repairs. The statute was discussed at the hearing in May. It is his opinion that the statutes need to be taken as a whole. He read Minnesota Statutes 103E.215 Subd. 6. Bruce Krahmer gave Branch 6 as an example. It is costing about \$400,000 to replace three tile lines in a given area with one new tile of substantially larger capacity. The engineer is saying that the proportionate share of the \$400,000 cost that is being expended is \$600,000 for repair and a \$200,000 refund as part of the improvement. He asked if that was correct. Chuck Brandel replied that he was correct. Bruce Krahmer asked if that was a proportionate cost or a theoretical cost of doing something that is never going to happen. Chuck Brandel

responded that without the improvement more than \$620,000 will be spent.

Bruce Krahmer said that the statute is referring to a portion of the cost of the improvement, not the cost of repairs that we are not going to make. Chuck Brandel replied that when looking at the project as a whole, he could give a cost for the whole improvement project and say that the proportionate cost is this. When looking at the project as a whole, it is a proportionate cost.

Bruce Krahmer asked if the board has broad discretion in making their decision. They are not bound to go with what the engineer recommends. Chuck Brandel responded that they are not. It is his opinion that this has been done many times on many other systems.

Bruce Krahmer asked at how many of those projects the negative numbers were discussed and have they been as large as this. In this case, it is more than \$600,000 of negative numbers and that is leaving freebies for those that just got down to zero with the calculation of the theoretical cost that will not be expended. How many other boards have actually discussed what this means? Chuck Brandel gave an example of Faribault CD 21, which is very similar to this. The mainline had two and three public tiles being replaced. It was discussed that the costs for these in some areas were more, or the same, as replacing with an open ditch. It has been discussed. That project was looked at as a whole. Part of the reason for that is those tile were the main outlet for the entire system. It was approved using repair costs for each one of those tile.

Bruce Krahmer stated that in the engineer's report he thought there were about 40 different segments that are separable. The engineer is determining the improvement cost and the repair cost in some theoretical manner that is not going to happen. The net costs are a refund to the system. There are, with the additional amendments, about 12 that go negative. Whether it is one or 12, the board has discretion to do what they think is fair and proper to determine who is charged for this \$1 million expense of expenses. Whether it is those on the entire system or those that benefit from the entire system. He asked if this was correct. Chuck Brandel responded that is correct. He is looking at the project as a whole. Bruce Krahmer thanked Chuck Brandel for answering his questions.

Jim Buschena asked if there were any other questions for the engineer. Jeff Braegelmann, Gislason and Hunter spoke next, representing Alba Grain and Mr. Hoddy Thompson. His client asked that he express concerns about the project and maybe raise a couple of questions that the engineer might address or that they respectfully asked the Board to consider before they make their final decision. It was Mr. Braegelmann's opinion that separable maintenance is the hot button here. The project wouldn't go ahead without it. The project is going to spend roughly \$7.1 million to produce roughly \$1.9 million of new benefit. That is what's happening here. The only way that can work is if separable maintenance is employed in some fashion. The Board has the minutes from the Jackson County Board. It was his opinion that the message to be taken from that is that the Jackson County Board redetermined benefits. It didn't make any decision that binds this Board on whether to use separable maintenance or how to use it. It was his opinion that if the Board does take any direction from the Jackson County Board, it is that when they do tile fixes, they fix it where it is needed, they don't replace it wholesale.

The main point that Mr. Braegelmann wanted to make on behalf of his client was the effect of using separable maintenance. For every dollar that gets spent in the repair/separable maintenance category, it costs his client about six times more than a dollar spent as an improvement. He was sure that was the case for others. There may be some of the landowners that don't have any improvement benefit. It is all being assessed as repair cost. We would ask the Board to at least consider capping the separable maintenance as they had once considered in a previous amendment. Jackson County isn't here to tell the Board how to apply separable maintenance. It is one thing to say that repair cost for a branch can be considered so as to reduce the improvement cost to that branch. It is another thing to take that improvement cost to a negative number. It seemed to him that under any common sense way to look at this, the most that can do is to reduce the improvement cost to zero, not put the improvement cost in a negative category. As to the overall method, Mr. Brandel has given his opinion. Obviously the Board has to consider that. Mr. Braegelmann also asked that the Board think about what they would do if there were no improvement project even being proposed. Would they spend \$5.6 million to repair this system? Or is that a number or a theory that has been advanced only because this improvement is pending. The bottom line and the main concern that his client asked him to express is that they think it would be appropriate for the Board to cap the separable maintenance as had been considered in one of the prior reports. He believed it was within the Board's discretion to do that. Jackson County doesn't have anything to say about that. He thanked the Board for their time and consideration.

Jim Buschena asked if there were any other questions or comments. Nila Pederson stated that she owns a quarter of land. She said that all this talk is way above her head. She didn't have a clue what half of it meant. She gets rent off one quarter of land. This is going to affect her big time for 20 years. She hoped the Board considered this. She thanked the Board. Jim Buschena thanked her for her comments.

Jim Buschena asked if there were any other comments. Hearing none, he made a motion to close the comment period for the engineer's final report. Gary Ewert seconded this. Motion carried unanimously.

#### **4. Viewers' Report**

The next item of business was to receive, review, and discuss the Viewers' Reports. Ron Ringquist is one of the Viewers. Jim Buschena requested that he present a summary of the Viewers' Reports and to specifically review: (1) the method used to calculate benefits; (2) the method used to calculate damages, and (3) the net benefits of the project. A copy of the Viewers' Report, as amended, was received, is incorporated by reference and will be maintained as a record of the HLWD.

Ron Ringquist stated that what is being addressed today is only the improvement benefits from the proposed project. The Jackson County Board adopted a ROB a year ago based upon the information that was provided to the Viewers at that time. Benefits of drainage are calculated based on two thoughts or processes. Cost in and of itself is a feasibility study and not one of the elements of value. Benefits are the Viewers' opinion of the difference in market value of a piece of property because a drainage system exists.

In doing that, the Viewers analyze sales data within Jackson County in the project area, if there are adequate sales. The law also says that the Viewers can consider an increase in agricultural potential. If land sells for \$7,500 per acre, it does not mean that every acre is worth \$7,500. Some of those acres are uplands that are very productive, don't need drainage, don't depend on the outlet, and don't need additional measures to be productive. Some may be the low lands and without the ditch have zero value or productivity for agricultural production because without the ditch they are nonproductive. The sales will tell the Viewers the maximum amount of value that can be found within a property. Under appraisal theory, that is the rule of substitution. If a piece of property can be bought that already produces 200 bushel per acre corn, does the landowner have to go buy the same piece and then spend a whole bunch of money to bring it up to 200 bushel corn production? The values are different.

The difference is in the productivity or deficiency that the lesser productive property may have. Because this system does not provide an adequate outlet to all of the parcels within this watershed, the Viewers had that as part of their consideration both in the redetermination and in looking at the improvement benefit.

If the Viewers say the optimum production for 200 bushel per acre corn is worth \$8,000, there is probably no need for drainage if it already provides that. If there are acres that need to be improved, to bring them up to that same standard, what is the value difference that allows that to happen? We consider location. If the parcel is a mile away from the ditch, the landowner has to pay for a mile of drainage privately in order to get the water to that outlet. If the parcel is on one of the existing tile branches, but it is one of the branches that the engineer says has a .17 inch drainage coefficient instead of a .50 inch, does that parcel get the same value from that drainage system as the people on the open ditch? The Viewers' opinion is no. They do not get the same quantity of drainage or quality of capacity. It will impact the value of those parcels.

The Viewers do a calculation on the best they can anticipate from land sales. They do not know of any sale where a wetland acre is purchased, drained, and made into productive farmland and therefore, went from a non-usable value to the most productive agricultural value. It doesn't happen anymore because of all the environmental rules and regulations. If that was going to be tried, the first thing would be to buy the land and then invest \$30,000 to replace the wetland acres. It can't be done. It doesn't make sense to do that. We look through sales the best we can and break them down.

Because it is a mass appraisal, the Viewers use four general benefit classifications. They do a comparison of no drainage, what was there in 1900, what is there today, and what will be there once the land is improved or those capacities and that outlet are increased. From the income approach, or what the law says is the increase in agricultural potential, the Viewers are able to look at those four classes of land and anticipate how much water impact there is going to be because of those restricted outlets.

The Viewers go through a 100-year rainfall cycle analysis. They look at different storm events. The one-year and two-year storms happen 50 times out of a 100 year cycle. Out of that, only 30 are limited to the two-year storm, so statistically, as rainfalls increase, it is a

two-year storm or greater.

The Viewers go through the 100-year analysis and estimate how long it takes the water to get off that property and how much impact that has on production. If it happens on May 15 and it gets to be 90 degrees the next day, water doesn't have to sit there very long. If that rain happens in October, water can sit there a long time and not affect the crop. There is no pure science that says exactly what happens. The Minnesota Viewers' Association has worked for years to try to define general indicators of impacts. The Viewers have applied a method that says that if water sits there for 48 hours, because of the timing of rain, the parcel may get 60 percent of its optimum production.

The Viewers analyze that in their cash flow analysis for the various land classes. They look at the input costs and the income and subtract the production costs. It does not take very long for those numbers to become negative. Between 60 and 70 percent of normal income covers input costs. If a landowner loses 30 percent of the crop and instead of 200 bushel, only gets 140 bushel corn, it doesn't mean the landowner didn't get anything, it means he or she made no money. That's not good.

When the Viewers look at benefits, they go through that analysis. Their reduction in value is limited by something that they refer to as cost to cure. Any time they look at a property value, the limiting factor is the cost to cure the deficiency. A simple example is, there is a \$200,000 house with a steel roof. Another house has asphalt singles on the roof. What is the difference in value between the steel roof and the shingled roof? If it is \$190,000 to build it with asphalt shingles and \$200,000 for the steel, the value difference is only \$10,000. That is the difference between having an adequate and a deficient property. One is better than the other. When the Viewers look at benefit from improvement, one of the considerations is how much does it cost to bring it up to that standard. The decrease in value should be no greater than what it costs to make those improvements or bring that value up.

That is what the Viewers' discussion with the Jackson County Board was. That is the information that they were provided by the engineer. Their benefit value of \$2 million was considering the fact that landowners could do the improvement to bring the system to that standard for about that same ratio of value.

If everybody had the one-inch adequate outlet, the potential benefits of this system are \$19,941,000. That is how much value could be added to this watershed, in the Viewers' opinion, if everybody had the same capacity as what the open ditch is providing directly to each individual 40-acre tract. The Viewers adjusted those values to reflect their opinion of the values subject to the improvement considerations - the costs to cure the deficiency. Within the redetermination, because not every property is going to have the one-inch drainage coefficient and not every property gets a direct outlet into the ditch system, they had the redetermined benefits of \$17 million. That left the system with \$2 million of benefit for the improvement. That is how the Viewers analyzed the benefits. In the report that has been submitted, they updated the cost estimates to match Amendment #5 of the final report. They did not change the benefits from those determined when Jackson County adopted the redetermination. Although there have been fewer land sales, the values of

land sales have not decreased significantly for the good properties. The market has shown that the properties selling for less are the marginal properties that are only growing 140 bushel corn because it doesn't cover the costs. The Viewers did lower from top values from three or four years ago. But they did not find from one year ago until this year that the market had really changed.

The Viewers submitted their report. The only real changes were the name changes, parcel splits, and corrections. They changed all of the names except for a couple that came up after the report was submitted. One correction to the report, other than the splits, that they would recommend, is an error that overcharged a split and left 27 acres on one piece when seven acres was supposed to go to another.

Jim Buschena asked if the Viewers had any other recommendations. Ron Ringquist stated that the Viewers recommend that the Board adopt the report with that one correction. Their reports are not specifically subject to the separable maintenance discussion. But, if the separable maintenance is changed, it may change their opinion of the value both for the improvement and the redetermination because that is not the information we were given to work with.

Jim Buschena opened the meeting to the public. He asked if anyone had any questions or comments respecting the Viewers' Report. Hearing none, he made a motion to cease public comment on the Viewers' Report. Wayne Rasche seconded this. Motion carried unanimously.

Jim Buschena asked the Viewer state on the record the total amount of benefits, the total amount of damages, and the net benefits attributable to the project as the benefits must exceed the damages in order to establish the project.

Ron Ringquist stated that with the one correction, it is the Viewers' opinion that the benefits of the improvement as proposed are \$1,888,015.45. The temporary damages for the construction of the project will affect production on 269.88 acres at a damage value of \$134,940, which is included within the estimated cost. The estimated improvement cost is \$1,481,080. The net benefits are \$1,888,015.45.

#### **5. Taking and consideration of testimony by interested persons**

The next item of business was to receive, review, and discuss testimony from any interested person relating to the project which has not been previously covered. That includes the last three hearings that have been conducted. So, we would like to receive any new information. Jim Buschena asked if anyone had any questions or concerns. Hearing none, he made a motion to close this portion of the hearing. Wayne Rasche seconded this. Motion carried unanimously.

#### **6. Action by the Board**

##### ***PROPOSED FINDINGS TO ESTABLISH PROJECT:***

Jim Buschena moved that based upon the evidence, the Board find that the detailed survey report and Viewers' Report have been made and other proceedings have been completed under Minnesota Statutes, Chapter 103E. Gary Ewert seconded this. Motion

carried unanimously.

Jim Buschena moved that based upon the evidence, the Board find that the reports made or amended are complete and correct. Wayne Rasche seconded this. Motion carried unanimously.

Jim Buschena moved that based upon the evidence, the Board find that the damages and benefits have been properly determined. Gary Ewert seconded this. Motion carried unanimously.

Jim Buschena moved that based upon the evidence, the Board find that the estimated benefits are greater than the total estimated cost, including damages. Wayne Rasche seconded this. Motion carried unanimously.

Jim Buschena moved that based upon the evidence, the Board find that the proposed drainage project will be of public utility and benefit, and will promote the public health. Gary Ewert seconded this. Motion carried unanimously.

Jim Buschena moved that based upon the evidence, the Board find that the proposed drainage project is practicable. Gary Ewert seconded this. Motion carried unanimously.

Jim Buschena moved that based upon the findings, I move that the Board issue its order:

- (i) containing the drainage authority's findings;
- (ii) adopting and confirming the Viewers' Report as made or amended; and
- (iii) establishing the proposed drainage project as reported and amended.

Gary Ewert seconded this. Motion carried unanimously.

Jim Buschena moved that the Jackson County Auditor be contacted by petitioner's attorney to confirm the length of time and number of annual statements in which the assessments for the project shall be paid and the interest rate to be borne by the drainage lien, and whether drainage bonds are to be issued to finance the construction, including the rate of interest for such bonds; and that this information be included in the final resolution and order. Wayne Rasche seconded this. Motion carried unanimously.

Jim Buschena moved that based upon the evidence, the Board find that only a separable portion of the existing drainage system will be improved and that this portion also needs repair. Gary Ewert seconded this. Motion carried unanimously.

Jim Buschena moved that based on the evidence, the Board determine and assess, by order, that the amount of \$5,759,471 be allocated as repairs and assessed against all property benefited by the entire drainage system, and that the balance of the cost of the improvement be assessed in addition to the repair assessment against the property benefited by the improvement. Wayne Rasche seconded this. Motion carried unanimously.

Jim Buschena moved that the attorney for petitioners shall draft the resolution and order establishing the drainage project and forward the draft order to the watershed's attorney for review. Upon review and approval as to form and content by the watershed attorney, the resolution and order will be considered and adopted at the next open meeting of the board of managers, and duly issued forthwith. Gary Ewert seconded this. Motion carried

unanimously.

Jim Buschena moved that this hearing be adjourned at 11:31 a.m. Wayne Rasche seconded this. Motion carried unanimously.

Wayne Rasche  
Acting Secretary