

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

**LOYD W. THOMPSON and RICKIE J.
THOMPSON, Husband and Wife,**

Plaintiffs,

vs.

Case No.: CIV-04-211-S

**WESTERN FARMERS ELECTRIC
COOPERATIVE, a cooperative corporation,
et al.,**

Defendants.

**DEFENDANT WFEC'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON THE MEASURE OF DAMAGES AVAILABLE TO
PLAINTIFF AND BRIEF IN SUPPORT**

Defendant Western Farmers Electric Cooperative ("WFEC") respectfully submits this Motion for Partial Summary Judgment and Brief in Support as to the proper measure of damages available to Plaintiffs, Loyd W. and Rickie J. Thompson ("Plaintiffs"), in this matter, pursuant to Fed.R.Civ.P. 56 and LCvR 56.1.

I. INTRODUCTION.

Plaintiffs brought this action as a citizen suit under the federal Clean Water Act alleging that Defendants had violated a stormwater permit. Plaintiffs further allege that sediment from Defendants' operations in constructing a power line has been carried onto Plaintiffs' property and affected the quality of water in Plaintiffs' lake, which was created by Plaintiffs constructing a dam without receiving the appropriate permits. Plaintiffs have claimed that, in addition to the alleged Clean Water Act violations, Defendants are liable to Plaintiffs for the impacts to their lake and for certain other damages to an access road, under common law theories of damage to real property, nuisance, trespass, unjust enrichment, and breach of contract.

In their First Amended Complaint, Plaintiffs seek legal damages for alleged harm to their real property and recovery in equity based upon Defendants' alleged unjust enrichment for work on the power line. First Amended Complaint, at ¶¶ 15-27. Plaintiffs seek recovery for actual damages and costs of remediation. *See, e.g.*, First Amended Complaint, after ¶ 20 (unnumbered prayer).¹ Plaintiffs have not alleged a cause of action for any personal injuries – physical or emotional – in the First Amended Complaint and have indicated they do not claim personal injury.

Plaintiffs clearly seek both property damages and costs of remediation. WFEC is entitled to a judgment as a matter of law that Plaintiffs are limited to recovery for damages for their Second, Third, and Fourth Claims for Relief in the amount by which Plaintiffs can demonstrate at trial the diminution in market value of their property, or the costs of remediation, whichever is less. The Oklahoma Supreme Court has stated the rule in *Schneberger v. Apache Corp.*, 1994 OK 117, 890 P.2d 847, 854 (Okla. 1994), that where “the cost to restore the land exceeds the loss in value, then the diminution in value is the correct measure of damages.”

Based upon their expert's report, Plaintiffs appear to contend that the total costs of remediation are in excess of \$1.3 million. This value far exceeds the entire value of Plaintiffs' property and must be restricted in advance of trial to the decrease in value to be proved at trial.

II. STATEMENT OF UNDISPUTED FACTS.

Solely for the purpose of this Motion for Summary Judgment, WFEC states that the following facts are undisputed:

¹ Plaintiffs also seek equitable relief in the form of unjust enrichment and injunctive relief. *See, e.g.*, First Amended Complaint, after ¶¶ 20, 27 (unnumbered paragraphs). Plaintiffs also seek punitive damages. *See, e.g.*, First Amended Complaint, after ¶ 20 (unnumbered paragraph).

1. On March 24, 2005, Plaintiffs submitted the expert report of Mike Chapman. *See* Exhibit “A,” Expert Opinions of Mike Chapman, notarized 3/24/05 (hereinafter, “Chapman Report”).

2. Part IV of the Chapman Report is entitled “Construction and Capital Cost Estimates for Correction of Activities at Thompson Property.” *See* Exhibit A, Chapman Report, at 10.

3. Under Part IV of the Chapman Report are three separate construction cost estimates: one for “Road Repairs,” one for “Restoration of Power Line ROW,” and one for “Lake Rehab.” *See* Exhibit A, Chapman Report, at Part IV, no page numbers.

4. The estimate for “Road Repair” is in the total amount of \$273,172.80 and appears to be for work on the access road on Plaintiffs’ property. *See* Exhibit A, Chapman Report, Part IV. Damage to the access road is alleged in ¶¶ 18 and 29 of the First Amended Complaint.

5. The estimate for “Restoration of Power Line ROW” is in the total amount of \$630,823.53 and appears to be for work on the transmission line right of way (ROW) from which sediment is alleged to have contaminated Plaintiffs’ lake. *See* Exhibit A, Chapman Report, Part IV; First Amended Complaint, ¶¶ 11, 12, 16.

6. It is not clear whether the work encompassed in the estimate for “Restoration of Power Line ROW” is for restoration of the portion of the right of way on Plaintiffs’ property, or the portion of the right of way on property directly to the north of the property owned by Plaintiffs, or both. *See* Exhibit A, Chapman Report, Part IV. The First Amended Complaint, ¶ 11, only complains of work done on “property directly to the north of the property owned by Plaintiffs.” The property directly to the north of the property owned by Plaintiffs which is

crossed by WFEC's transmission line right of way is owned by Clark McEntire.² See Exhibit "B," Videotaped Deposition of Loyd Wayne Thompson (hereinafter "Thompson Depo"), at 22:19-21.

7. The estimate for "Lake Rehab" is in the total amount of \$418,020.09 and appears to be for work to remove silt from the lake on Plaintiffs' property. See Exhibit A, Chapman Report, Part IV. Damage to the lake is alleged in ¶¶ 11, 12, and 16 of the First Amended Complaint.

8. The total amount of all three construction cost estimates in Part IV of Chapman's report is \$1,322,016.04. See Exhibit A, Chapman Report, Part IV.

9. Plaintiffs have not submitted any other cost estimates for repair or restoration work due to the property damage alleged in the First Amended Complaint.

10. Plaintiffs have not alleged any personal injuries arising from the alleged nuisance. See Exhibit B, Thompson Depo, at 76:17-79:21.

11. On March 23, 2005, WFEC submitted an expert report by Mike Sisemore which estimates the fair market value of Plaintiffs' property at \$423,500. See Exhibit "C," Appraisal of Mike Sisemore (hereinafter, "Sisemore Report"), at 24.

12. Sisemore's report also estimates the diminution in fair market value of Plaintiffs' property as a result of the property damage alleged in the First Amended Complaint to be in the range from \$0 (zero) to, at most, \$76,000. Sisemore believes the most likely diminution in value is \$13,500 based on the cost of repair ("cost to cure"). Sisemore's diminution in value estimates

² Plaintiffs have not yet responded to WFEC's Interrogatories (due date was March 18, 2005), which asked whether Plaintiffs are claiming that they should be compensated for the cost of any restoration on McEntire's property, and WFEC has not deposed Chapman (the deposition is scheduled for April 8, 2005). Thus, WFEC reserves the right to supplement its Brief on this issue in its Reply should additional information from the Interrogatory answers or the Chapman deposition be available at that time.

assume satisfactory revegetation of the right of way that drains into Plaintiffs' lake. See Exhibit C, Sisemore Report, at 25-26.

III. ARGUMENT AND AUTHORITY.

A. Summary Judgment Standard.

Rule 56(c) of the Federal Rules of Civil Procedure provides when a party moves for summary judgment:

[t]he judgment shall be granted forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed to secure the just, expedient and inexpensive determination of an action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In the summary judgment context, the initial burden is with the movant to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992), *cert. denied* 506 U.S. 1013, 113 S.Ct. 635, 121 L.Ed.2d 566 (1992). If this burden is met, the non-movant must come forward with the specific facts showing that there is a genuine issue for a trial as to elements essential to the non-movant's claim or position. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-movant's burden is more than a simple showing of "some metaphysical doubt as to the material facts." *Id.* Rather, the non-movant is required to "present sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor." *Thomas v. International Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995) (citations omitted).

B. WFEC is Entitled to an Order Limiting Plaintiffs' Recovery for Property Damage in their Second, Third, and Fourth Claims for Relief, if Any, to the Lesser of the Costs of Remediation or the Diminution in Value to Plaintiffs' Property as Proven at Trial.

Plaintiffs in the instant action have alleged claims for damage to real property, nuisance, and trespass, but the First Amended Complaint does not specify whether the alleged damage to their real property, or certain portions thereof, is temporary or permanent or both.³ In any event, the proper measure for damages under the common law for damage to real property, nuisance, and trespass cannot exceed the diminution in market value to Plaintiffs' property as a result of the alleged nuisance.

Although it appears obvious, it is necessary to state at the outset that Plaintiffs are not entitled to recover damages for restoration costs for property not owned by Plaintiffs. *See, e.g., Nichols v. Mid Continent Pipe Line Co.*, 1996 OK 118, 933 P.2d 272 (Okla. 1996) (“*Common-law nuisance* – a field of tort-like liability which allows recovery of damages for wrongful interference with the use or enjoyment of rights or interests in land – *affords the means of recovery for damage incidental to the land possessor's person or chattel.*”) (emphasis added). Thus, to the extent Chapman's Report suggests that Plaintiffs are entitled to recover restoration costs for property owned by McEntire – *and not Plaintiffs* – such is clearly without merit. Facts, ¶¶ 5-6. Moreover, Plaintiffs have not alleged any damage to any portion of the right of way owned by them. First Amended Complaint, ¶ 11 (alleging that Defendants conducted operations “on property directly to the north of the property owned by Plaintiffs”). Therefore, Plaintiffs are not entitled to any restoration costs claimed for the right of way restoration.

³ WFEC interprets Chapman's Report assigning restoration costs to the access road, the transmission right of way, and Plaintiffs' lake as suggesting that all of the alleged damages are abatable, and by definition, therefore, “temporary.” *See Briscoe v. Harper Oil Co.*, 1985 OK 43, 702 P.2d 33, 37 (Okla. 1985) (“Temporary damages in the context of ... nuisance are by definition abatable. Damages reasonably incapable of abatement are permanent.”). However, because Plaintiffs have not yet responded to WFEC's Interrogatories, it is unclear whether Plaintiffs intend to argue that permanent damages are also present.

To the extent Plaintiffs allege permanent damage to *their* property, the Oklahoma Supreme Court has instructed that “[t]he measure of damages for permanent injuries to land is the difference between the reasonable market value of the land immediately before the injuries and the reasonable market value of the land immediately after the injuries.” *Houck v. Hold Oil Corp.*, 1993 OK 166, 867 P.2d 451, 461 (Okla. 1993). Thus, should the trier of fact determine that Defendants have permanently harmed Plaintiffs’ property, the proper measure of damage cannot exceed the diminished fair market value of the property.

For temporary damage, the rule is slightly different. Where the damage is abatable, the Court allows plaintiff to recover the cost of abating the temporary nuisance and restoring the land to its former condition. However, as in the case of permanent damage, the Court has long held that Plaintiffs are limited to recovering no more than the diminution in value to the property. *See Peevyhouse v. Garland Coal & Mining Co.*, 1962 OK 267, 382 P.2d 109, 114 (Okla. 1962). The Court’s decision in *Houck* is again instructive.

For temporary injury to land the measure of damages is the cost of restoring the land to its former condition, with compensation for loss of use of it, *if this altogether is less than the diminution in value with the injuries left standing. This is so because if the cost of repairing the injury is greater than the diminution in market value of the land, the latter is the true measure of damages*; the rule of avoidable consequences requiring that in such case the plaintiff shall diminish the loss as much as possible.

Houck, 867 P.2d at 460 (emphasis added). This same rule applies whether the cause of action sounds in damage to real property (*Peevyhouse*, 282 P.2d at 114), nuisance (*Houck*, 867 P.2d at 460), or trespass (*Enid & Anadarko Ry Co. v. Wiley*, 1904 OK 70, 78 P. 96, 99-100 (Okla. 1904)).

The Oklahoma Supreme Court has recently reaffirmed its reliance on the *Peevyhouse* doctrine. *See Schneberger v. Apache Corp.*, 1994 OK 117, 890 P.2d 847 (Okla. 1994). Citing

23 O.S. § 97 for the rule that damages must in all cases be reasonable, the Court held that the diminution in value is the most that can be awarded for damage to real property. In *Schneberger*, plaintiff's estimated costs of remediation were \$1.3 million dollars, while the diminution in value to plaintiff's land was estimated at \$5,175.00. Labeling the cost of remediation as "grossly disproportionate" to the actual property damage, the Court in *Schneberger* again held that diminution in value was the proper measure of damage. *Id.* at 854.

Oklahoma law makes it clear that Plaintiffs, should they be successful at trial, are entitled to a single recovery for *either* the costs of remediation *or* the diminution in value of the property as a whole, whichever is less. *See Briscoe*, 702 P.2d at 41 (dissenting opinion) ("Corollary to this rule [limiting damages to diminution in value] is the proposition that a party cannot have a recovery for permanent depreciation, or diminution in value, and also for the cost of remediation of the same land to its former condition."). This is true even if Plaintiffs' evidence at trial demonstrates that some of the damage to real property is temporary (abatable) and some is permanent (not reasonably abatable). *See Houck*, 867 P.2d at 461.

In *Houck*, the Court recognized that there may be situations where "there may be permanent damage to one part of a tract while other parts of the tract suffer injuries causing only temporary damage." *Id.* For instance, much as here, plaintiff in *Houck* claimed that defendant caused permanent damage by constructing a wider and/or longer road than was necessary to use plaintiff's property. Additionally, plaintiff alleged defendant had caused temporary damage to other portions of plaintiff's property by clearing numerous trees and failing to clean them up and by using soil and dirt from plaintiff's property to build a road off-site.

In such situations, the Court held it is proper to allow recovery for both the permanent and temporary damage "so long as it is made clear to the jury no double recovery can be

recovered for the same item of damage.” *Id.*; see also *Briscoe v. Harper Oil Co.*, 1985 OK 43, 702 P.2d 33, 37 (Okla. 1985) (affirming jury verdict of \$30,587 for permanent and temporary damages as proper where testimony reflected the value of the farm had decreased up to \$36,500, although complete restoration would cost approximately \$91,000). However, “when injuries are both permanent and temporary **a defendant can in no event be held liable for more than the total diminution in reasonable market value** assuming the temporary injuries were left standing or unrestored.” *Houck*, 867 P.2d at 461 (emphasis added). Thus, plaintiff in *Houck* was limited to recovering no more than the total diminution in value.

Diminution in value provides the caps for all of Plaintiffs’ claims in their Second, Third, and Fourth Claims for Relief. Plaintiffs have not alleged any personal injuries – physical or emotional – arising from the alleged nuisance. Facts, ¶ 10. Although Plaintiffs have generally alleged they have been annoyed or inconvenienced by the alleged pollution of their pond, First Amended Complaint, ¶ 23, annoyance and inconvenience is an essential element of a nuisance claim. See 50 O.S. § 1 (defining nuisance to include an act or omission which “[a]nnoys, injures or endangers the comfort, repose, health, or safety of others.”). The Oklahoma courts have also held that “inconvenience, annoyance, and discomfort” is a separate and distinct cause of action for personal injury which can arise in a nuisance action. See *Truelock v. City of Del City*, 1998 OK 64, 967 P.2d 1183 (Okla. 1998). Plaintiffs have not pled a separate cause of action for personal injury. See *Oklahoma City v. Tytenicz*, 1935 OK 433, 43 P.2d 747 (holding that the personal injury claim for “inconvenience, annoyance, and discomfort” should have been separately stated). Nor have Plaintiffs alleged a medically established nexus to their claimed injury. See *Nichols v. Mid-Continent Pipeline Co.*, 1996 OK 118, 933 P.2d 272, 277 (Okla. 1996). Plaintiffs must rely on their allegations that they have been annoyed and inconvenienced

at trial to establish their nuisance claim. However, because Plaintiffs have not stated a claim for personal injury, they are not entitled to damages for annoyance and convenience, or the diminution in value represents the cap on all of Plaintiffs' damages for the alleged nuisance.

Here, as in *Schneberger*, Plaintiffs' expert has estimated the costs of remediation to be approximately \$1.3 million dollars, identifying three separate areas – some of which may not be owned by Plaintiffs and therefore not recoverable – that should be remediated or restored. Facts, ¶¶ 1-9. Although the amount by which Plaintiffs' property value has decreased is a factual issue to be determined at trial, it has been estimated by WFEC's expert to be \$423,500, and in any event will be considerably less than \$1.3 million. Facts, ¶¶ 11-12. Even if the trier of fact were to determine that Plaintiffs' property was rendered entirely valueless, which would be an extreme outcome on the facts, the diminution in value could not exceed the market value of Plaintiffs' property prior to construction of the power line. Whether the alleged damage is permanent or temporary or both, WFEC is entitled to judgment as a matter of law that Plaintiffs' recovery for damage to real property, nuisance, and trespass, if any, cannot exceed the diminution in market value to Plaintiffs' property as proven at trial.

C. Plaintiffs' Unjust Enrichment Claim is Not Proper Because Plaintiffs have an Adequate Remedy at Law, and Plaintiffs are not Entitled to a Double Recovery.

In addition to their tort and contract-based claims, Plaintiffs have brought a separate claim for relief for unjust enrichment. *See* First Amended Complaint, ¶¶ 25-27. Essentially, Plaintiffs allege that Defendants have saved money by failing to install all the appropriate controls necessary to comply with the Clean Water Act permit. Unjust enrichment is an equitable remedy based upon a theory of restitution. *See French Energy, Inc. v. Alexander*, 1991 OK 16, 818 P.2d 1234 (Okla. 1991) ("Recovery based on unjust enrichment depends upon a showing that [defendants] have money in their hands that, in equity and good conscience, they

ought not be allowed to retain.”)

One of the basic principles of equity jurisdiction – and a longstanding rule in Oklahoma – is that a court may not invoke such jurisdiction without a showing that no adequate statutory or legal remedy is available. *See Billingsley v. North*, 1956 OK 153, 298 P.2d 418 (Okla. 1956). Thus, where an adequate remedy at law is available to a plaintiff through its tort and contractual claims, the court should not invoke its equitable jurisdiction on an issue of unjust enrichment. *See Hydro Turf, Inc. v. Int’l Fidelity Ins. Co.*, 2004 OK CIV APP 45, 91 P.3d 667 (Okla. Civ. App. 2004). Here, Plaintiffs have an adequate remedy at law for the alleged damage to their property in their tort and contract claims.

Plaintiffs are entitled to seek alternative remedies and theories of recovery but must be precluded from obtaining a double recovery. The case of *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288 (Okla. Civ. App. 1996), is instructive. Therein, the Court recognized that plaintiffs were entitled to plead alternative theories of nuisance and unjust enrichment, but expressly held that plaintiffs must “not be given double recovery for the same injury.” *Id.* at 295. Pursuant to the Court’s holding, in a case involving the alternative theories of nuisance and unjust enrichment, “in order to recover on grounds of unjust enrichment, Plaintiffs must prove not only that [defendant] is responsible for contaminating the property, **but also that the contamination will not be abated**, and that [defendant] in fact has received an economic benefit thereby.” *Id.* (emphasis added).⁴ Thus, unjust enrichment is a proper

⁴ In *N.C. Corff*, the Court of Appeals was forced to guess the basis for the district court’s grant of summary judgment for defendant on the merits as to all of plaintiffs’ claims because the order did not specify its grounds. Thus, the Court of Appeals assumed it was one that went to all claims (such as the statute of limitations). The Court indicated that there was a disputed factual issue as to the existence of a nuisance and the statute of limitations. However, the Court appeared to discuss the alternative theories, such as unjust enrichment, in case the nuisance action was deemed to be barred by the statute of limitations. Here, WFEC has not alleged a statute of limitations defense that would bar the nuisance action; therefore, the alternative theory of unjust enrichment is not necessary.

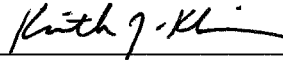
alternative ground for recovery only where damages for nuisance are not recoverable and abatement will not occur, such as where a plaintiff's private nuisance action is barred by the applicable statute of limitation.

Thus, in the instant action, in order to recover on an unjust enrichment theory, Plaintiffs would be required to prove, at a minimum, that the alleged contamination of their pond will not be abated. This line of proof directly contradicts the report of Plaintiffs' expert, who has assigned value to the restoration work he proposes for three different areas – some of which may not be owned by Plaintiffs. Facts, ¶¶ 1-6. WFEC has not argued that it is entitled to full summary judgment on Plaintiffs' private nuisance claims. Thus, WFEC requests this Court enter an order determining that Plaintiffs have an adequate remedy at law precluding their claim for unjust enrichment. Alternatively, WFEC requests this Court enter an order prohibiting double recovery for unjust enrichment if Plaintiffs are awarded any damages for injury to their property and/or are entitled to abatement.

CONCLUSION

For the reasons set forth above, WFEC respectfully requests the entry of partial summary judgment determining that Plaintiffs may be awarded an amount in damages for their Second, Third, and Fourth Claims for Relief, if any, no greater than the diminution in fair market value of their property, and that if, alternatively, Plaintiffs are awarded the costs of remediation, such costs may not exceed the diminished fair market value of their property. In addition, WFEC requests an order that Plaintiffs are not entitled to damages for restoration work to be performed on the right of way, because the allegedly damaged property is not owned by them. WFEC further requests summary judgment on Plaintiffs' unjust enrichment claim because Plaintiffs have an adequate remedy at law.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT WESTERN
FARMERS ELECTRIC COOPERATIVE

CERTIFICATE OF SERVICE

This is to certify that on this 4th day of April, 2005, a true and correct copy of the above and foregoing DEFENDANT WFEC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE MEASURE OF DAMAGES AVAILABLE TO PLAINTIFF AND BRIEF IN SUPPORT was served on all counsel of record by U.S. mail, first-class postage prepaid, to:

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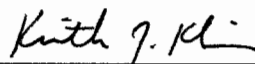
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KEITH J. KLEIN

In the matter of

Loyd W. Thompson and Rickie J. Thompson, Husband and Wife

v.

Western Farmers Electric Cooperative, a cooperative corporation,
Chapman Construction, L.P.,
Terry White

Case No. CIV-04-211-S

In the United States District Court
for the Eastern District of Oklahoma

Expert Opinions

of

Mike Chapman, P.E. No. 12730
Chapman, Cottle, Gill, and Associates, Inc.
205 W. Hartford Ave., Suite 100
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March 22, 2005

Prepared for

Jason B. Aamodt
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EXHIBIT A

IV. CONSTRUCTION AND CAPITAL COST ESTIMATES FOR CORRECTION OF ACTIVITIES AT THOMPSON PROPERTY

I routinely perform construction and capital cost estimating for a number of cities, towns, and private clients for various purposes:

- To establish the dollar amount to acquire by grants, loans, bond issues, cash reserves etc. for public entities,
- To allow my client's information to decide whether or not to proceed with a project or which alternative to select,
- To be used by private clients to acquire other investors, bank loans, or other funding sources,
- To be used for comparison purposes with the construction Contractor's bid to assist in making the decision whether to award the construction contract or rebid it,
- To determine the reasonableness of construction contract change order.

These cost estimates were developed using standards of practice routinely employed by me and other professional engineers in the development of construction and capital cost estimates for this type of work in this area of Oklahoma and includes adjustments for local construction cost factors. My construction and capital cost estimates follow.

**CONSTRUCTION COST
ESTIMATE OF ROAD REPAIRS
ENR INDEX=7297.58**

ITEM NO.	DESCRIPTION	UNIT	UNIT PRICE	ESTIMATED QUANTITY	EXTENSION
1	Silt Fence	LF	3.00	4461	13383.00
2	Bale Barriers	LF	3.00	315	945.00
3	Grading	SY	1.00	13843	13843.00
4	15" GCMP	LF	17.50	140	2450.00
5	Pre-fab GMP End Sections	each	200.00	14	2800.00
6	Rip-Rap	SY	35.00	25	875.00
7	Filter Fabric	SY	3.00	6708	20124.00
8	Turf Reinforcing Mat	SY	7.25	5905	42811.25
9	Topsoil	CY	18.75	820	15375.00
10	Fertilizer	ton	400.00	0.02	8.00
11	Solid Slab Sod	SY	2.50	820	2050.00
12	Watering	Mgal	15.00	80	1200.00
13	Traffic Bound Surface Course- Type E	ton	35.00	1676	58660.00
14	9" Flyash Subgrade Modification	SY	2.50	178	445.00
15	Flyash	ton	35.00	12.5	437.50
16	6" Port. Cement Paving Slab	SY	40.00	156	6240.00
17	Type C Concrete Slope Walls	CY	225.00	36	8100.00
18	Construction Staking	lump sum			7500.00
19	Mobilization/demobilization	lump sum			7500.00
	TOTAL CONSTRUCTION				204746.75

**CAPITAL COST
ESTIMATE OF ROAD REPAIRS
ENR INDEX=7297.58**

1	Construction	\$204,746.75
2	Surveying	\$2,800.00
3	Engineering	\$21,293.66
4	Inspection	\$7,780.38
5	Soil Compaction & Conc. Testing	\$2,500.00
6	Contingency 15%	\$30,712.01
7	ODOT Permit for work on ROW	\$840.00
8	SWP3 and NOI	\$2,500.00
	TOTAL CAPITAL	\$273,172.80

**CONSTRUCTION COST ESTIMATE
FOR RESTORATION OF POWER LINE ROW
ENR INDEX=7297.58**

ITEM NO.	DESCRIPTION	UNIT	UNIT PRICE	ESTIMATED QUANTITY	EXTENSION QUANTITY	EXTENSION PRICE
1	Excavation of sediment trap south of creek for 5.295 Ac	CY	3.00	706	2118.00	
2	Excavation of sediment trap north of creek for 3.905 Ac	CY	3.00	521	1563.00	
3	Cleaning out sed traps when 1/2 full-twice until sodded	CY	7.50	614	4605.00	
4	Rip-Rap for Sed Basin Discharge	CY	45.00	240	10800.00	
5	Fabric Wrap Sed Basin Rip-rap	SY	3.00	1013	3039.00	
6	Silt Fence	LF	3.00	5050	15150.00	
7	Rough Grading	SY	1.00	44529	44529.00	
8	Topsoil	CY	18.75	6200	116250.00	
9	Shaping Topsoil & Prep	SY	2.00	44529	89058.00	
10	Fertilizer	ton	400.00	1	400.00	
11	Solid Slab Sod	SY	2.50	44529	111322.50	
12	Watering	Mgal	15.00	3600	54000.00	
13	20'x20' Rip-Rap Transition at ends of 9 Terraces	CY	45.00	208	9360.00	
14	Fabric beneath Rip-rap	SY	3.00	800	2400.00	
15	Construction Staking	lump sum			3500.00	
16	Mobilization/demobilization	lump sum			16400.00	
	TOTAL CONSTRUCTION				484494.50	

**CAPITAL COST
ESTIMATE OF POWER LINE ROW RESTORATION
ENR INDEX=7297.58**

1	Construction	\$484,494.50
2	Surveying	\$8,500.00
3	Engineering	\$41,424.28
4	Inspection	\$16,230.57
5	Contingency 15%	\$72,674.18
6	SWP3 and NOI	\$7,500.00
	TOTAL CAPITAL	\$630,823.53

**CONSTRUCTION COST
ESTIMATE OF LAKE REHAB
ENR INDEX=7297.58**

**NOTE: ALL ROADWORK IN THE DRAINAGE BASIN OF
THE LAKE AND POWER LINE ROW RESTORATION MUST BE
COMPLETE AND SUCCESSFULLY PERFORMING PRIOR TO THIS WORK**

ITEM NO.	DESCRIPTION	UNIT	UNIT PRICE	ESTIMATED QUANTITY	EXTENSION
1	Temporary 3-Phase Power to Site	lump sum			10,000.00
2	Preparation of Staging Area-100'x100' Gravel Pad	tons	39	300	11,700.00
3	Job Trailer	lump sum			3,000.00
4	Sanitary Facilities	lump sum			6,000.00
5	Demolition of Existing Damaged Spillway	lump sum			7,500.00
6	Excavation for Downstream Spillway Channel	CY	8	840	6,720.00
7	Rip-Rap and Filter Fabric in Spillway Channel	SY	40	1000	40,000.00
8	12" PE Temporary Pump Discharge Pipe	LF	30	350	10,500.00
9	Armored Conductors to Pump	LF	7.5	350	2,625.00
10	6" Electric Pump Rental w/ Control Panel	week	555	16	8,880.00
11	Pumping @1590gpm, lake vol=11.26 MG pumped 3 times during construction	hour	10	355	3,550.00
12	48" Pump Sump w/gravel	lump sum			5,000.00
13	Crane w/dragline bucket for Pump Sump, setting pump, and rock base beneath access road	hour	300	120	36,000.00
14	18" Rock Base beneath road 14'x400' in lake	CY	50	312	15,600.00
15	6" TBSC-Type E for access road in lake	tons	39	144	5,616.00
16	Brush Removal	Acre	2750	3.63	9,982.50
17	Brush Disposal	lump sum			10,000.00
18	Silt Removal from Lake & loading on trucks	CY	2.5	4900	12,250.00
19	Hauling & disposal of silt	CY	11	4900	53,900.00
20	Silt Removal, Hauling, & Disposal during Work	CY	13.5	1000	13,500.00
21	Seeding, Fertilizing, & Mulching exposed area	SY	1	20000	20,000.00

22	Brush Piles in Lake							
23	Solid Slab Sod @ Waterline of Dam							
24	Watering		6	270			1,620.00	
24	Sand Swimming Beach		2.75	615			1,691.25	
25	Final Cleanup	Mgal						
26	Restocking Lake	tons	15	105			1,575.00	
27	Construction Staking	lump sum					10,000.00	
27	Mobilization/demobilization	lump sum					5,000.00	
	TOTAL CONSTRUCTION	lump sum					11,000.00	324,209.75

**CAPITAL COST
ESTIMATE OF LAKE RESTORATION
ENR INDEX=7297.58**

1	Construction	\$324,209.75
2	Surveying	\$3,000.00
3	Engineering	\$29,178.88
4	Inspection	\$11,500.00
5	Contingency 15%	\$48,631.46
6	SWP3 and NOI	\$1,500.00
	TOTAL CAPITAL	\$418,020.09

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

LOYD W. THOMPSON AND RICKIE)
J. THOMPSON, husband and wife,)
Plaintiffs,)

-vs-) No. CIV-04-211-S

WESTERN FARMERS ELECTRIC)
COOPERATIVE, a cooperative)
corporation, CHAPMAN)
CONSTRUCTION, L.P., SGS)
WITTER, INC., TERRY WHITE,)
BRUCE SMITH, AND GALE SMITH,)
Defendants.)

COPY

VIDEOTAPED DEPOSITION OF LOYD WAYNE THOMPSON
TAKEN ON BEHALF OF THE DEFENDANTS
IN TULSA, OKLAHOMA
ON FEBRUARY 22, 2005

CITY REPORTERS, INC.
406 SOUTH BOULDER, SUITE 429
TULSA, OKLAHOMA 74103-3800
(918) 585-3376

REPORTED BY: CYNDI WHITE LARIMER, CSR

1 right, like, on the corner.

2 This is pure guesswork, now.

3 Q This is approximate. This is an estimate. I
4 understand.

5 A Yeah.

6 Then runs 40 acres this way, then goes back
7 to the west.

8 Q So crosses the creek?

9 A Yeah. It crosses that little creek again,
10 right there.

11 Q And then goes --

12 A Then goes back -- That's just guesswork, but
13 goes back that way somewhere.

14 Q Okay.

15 A That's kind of what it looks like, if we've
16 got it in the right spot.

17 Q All right. So we've marked your property
18 line, approximately, with a large dotted line.

19 And the property to the north is
20 Mr. McEntire's property; is that right?

21 A Yes. Uh-huh.

22 Q And do you own everything down the road?

23 A Yes. I own everything in here, for a mile
24 down the road.

25 Q Okay. So you're pointing to the left side of

1 I told them they were pretty nervy to come back on my
2 property after telling me that they'd rather see me in
3 court."

4 It was those kind of things. You just
5 couldn't keep people out of there. So --

6 MR. LANG: Can I -- Well, go ahead. I was
7 going to say, can we take a rest room break here in a
8 minute?

9 MR. KLEIN: Okay. Yeah.

10 MR. LANG: It's been over an hour that
11 we've been going.

12 MR. KLEIN: Sure. Right now is good
13 enough.

14 MR. LANG: Yeah. Is that fine?

15 MR. KLEIN: Fine with me.

16 (Short break)

17 Q (By Mr. Klein) Okay. Sir, the complaint
18 states that it is the pollution of your property that
19 constitutes a nuisance.

20 And I would like to know, how have you been
21 annoyed and inconvenienced by the pollution of your
22 property, in your own words?

23 A Well, our lake has been ruined. It has
24 always been a source of recreation for us. That's what
25 it was built for. The kids can't swim in it anymore.

1 When they swim in it, they have to be washed off with a
2 hose to get the silt off of them when they get out of
3 the pond.

4 When I built the lake, I put a sand beach in
5 it. It's now a yellow cauldron of mud of some kind all
6 underneath the deck where the kids dive off and swim
7 around there.

8 In the past, we've had all kinds of swimming
9 parties out there. I pastor a church, and -- or did,
10 and oftentimes had groups out there. My wife had
11 employees. They were out there. Our families met
12 there around the 4th of July and so forth, and had
13 cookouts and swim-outs.

14 You can't do any of that anymore. The lake
15 is like a sewer without a smell. That's the best words
16 I can say.

17 There's no recreational benefit of it left.
18 Used to, you could go down there and throw a plug or a
19 hook in it and catch a fish every time you threw out
20 there almost. Now you can't hardly ever catch a fish.
21 It's just -- it's nothing but an icky, muddy mess.

22 That's the -- that's the biggest nuisance
23 it's been to us. It's just ruined our recreational
24 facilities there.

25 Q Okay. Would you tell me any of the other

1 ways that you've been annoyed or inconvenienced by the
2 pollution?

3 A Just having to look at it. We have a big
4 deck that goes around our house on three sides. You
5 can look down on the pond and see about anything --
6 ducks, geese. It's killed all of the vegetation out of
7 the lake. We no longer have those to look at.

8 It's -- the big annoyance is just sitting
9 there having to look at it and remember the way it was
10 versus what we've got now. It's disheartening. It
11 makes you wonder why you even built your home on that
12 place.

13 Q All right, sir. Let me ask you, are you
14 claiming that anything that the defendants did has
15 caused you any physical health problems?

16 A No. I don't know of any.

17 Q And when I say "you," I mean you or your
18 wife.

19 A Not any physical ones, I don't think.

20 Q Okay.

21 A Maybe -- well --

22 Q Okay. The answer was no?

23 A "No."

24 Q No, you're not claiming any physical health
25 problems?

1 A No.

2 Q How about any mental health problems, other
3 than the annoyance that you've already talked about?

4 A Well, that's just the main thing, is just we
5 planned this, built this house. I built this lake in
6 '92, waited to see what we had, built this home that --
7 I believe you've been there. Weren't --

8 Q I've been there.

9 A And built this home on this lake that we had,
10 that we thought was going to be like it was forever.
11 And now we live on top of a yellowish-brown whatever
12 you want to call it, without any recreational things to
13 it anymore. There's nothing we can do in it.

14 Q But except for those impacts to annoyance and
15 inconvenience, you're not claiming that the defendants
16 have caused you any psychological problems that you had
17 to see a doctor for or anything like that?

18 A Well, no, I haven't seen a doctor for it, but
19 I've been upset over it. It's certainly caused both of
20 us to be upset.

21 Q To be upset. All right.

22 If you'll look at the fourth claim for relief
23 in the first amended complaint, sir, Exhibit 2, it says
24 that the defendants' acts have caused pollutants to
25 enter upon and below the surface of plaintiffs'

**A
COMPLETE APPRAISAL
Presented in a
SUMMARY APPRAISAL REPORT
Format**

ON

The NE/4 NW/4 and the N/2 NW/4 NW/4 and the S/2 NE/4 (less that part previously conveyed to the State of Oklahoma) and the S/2 NW/4 NW/4 and the S/2 lying north of the right-of-way of Oklahoma Highway No. 43, all in Section 12, Township 1 South, Range 12 East of the Indian Base and Meridian, Atoka County, Oklahoma

OWNED BY

Lloyd W. Thompson and Rickie J. Thompson

AS OF

February 28, 2005

FOR

**Western Farmers Electric Cooperative
c/o Keith J. Klein, Attorney at Law
Ryan, Whaley & Coldiron
119 North Robinson, Suite 900
Oklahoma City, OK 73102**

BY

SISEMORE APPRAISAL SERVICES

**P.O. BOX 388
SALINA, OK 74365**

918/434-6407

EXHIBIT C

Final Reconciliation

Sales Comparison Approach - Vacant Land

The Sales Comparison Approach is considered the most applicable to this appraisal and indicates the value of the subject property to be \$400 per acre, or (\$400 x 301.04 acres) \$120,416.

Cost Approach

The Cost Approach is considered applicable to this appraisal and indicates the value of the subject property to be \$425,000.

Sales Comparison Approach - Improvements

The Sales Comparison Approach, involving improvements, indicates the value of the subject property to be \$422,000.

Income Approach

The Income Approach was not applicable to this appraisal as property similar to the subject are not typically bought and sold as rental properties.

Final Indicated Value

Considering all approaches to value it is concluded the Fair Market Value of the property as of February 28, 2005 is:

**Four Hundred Twenty Three Thousand Five Hundred Dollars
(\$423,500)**

Diminution in Value Analysis

For purposes of this appraisal it is assumed that the 3.47 acre pond or lake located west of the house contained clear water and that at some point in time the water clarity diminished to what it was on the date of my last inspection, February 28, 2005. With this in mind I have been asked to calculate the effect on Fair Market Value, if any, caused by the change in water clarity. To determine if a change of water clarity in a 3.47 acre pond has an effect on Fair Market Value the appraiser has several methods and techniques available to consider, which are shown following:

1. Sales analysis of properties with ponds of different water clarity

Sale 3 has a clear pond and Sale 4 has a muddy pond. Sale 4 sold for a higher price per acre which does not indicate a diminution in value for the effect of a muddy pond. It should be noted that Sale 4 is the highest priced sale shown on the comparable sales spreadsheet of larger sales on page 19 of this report and it has a muddy 3+- acre pond.

Conclusion: These sales indicate the change in water clarity has no effect on Fair Market Value.

2. Cost to Cure

Dr. Masser has indicated that the water clarity in the subject pond/lake can be restored with the application of lime or other suitable materials for a cost of \$7,500. It is understood that to insure the water clarity is restored the \$7,500 allows for treating the pond/lake 3 times over a 5 year period.

In addition, I have been asked to consider the effect on Fair Market Value caused by a damaged roadway on the property. Market data does not exist to make this determination, therefore, the cost to restore the roadway will be used to make this calculation.

It is estimated that the cost to cure the roadway will involve a bulldozer working for 3 to 5 days at a cost of \$70/per hour and hauling in 10 to 20 loads of gravel at a cost of \$145¹ per load and re-seeding the disturbed area along the roadway at a cost of \$500.

Range of estimated costs to cure roadway:

Bulldozer for 24 hours at \$70/hr	\$1,680	Bulldozer for 40 hours at \$70/hr	\$2,800
10 loads gravel at \$145/load	\$1,450	20 loads gravel at \$145/load	\$2,900
Grass Seed	<u>\$ 500</u>	Grass Seed	<u>\$ 500</u>
	\$3,630		\$6,200

Conclusion: The cost to cure the roadway is estimated to be \$6,000.

¹ Pat Ebrel Trucking (580)889-970

Diminution in Value Analysis - Continued

3. Analysis of decrease in value based on value of Pond/Lake

Value of the property with the pond/lake

Value of land & improvements	\$353,500	
Cost to Construct 3.47 Acre Pond/Lake	<u>\$ 70,000</u>	
	\$423,500	\$ 423,500

Value of the property less cost of pond/lake

Value of land & improvements	\$353,500	<u>\$ 353,500</u>
Loss in fair market value based on value of pond		<u>\$ 70,000</u>

Conclusion: Loss in fair market value based on value of pond is \$70,000.

Comment: Western Farmers Electric Coop. is required by storm water regulations to re-vegetate the transmission line right of way at their expense, therefore, this cost was not included in this appraisal.

Summary - Diminution in Value Analysis

The sales analysis of properties with ponds of different water clarity indicate the change in water clarity has no effect on Fair Market Value.

Dr. Masser has indicated that the water clarity in the subject pond/lake can be restored with the application of lime or other suitable materials at a cost of \$7,500.

The cost to cure the roadway is estimated to be \$6,000.

The analysis of decrease in value based on value of Pond/Lake is \$70,000.