BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE
DIVISION OF WATER RESOURCES

In The Matter of the Designation of the	)
Groundwater Management District No. 4	)
District-Wide Local Enhanced Management Area	)
in Cheyenne, Decatur, Rawlins, Gove, Graham,	)Case No. 002-DWR-LEMA-2017
Logan, Sheridan, Sherman, Thomas, and	)
Wallace Counties in Kansas.	)
	)

MEMORANDUM IN SUPPORT OF THE INTERVENORS' MOTION TO PROVIDE DUE PROCESS PROTECTIONS FOR IRRIGATORS

Statement of Facts

The essential facts that are relevant to the Chief Engineer's consideration of the Intervenors' Motion to Provide Due Process Protections for Irrigators are as follows:

1. The Northwest Kansas Groundwater Management District No. 4 ("GMD4") has proposed a district-wide Local Enhanced Management Area ("LEMA") pursuant to K.S.A. 82a-1041 (the "LEMA statute").

2. Highly summarized, the plan proposes that the Chief Engineer enter an order reducing all irrigation water rights within each township in GMD4 based on the extent of annual decline in the High Plains Aquifer in that township during 2004 to 2015.

3. The plan calls for across-the-board cuts in the quantity of water that can be diverted for irrigation use based on the location of the place of use for each water appropriation right with no consideration of their relative priority in violation of the

Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, and the Kansas Groundwater Management District Act, K.S.A. 82a-1021, *et seq.*[1]

4. In addition, the proposed plan treats irrigation, stockwatering, and other users differently in violation of K.S.A. 82a-707(b) which specifically states that the "date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights."

5. The GMD4 plan, dated June 8, 2017, was submitted to the Chief Engineer and on June 27, 2017, he entered a finding that the plan meets the threshold requirements set out in K.S.A. 82a-1041(a) and is "acceptable for consideration."

6. The Chief Engineer appointed Connie Owen to serve as hearing officer for the first hearing required by the LEMA statute. It appears that Ms. Owen may have prepared an order after that hearing. An unsigned, undated draft order has been placed on the Division of Water Resources ("DWR") and GMD4 web sites but there is no indication that the Ms. Owen signed, dated, or issued the order that appears to be a preliminary draft.

7. Nevertheless, the Chief Engineer has set the second hearing required by the statute for November 14, 2017. On October 10, 2017, counsel for the Intervenors

[1] See the Memorandum in Support of Intervenors' Motion for Reconsideration.

entered their appearance in the proceeding and filed a motion seeking a continuance of the hearing.

8. The Chief Engineer has not ruled on this Motion. Instead, counsel for the Chief Engineer responded by electronic mail stating, in part, that:

> [N]either the LEMA statute, nor any other statute or regulation applies the procedural requirements of KAPA or K.A.R. 5-14-3a to these hearings. Therefore, the Chief Engineer has determined that these shall be non-adversarial informational proceedings and he will not be entertaining any formal motions.

Argument and Authorities

I. The Due Process Clause applies to LEMA hearings because any orders issued are state action that will adversely affect real property interests.

The Chief Engineer has determined that the hearings required by the LEMA statute will be "non-adversarial informational proceedings" rather than adjudicative hearings that adequately protect the property interests that will be substantially and negatively impacted if the GMD's proposed plan is adopted. This decision was made in spite of the fact that the Chief Engineer has failed to comply with the 5.5 year old legislative mandate directing him to adopt rules and regulations "to effectuate and administer the provisions of this section." K.S.A. 82a-1041(k).

The Chief Engineer's decision to hold "non-adversarial informational proceedings" impermissibly denies the Intervenors, and all other water users in GMD4, the right to due process guaranteed by the United States and Kansas Constitutions.

The Fourteenth Amendment prohibits depriving "any person of life, liberty, or property, without due process of law." Similarly, Section 18 of the Bill of Rights in the Kansas Constitution states: "All persons, for injuries suffered in person, reputation or ***property***, shall have remedy by due course of law, and justice administered without delay." (Emphasis added.)

The Kansas Supreme Court has traditionally held that the protections guaranteed by Section 18 of the Kansas Constitution are the same as those guaranteed by the Fourteenth Amendment. *Gannon v. State*, 298 Kan. 1107, 1134, 319 P.3d 1196, 1216 (2014) (citing *Murphy v. Nelson*, 260 Kan. 589, 597, 921 P.2d 1225, 1232 (1996)).

The Due Process Clause of the Fourteenth Amendment protects individuals from government action that would arbitrarily deprive them of their property. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The clause ensures that any action taken by the state is "consistent with the fundamental principles of liberty and justice which lie at the base of American civil and political institutions." *Buchalter v. New York*, 319 U.S. 427, 429 (1943).

The Due Process Clause applies when state action threatens deprivation of an interest of sufficient substance to warrant constitutional protection. *Prager v. State*, 271 Kan. 1, 40, 20 P.3d 39, 65–66 (2001) (citing *Wertz v. S. Cloud Unified Sch. Dist.*, 218 Kan. 25, 29, 542 P.2d 339, 344 (1975)). In *Wertz*, the court said:

> One of the interests protected is termed "property." It is a purpose of the constitutional right to a due process hearing to provide an opportunity for

> a person to secure certain benefits and support claims of entitlement to protected rights, such as an interest in property which is being threatened by the state and its agencies. For due process under the 14th Amendment to the U. S. Constitution to apply, there must be state action and deprivation of an individual interest of sufficient substance to warrant constitutional protection.

Wertz, 218 Kan. at 29, 542 P.2d at 344–45. Here, the Chief Engineer is acting on behalf of the state, so there is clearly state action.

Likewise, a deprivation of a substantial individual interest is likely to occur. Individual interests in property are protected by the Due Process Clause, not created by it. Therefore, "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). In no uncertain terms, the Kansas Legislature has defined a "water right" as a "real property right." K.S.A. 82a-701(g). Because a real property interest is at stake, and because there is state action, the Intervenors and all other water right owners are entitled to the protection of the Due Process Clause.

The Due Process Clause guarantees procedural safeguards. *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 197–98 (1979). The procedural safeguards ensure that a given procedure will be fair. 16B Am. Jur. 2d *Constitutional Law* § 955. At a bare minimum, the Due Process Clause guarantees fair procedures by mandating notice and an opportunity to be heard "at a meaningful time and in a meaningful manner."

Winston v. State Dep't of Soc. & Rehab. Servs., 274 Kan. 396, 409, 49 P3d 1274 (2002) (citing *Kennedy v. Bd. of Cty. Comm'rs*, 264 Kan. 776, 797–98, 958 P.2d 637 (1998)).

> Procedural due process requires a real opportunity to be heard at a meaningful time and in a meaningful manner; in other words, to qualify under due process standards, the opportunity to be heard must be meaningful, full, and fair and not merely colorable or illusive.

16B Am. Jur. 2d *Constitutional Law* § 1008.

Kansas law is in accord. "Process which is a mere gesture is not due process." *Bd. of Cty. Comm'rs v. Akins*, 271 Kan. 192, 196, 21 P.3d 535, 539 (2001) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950)).

While there is some authority for the proposition that administrative agencies need not provide adjudication-style hearings in all cases, none of the circumstances that would otherwise permit a "non-adversarial informational proceeding" are present in this case and the Agency cannot meet its "heavy burden" to show that an evidentiary hearing is not required.

> The right to a trial-type, or formal, hearing in administrative proceedings is generally limited to the situation where adjudicatory facts, that is, facts pertaining to a particular party, are in issue. An administrative agency need not provide a formal, or evidentiary, hearing when no material facts are in dispute or when the dispute can be resolved adequately from a paper record. Noncontested cases thus do not require formal hearings before the administrative body. Furthermore, in some situations, an agency may refuse to conduct an evidentiary hearing when it will serve absolutely no purpose. ***An agency, however, is under a heavy burden to demonstrate that such a hearing is unnecessary, especially where it appears that individual facts relevant to the dispute are at issue.***

2 Am. Jur. 2d *Administrative Law* § 258 (emphasis added).

In many situations, including this one, the mere opportunity to appear and provide comments is not sufficient to satisfy the Due Process Clause. Additional protections are required.

II. Any LEMA hearing conducted without allowing the Intervenors to cross-examine witnesses, an opportunity to conduct discovery, and adequate time to prepare violates the Intervenors' due process rights.

Additional procedural safeguards that pose a limited burden on the DWR and GMD4 are required before the Intervenors' substantial property interests in their water rights can be reduced under the LEMA statute. These procedural safeguards include adequate preparation time, the ability to conduct discovery, and the ability to cross-examine the proponents of the LEMA plan.

When deciding if further protections are warranted, the courts weigh three factors: "(1) the individual interest at stake, (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the state's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *Winston*, 274 Kan. 409–10 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

A. Because water rights are real property rights, the Intervenors' interests are entitled to significant procedural protection.

The individual interests at stake here are paramount. As the Legislature has emphasized, water rights are real property rights, and protecting real property rights is

a vital interest. *See Bratton v. City of Atchison*, 376 P.3d 95, 2016 Kan. App. Unpub. LEXIS 510, at *25–27 (Kan. Ct. App. 2016) (noting that when the city destroyed plaintiff's property, a much higher interest was a stake than mere labeling plaintiff as a habitual violator would have been).

The Kansas Legislature has emphasized the vital importance of private property rights directing state agencies to be sensitive to and account for due process protections:

> On and after January 1, 1996, it is the ***public policy of the state of Kansas that state agencies,*** in planning and carrying out governmental actions, anticipate, ***be sensitive to and account for the obligations imposed by the fifth and the 14th amendments of the constitution of the United States and section 18 of the bill of rights of the constitution of the state of Kansas.*** It is the express purpose of this act to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain lawful governmental actions.

K.S.A. 77-702.

The Agency can act without procedural safeguards only when "the length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination." *Id.*

Here, GMD4 asks the Chief Engineer to reduce up to 25% of the specific quantities of water that can be diverted pursuant to water appropriation rights that are real property rights. The Water Appropriation Act is clear:

> (f) "Appropriation right" is a right . . . to divert from a definite water supply ***a specific quantity of water*** at a specific rate of diversion.

> (g) "Water right" means any vested right or appropriation right under which a person may lawfully divert and use water. It is a ***real property right*** appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other disposal, or by inheritance.

K.S.A. 82a-701 (emphasis added.)

To establish and maintain a water appropriation right in GMD4, one must own, purchase, or lease land; drill and equip a well; purchase irrigation equipment; purchase fuel, seed, fertilizer, and other chemicals; own or lease heavy equipment; and incur other costs to say nothing about hard work. That generally requires borrowing large sums of money. Repayment requires being able to generate yields that are high enough to cash flow the farming operation and irrigators have no control over the market for their crops.

Nevertheless, they must pay their mortgage and operating loans.

Even assuming, arguendo, that the Agency has the power to impose the proposed restrictions,[2] the nature of the property interest involved, the number of individual water rights that could be impacted, and the significant financial impact of an improper deprivation requires that the Agency provide adequate procedural safeguards.

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[2] *See* the companion Memorandum in Support of Intervenors' Motion for Reconsideration which demonstrates that the Agency does not have the power to order implementation of the proposed plan.

A court would find that the Intervenors' real property interest deserves the highest level of due process protection.

B. The Chief Engineer's proposed procedures carry a significant risk of erroneous deprivation and additional procedural safeguards dramatically increase the Intervenors' ability to safeguard their property interests.

The second factor, the risk of erroneous deprivation and the value of additional safeguards, also favors the Intervenors. The Chief Engineer has decided that the "hearing" required by the statute will be "non-adversarial informational proceedings," but this could mean anything. Any procedures short of allowing Intervenors to cross-examine the proponents of the LEMA plan, to conduct discovery, and permitting adequate preparation time creates a serious risk that Intervenors' valuable property rights will be erroneously deprived. Specifically, not allowing a right of cross-examination creates a huge risk that factual findings will be based on incomplete and potentially inaccurate information.

The Supreme Court has said, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). *See also Santee v. North*, 223 Kan. 171, 173 (1977) ("The right to examine and cross-examine witnesses testifying at any judicial or quasi-judicial hearing is an important requirement of due process.").

The Chief Engineer's decision to approve or disapprove the proposed LEMA plan turns on important factual findings because the LEMA statute specifically requires that the Chief Engineer make factual findings. K.S.A. 82a-1041(b) ("The initial public hearing shall resolve the following findings of fact . . . .").

Furthermore, the Intervenors have specific questions and concerns about the decision-making process that require answers and those answers can only be adequately obtained through discovery and cross-examination. Discovery limits the element of surprise, simplifies the issues, and will increase the chances of a correct disposition. *Ryan v. Kan. Power & Light Co.*, 249 Kan. 1, 11–12 (1991). Holding the hearing without allowing these basic procedural protections creates a high likelihood of erroneous deprivation.

The value of these protections is substantial and they will have little or no adverse impact on the Agency. Instead, these basic procedures would benefit the LEMA process and in order to protect their property interests, the Intervenors must be able to determine how and why this LEMA plan was proposed and vetted. Discovery would streamline the hearing and add valuable accuracy to the entire process.

Moreover, due process ensures "a reasonable time to prepare a defense." *In the Interest of R.S.*, 1999 Kan. App. Unpub. LEXIS 704, at *1 (Kan. Ct. App. Sep. 3, 1999) (per curiam) (citing *In re S.M.*, 12 Kan. App. 2d 255, 256 (1987)). In that case, the Kansas Court of Appeals found that three months during which the plaintiff was represented

by counsel, was adequate preparation time. *Id.* The LEMA statute requires at least 30 days' notice before any hearing may be held. K.S.A. 82a-1041(b). In some situations, 30 days may be reasonable to prepare a defense but not in this case. The Intervenors have been represented by counsel for less than one month.

Finally, the LEMA statute and the administrative review provisions permit the Intervenors to request review of any orders issued by the Chief Engineer. K.S.A. 82a-1041 and K.S.A. 82a-1901 (2010) (amended 2017). Thereafter, any final order is subject to judicial review under the Kansas Judicial Review Act. K.S.A. 77-601, *et seq.* Review by the District Court is on the administrative record. It is likely that the Secretary's review is also on the record. The Chief Engineer's procedure will not permit the Intervenors to establish an adequate record for review and would likely require a remand from the Secretary or the District Court to create an adequate record.

C. Any additional burden caused by providing the Intervenors with their basic due process rights will be minimal and, in fact, illumination of all of the facts, which is best accomplished in an adjudicative hearing, will be to the Agency's advantage.

The third step of the balancing test is determining what burdens these procedures will place on the Agency and the answer is that there will be virtually no additional burden.

In similar cases, DWR has used the two-part hearing process contemplated by the Water Transfer Act where the Legislature defined a party to a transfer proceeding as follows:

> "Party" means: (1) The applicant; or (2) any person who successfully intervenes pursuant to K.S.A. 82a-1503 and amendments thereto and actively participates in the hearing. "Party" does not mean a person who makes a limited appearance for the purpose of presenting a statement for or against the water transfer.

K.S.A. 82a-1501(h). The Act goes on to require a "formal public hearing" with an optional "public comment hearing."

DWR has used this approach in other contexts, for example in the Pawnee-Buckner and Wet Walnut IGUCA proceedings and in the 2006 City of Hays Smoky Hill Change Application proceeding. In those cases only the "parties" were allowed to call and cross-examine witnesses but the public was able to appear and provide both written and oral comments.

The Chief Engineer's decision is controlled by two key considerations. First, the Agency is bound by and must comply with the U.S. and Kansas Constitutions, the LEMA statute, the Water Appropriation Act, and the balance of the Groundwater Management District Act.

Second, within the boundaries established by the law, the Chief Engineer must make a decision that is based on the best available science. If the science cannot stand up to scrutiny, it should not form the basis for approving the plan. Given the timing of the proceeding, a delay of several months is unlikely to prejudice the DWR or the GMD and will promote their mutual interest in obtaining an optimum result.

The hearing is now scheduled for mid-November and public comments are not due until December 12, 2017. Three of the Chief Engineer's four Subsection (d) options would result in delays beyond the first of the year. Planning for 2018 cropping is already underway and it would be grossly unfair to implement the LEMA for 2018 even if the Chief Engineer were to issue an order approving the plan shortly after th comment period closes. Since it is likely that a plan will not be implemented until 2019, no one will be prejudiced by a delay of a few months.

Finally allowing time for discovery and adequate preparation imposes only a minimal burden on the Agency. Much of the information that will be needed is likely to have already been collected so the information should be readily available. But the Intervenors are handicapped by not knowing exactly what to ask for, how long it will take to review and analyze the information, and what follow up discovery will be needed.

The high importance of the Intervenors' property rights combined with the value provided by discovery, adequate time, and cross-examination far outweighs any minimal burden on the Agency. Comparing the burdens of discovery and adequate preparation time with the importance of the Intervenors' property rights and the value of these added procedures, it is clear that conducting a hearing without implementing the procedures would violate the Intervenors' due process rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 27th day of October 2017, I hereby certify that the original of the foregoing was sent by electronic mail and by U.S. First Class Mail, postage prepaid to:

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