

**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 FOR RECONSIDERATION**

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Statement of Facts

The essential facts that are relevant to the Chief Engineer’s consideration of the Intervenor’s Motion for Reconsideration 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 many but not all townships 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’s June 27, 2017, findings include a determination that the plan “is consistent with state law” as required by K.S.A. 82a-1041(a)(6).

7. The plan states that water appropriation rights for irrigation use will be limited to the allocation based on the accompanying map.

¹ See the Memorandum in Support of Intervenors’ Motion for Reconsideration.

8. The map includes 13 townships shaded in green (no decline) and 42 townships shaded in blue (0.0 -- 0.5% decline) for which there are no reductions shown.

9. If the plan is approved, irrigation water rights in the balance of the townships in GMD4 will be reduced based on the location and not on their relative priority.

Argument and Authorities

The GMD4 plan does not comply with Kansas law and cannot be lawfully adopted as written.

I. Kansas public policy is established by the Legislature, not by administrative agencies.

“The legislative power of this state shall be vested in a house of representatives and senate.” KAN. CONST. ART. 2, § 1. Thus, public policy is set out in statutes, not in administrative regulations or in orders issued by administrative agencies. The Legislature has the power to establish Kansas public policy; administrative agencies do not. *State ex rel. Londerholm v. Columbia Pictures Corp.*, 197 Kan. 448 (1966) (“The authority to declare the public policy of this state is vested in the legislature, not an administrative board. . .”)

When asked to “judicially craft public policy” in its interpretation of a statute in *Iron Horse Auto, Inc. v. Lititz Mut. Ins. Co.*, 283 Kan. 834, 843 156 P.3d 1221 (2007), Justice Johnson wrote:

Our first constraint, of course, is the separation of powers. We are to “give effect to the intention of the legislature as expressed rather than determine what the law should or should not be.” (Citations omitted.)

And, in *Higgins v. Abilene Mach., Inc.*, 288 Kan. 359 204 P.3d 1156 (2009), Justice

Beier stated:

We are left with Higgins’ public policy argument, i.e., that claimants should not be prevented from obtaining adequate post-award care because they cannot afford to employ an expert to support additional medical benefits. We can certainly understand that this argument is emotionally compelling. Nevertheless, *we are not free to act on emotion or even our view of wise public policy*. We leave the guidance of public policy through statutes to the legislature. (Emphasis added.)

If the Supreme Court, authorized and created by the Kansas Constitution, cannot make public policy, the Chief Engineer is certainly not empowered to do so and is not free to disregard the clear statutory mandates based on his “view of wise public policy.” Instead, the Chief Engineer must look to 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.*, to determine the limits of his power and he must act within those limits.

A. DWR and the GMD are creatures of statute with no inherent authority or power; they are limited to the authority specifically granted by the Legislature and must operate within the confines of those specific powers.

In contrast to the Legislature, which was created by the Kansas Constitution, administrative agencies are creatures of statute and their power and authority are defined, limited by, and dependent upon enabling legislation. *Legislative Coordinating*

Council v. Stanley, 264 Kan. 690, 706, 957 P.2d 379 (1998); *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 378, 673 P.2d 1126 (1983).

Any exercise of authority claimed by an agency must come from within its enabling statutes because administrative agencies have no general or common-law powers of their own. *See, e.g., LCC v. Stanley, supra; Pork Motel, supra; Acosta v. Nat'l Beef Packing Co.*, 273 Kan. 385, Syl. ¶ 5, 44 P.3d 358 (2002); *Clawson v. State, Dept. of Agriculture, Div. of Water Resources*, 49 Kan.App.2d 789, 800, 315 P.3d 896 (2013).

While some quasi-legislative functions may be delegated to administrative agencies, the Legislature must set forth guidelines that establish the manner and the circumstances for the exercise of those functions. *See, e.g., State ex rel. Schneider v. Bennett*, 219 Kan. 285, 300, 547 P.2d 786 (1976). (Legislative power may be delegated “where the policy is fixed and standards are definitely established which determine the manner and circumstances of the exercise of such power.”)

B. Orders that go beyond the agency’s specifically delegated power are void.

In *Vaughn v. Martell*, 226 Kan. 658, 661-662, 603 P.2d 191 (1979), the court said that an administrative agency’s “authority and power is only such as is expressly or impliedly given by legislative enactment. If it attempts to exercise jurisdiction over a subject matter not conferred by the legislature, its orders with respect thereto are without authority of law and void.” *See also Olathe Community Hospital v. Kansas Corp. Com.*, 232 Kan. 161, 167, 652 P.2d 726 (1982) (“[A]ttempts to exercise jurisdiction beyond

the power conferred by the legislature are without authority and void.”); *Kansans for Fair Taxation v. Miller*, 20 Kan. App. 2d 470, 889 P.2d 154 (1995) (“[T]he Commission did not abide by the statute which imposed conditions on its power and...acted beyond the scope of its statutory authority. Such attempts are without power and are void.”); and *Director of Taxation, Dept. of Rev. v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 459, 691 P.2d 1303 (1984) (“[A]n administrative agency may not under the guise of a regulation or order substitute its judgment for that of the legislature. It may not exercise its powers derived from the legislature to modify, alter, or enlarge the legislative act which is being administered.”)

II. Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available to meet the needs of all appropriators.

The 1945 Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, declares that all water within the State is dedicated to the use of the people and is subject to control and regulation by the State. K.S.A. 82a-702.

The Act adopted the prior appropriation doctrine for both surface water and groundwater. K.S.A. 82a-707(c). That doctrine states:

In the event of a shortage of supply, water will be supplied *up to a limit of the right* in order of temporal priority: the last man to divert and make use of the stream is the first to have his supply cut off.

Waters and Water Rights, Robert E. Beck, ed., The Michie Company, 1991, § 12.02, p. 90, quoting a 1971 Report to the National Water Commission by Charles Meyers (emphasis added.)

Under this doctrine, during periods of short supply, the most senior water right has the highest and best claim to the continued use of water. A senior user is entitled to the full quantity of water reasonably needed for his or her use even if junior right holders receive nothing.

This approach was developed in very arid parts of the western United States. By allowing senior users to divert the full quantity needed, their economic activity was not curtailed during periods of short supply and the public interest was better served because “equitable sharing” of available water would often leave no one with an economically-viable quantity.

A. The prior appropriation doctrine permeates the Kansas Water Appropriation Act and is fundamental Kansas public policy that is binding on all water users and government agencies, including the Division of Water Resources and the Groundwater Management District.

The clearest statement of the Kansas version of the doctrine is set out in K.S.A.

82a-707(b):

(b) 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. Where lawful uses of water have the same date of priority, such uses shall have priority in the following order of preference: Domestic, municipal, irrigation, industrial, recreational and water power uses. The holder of a water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently

as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this state, other than through condemnation.

(c) As between persons with appropriation rights, *the first in time is the first in right.*

K.S.A. 82a-707(b) and (c) (emphasis added).

The prior appropriation doctrine is referred to in numerous sections of the Water Appropriation Act:

- a. K.S.A. 82a-706 requires the Chief Engineer to “enforce and administer” the Act “in accordance with the rights of priority of appropriation.”
- b. K.S.A. 82a-706b makes it unlawful to prevent water from moving to a person having a prior right.
- c. K.S.A. 82a-706e directs DWR field offices to supervise the distribution of water “according to the rights and priorities of all parties concerned.”
- d. K.S.A. 82a-708b permits certain changes to existing water rights “without losing priority of right.”
- e. K.S.A. 82a-716 entitles a senior appropriator to injunctive relief to protect against use of water by a junior appropriator.
- f. *See also*, K.S.A. 82a-703b(b), 82a-707(d), 82a-710, 82a-711(b)(3), 82a-711a, 82a-712, 82a-717a, 82a-742, and 82a-745.

B. The application and enforcement of the prior appropriation doctrine is arguably the most important “duty or power of the chief engineer granted pursuant to the Kansas water appropriation act,” quoting from K.S.A. 82a-1039.

The Chief Engineer has a statutory duty to enforce the prior appropriation doctrine.

The chief engineer *shall enforce* and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants *in accordance with the rights of priority of appropriation.*

K.S.A. 82a-706 (emphasis added).

III. Kansas public policy specifically permits groundwater mining in areas where there is little or no recharge even though it reduces the quantity of water available to senior users, the public, and future users.

The Water Appropriation Act was amended in 1957 following a careful study prepared by Kansas University visiting law professor, Earl B. Shurtz. In November of 1956, the Kansas Water Resources Board, published his report entitled, *Report on the Laws of Kansas Pertaining to the Beneficial Use of Water*, Bulletin Number 3, Kansas Water Resources Board, November, 1956.

[T]he report summarizes historical and doctrinal aspects of water law, examines the various sections of the Kansas water appropriation act in detail, and presents recommended solutions in bill form to many of the problems raised.

Id., p. 7. The discussion of the “impairment problem,” and the proposed amendments on that topic, take up over 7.5 single spaced pages, a significant portion of the Report.

While the text of the 1957 amendments is sufficiently clear, the history makes the legislative intent even clearer. Professor Shurtz explained the need for K.S.A. 82a-711(c) and K.S.A. 82a-711a as follows:

[Existing section 82a-711] of the appropriation act requires the chief engineer . . . to approve all appropriation applications, provided the proposed use neither conflicts with existing uses nor prejudicially affects the public interest. If he determines that the proposed appropriation would impair vested rights or prior appropriations, he must reject such application. The act neither defines nor suggests, however, just what constitutes an impairment.

The problem of what constitutes an impairment of ground water uses is particularly important—and difficult. In areas with negligible recharge, such as portions of western Kansas, *any diversion will necessarily affect the level of the water table and affect other users to some extent*. What constitutes an impairment, then, under one approach, is *merely a matter of degree*.

Id., p. 85 (emphasis added). Professor Shurtz goes on to conclude:

Obviously, whether a flowing stream or an underground reservoir is involved, a subsequent appropriation may well render fulfillment of prior appropriation rights economically impossible. Some protection of prior diversion systems is essential. *Absolute protection would seriously hazard subsequent development*. The economics of ground-water development, of course, varies greatly with local circumstances. For example, where fuel is available and inexpensive, as in parts of western Kansas, a large lift is economically feasible. This is, of course, not true elsewhere.

Impairment is a practical matter and requires a practical solution. Small domestic users must not be prejudiced in the public's zeal to develop water resources. *Yet development is necessary*.

It would seem desirable to provide affirmatively that each appropriation is subject to a reasonable lowering of the static water level at the appropriator's point of diversion and that impairment consists of a

lowering of the static water level, or of an impairment of the quality of the water, beyond a reasonable economic point. In areas of negligible ground-water recharge, where *mining operations* make impairment merely a matter of time, it would seem that *impairment either (1) must be one of the natural conditions to which all are subject without compensation, regardless of date of appropriation, or (2) must be dependent upon legislative definition or administrative determination of reasonable depletion* in terms of rate of depletion and deterioration of quality.

Following his recommendation, the 1957 Legislature declared that impairment does not occur just because a junior water right lowers the water table. The Legislature made this same point twice, adding what is now subsection (c) to K.S.A. 82a-711 and enacting a new section codified at K.S.A. 82a-711a. These critical provisions read as follows:

With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the *unreasonable raising or lowering of the static water level* or the *unreasonable increase or decrease of the streamflow* or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit.

K.S.A. 82a-711(c) (emphasis added).

It shall be an express condition of each appropriation of surface or ground water that the right of the appropriator shall relate to a specific quantity of water and that such right must allow for a reasonable raising or lowering of the static water level and for the reasonable increase or decrease of the streamflow at the appropriator's point of diversion: *Provided*, That in determining such reasonable raising or lowering of the static water level in a particular area, the chief engineer shall consider the economics of diverting or pumping water for the water uses involved; and *nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be raised or lowered at the point of diversion of a prior appropriator*, so long as the rights of holders of existing water rights can be satisfied under such express conditions.

K.S.A. 82a-711a (emphasis added).

Based on the plain statutory language and the legislative history of the 1957 amendments, it is abundantly clear that the Kansas Legislature specifically intended to deviate from a strict application of the prior appropriation doctrine but only by making it clear that groundwater that is not being recharged can be fully appropriated even if it causes general groundwater declines.

In fact, the purpose of these amendments was to make it very clear that declines in static groundwater levels could affect other water rights without causing impairment.

The 1945 Act and the 1957 amendments focused on the full development of the State's water resources. There have been numerous amendments to the Water Appropriation Act that focus on conservation of water since 1957. And in 1972, the Legislature passed the Groundwater Management District Act. K.S.A. 82a-1022, *et seq.* But none of these amendments have altered the fundamental first-in-time-is-first-in-right public policy. In fact, subsequent amendments have specifically left this central policy intact.

IV. The Groundwater Management District Act is subject to, controlled by, and does not amend the Kansas Water Appropriation Act making all of the GMD Act's provisions subject to the prior appropriation doctrine.

In 1972, the Legislature adopted the Groundwater Management District Act, K.S.A. 82a-1020, *et seq.* Several provisions of the Act specifically and clearly make it

subject to the prior appropriation doctrine established by the Water Appropriation Act, beginning with the following legislative declaration of public policy.

It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets. *It is the policy of this act to preserve basic water use doctrine* and to establish the right of local water users to determine their destiny with respect to the use of the groundwater *insofar as it does not conflict with the basic laws and policies of the state of Kansas*. It is, therefore, declared that in the public interest it is necessary and advisable to permit the establishment of groundwater management districts.

K.S.A. 82a-1020 (emphasis added).

Moreover, GMDs are permitted to “adopt administrative standards and policies” that are “*not inconsistent* with the provisions of . . . the Kansas water appropriation act.” K.S.A. 82a-1028(n) (emphasis added).

In addition, GMDs are permitted to recommend rules and regulations to be adopted by the Chief Engineer so long as they are “*not inconsistent* with . . . the Kansas water appropriation act.” K.S.A. 82a-1028(o) (emphasis added).

The GMD Act also requires that each GMD develop a management plan that is consistent with the Water Appropriation Act.

Before undertaking active management of the district the board shall prepare a management program. Upon completion of the management program the board shall transmit a copy to the chief engineer with a request for his or her approval. The chief engineer shall examine and study the management program and, *if he or she finds that it is*

compatible with article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto and any other state laws or policies, he or she shall approve it and notify the board of his or her action.

K.S.A. 82a-1029 (emphasis added.)

The 1978 IGUCA amendments permitted the Chief Engineer to impose the following specific corrective actions.

(1) A provision closing the intensive groundwater use control area to any further appropriation of groundwater in which event the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area;

(2) a provision determining the permissible total withdrawal of groundwater in the intensive groundwater use control area each day, month or year, and, insofar as may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders in such area *in accordance with the relative dates of priority of such rights*;

(3) a provision reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the intensive groundwater use control area;

(4) a provision requiring and specifying a system of rotation of groundwater use in the intensive groundwater use control area;

(5) any one or more other provisions making such additional requirements as are necessary to protect the public interest.

K.S.A. 82a-1038(b)(1)-(5) (emphasis added).

But, after granting the Chief Engineer these seemingly broad powers, the fourth section of the IGUCA amendments made it clear that all corrective actions must comply with the prior appropriation doctrine stating: “[n]othing in this act shall be construed as limiting or affecting any duty or power of the chief engineer granted pursuant to the Kansas water appropriation act.” K.S.A. 82a-1039.

In the final section of the IGUCA amendments, the Legislature made those provisions part of and supplemental to the Groundwater Management District Act, which, in turn, is subject to the Water Appropriation Act and the prior appropriation doctrine. K.S.A. 82a-1040.

In 2012, the Legislature added the LEMA provisions that are the subject of this proceeding. K.S.A. 82a-1041. Like the IGUCA amendments, the LEMA provisions are part of and supplemental to the provisions of the Groundwater Management Act making it clear that it too is subordinate to the Kansas Water Appropriation Act. K.S.A. 82a-1041(l).

A prerequisite to beginning a LEMA proceeding is a required finding by the Chief Engineer that a proposed Plan is, among other things, “consistent with state law.” K.S.A. 82a-1041(a)(6). The Chief Engineer’s letter dated June 27, 2017, states that the proposed Plan complies with state law without explaining how it complies with the Water Appropriation Act and specifically the prior appropriation doctrine.

It is clear on the face of the plan that it violates the requirement that the date of priority and not the purpose of use determine the right to divert and use water. K.S.A. 82a-707(b). The Chief Engineer is without power or authority to allocate water among competing water users on any basis other than the prior appropriation doctrine. *See, e.g.,* K.S.A. 82a-706.

V. The Legislature mandated that IGUCAs follow the prior appropriation doctrine by specifically stating that the duties and powers granted to the Chief Engineer in the water appropriation act trump the IGUCA provisions.

The Chief Engineer can initiate IGUCA proceedings within a GMD at the request of a GMD or pursuant to a petition from eligible GMD voters. K.S.A. 82a-1036.

The Chief Engineer can initiate IGUCA proceedings outside of an existing GMD if he finds that one or more of the following circumstances exist:

- (a) Groundwater levels in the area in question are declining or have declined excessively;
- (b) the rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area;
- (c) preventable waste of water is occurring or may occur within the area in question;
- (d) unreasonable deterioration of the quality of water is occurring or may occur within the area in question; or
- (e) other conditions exist within the area in question which require regulation in the public interest.

K.S.A. 82a-1036.

When IGUCA proceedings are initiated, the Chief Engineer is required to hold a public hearing on the question of designating an area as an IGUCA. K.S.A. 82a-1037.

When the Chief Engineer finds one or more of the circumstances listed in K.S.A. 82a-1036, quoted above, that permit him to establish an IGUCA outside of a GMD and that the public interest requires corrective controls, the Chief Engineer can issue an order designating an IGUCA. K.S.A. 82a-1038(a).

VI. DWR and the GMD have implemented Kansas public policy that permits mining of groundwater in Northwest Kansas.

DWR's undated Administrative Policy No. 83-33 stated that when preparing Certificates of Appropriation for irrigation water rights, quantities were not to exceed 2.25 acre-feet per acre for water rights between the Range 20 West/Range 21 West line and the Kansas/Colorado border. Ex. 1.

This policy became effective sometime between June 22, 1979 and September 26, 1983, and presumably before that, because it superseded the "Memorandum of 1-5-79 and Memorandum of 6-22-79, by Warren D. Lutz, Hydrologist" and was superseded by a subsequent policy dated September 26, 1983. *Id.*

GMD4 regulations effective as of May 1, 1983, included K.A.R. 5-24-2, entitled "Planned depletion," that implemented planned depletion in GMD4 based on reductions in saturated thickness of 2% each year. That regulation read, in part:

The sum of the proposed appropriation, the vested rights, prior appropriation rights and earlier priority applications shall not exceed a calculated rate of depletion of more than two percent of the saturated thickness underlying the area included within a two mile radius (approximately 8,042 acres) whose center is the location of the proposed well.

Kansas Register, Vol. 2 No.12; March 24, 1983, p. 262. This two percent depletion policy was calculated using the following formula:

$$Q = \frac{0.02 (AMS) + AR}{12}$$

Where Q = allowable annual appropriation, acre-feet per/year
A = area of consideration, acres

M = average saturated thickness, feet
S = storage coefficient (specific yield)
R = average annual recharge, inches per/year)

Id., see also, Section VIII, *infra*.

DWR's Administrative Policy No. 83-33 dated September 26, 1983, stated that when preparing Certificates of Appropriation for water rights for irrigation use, quantities were not to exceed 2.0 acre-feet per acre for water rights between the Range 20 West/Range 21 West line and the Kansas/Colorado border. Ex. 2.

The 2.0 acre-feet per acre limitation was continued in Administrative Policy 86-8, effective November 5, 1986. Ex. 3.

The 1991 amendments to the GMD4 regulations stated that up to two acre-feet per acre on irrigated land "is reasonable for the intended use." Kansas Register, Vol. 10, No. 27, July 4, 1991, amending K.A.R. 5-24-5.

When DWR Administrative Policies were codified in September of 2000, the maximum annual quantity of water reasonably necessary for irrigation in GMD4 for applications filed before September 22, 2000, remained unchanged. Kansas Register, Vol. 2 No.12; March 24, 1983, p. 262. K.A.R. 5-3-19.

All of GMD4 lies west of the Range 20 West/Range 21 West line.

Applications filed after September 22, 2000 are limited to 1.5 acre-feet per acre for all counties within GMD4. K.A.R. 5-3-24.

VII. DWR has entered a finding of fact for every Kansas water appropriation right holding that the permitted quantity is reasonable and that finding cannot be collaterally attacked by the permittee, other water users, or governmental agencies, including the Division of Water Resources or the Groundwater Management District.

While the Water Appropriation Act does not give the Chief Engineer power to make public policy, it does delegate the authority to make administrative determination about whether a proposed use should be permitted. In order to issue a permit to appropriate water, the Chief Engineer must make certain findings of fact, including specially that:

- a. the proposed use does not impair an existing water right;
- b. the proposed use does not prejudicially or unreasonably affect the public interest;
- c. the application was made in good faith and in proper form;
- d. the water will be used for a beneficial purpose; and
- e. the rate of diversion and quantity are within reasonable limitations.

K.S.A. 82a-711(a); *see also* K.S.A. 82a-707(e) (“Appropriation rights in excess of the reasonable needs of the appropriators shall not be allowed.”)

A DWR “Approval of Application and Permit to Proceed” is a final order under KAPA. In *Clawson v. State, Dept. of Agriculture, Div. of Water Resources*, 49 Kan.App.2d 789, 801-802, 315 P.3d 896 (2013) (rev. denied), the court stated that “DWR does not contest that its order granting the water appropriations was a final order.” The *Clawson* court went on to hold:

14. The chief engineer does not retain jurisdiction to modify a final order during the water appropriation perfection period. *The chief engineer’s*

ability to modify the water appropriation permit based on the applicant's actual beneficial use of water is merely enforcement of the final order consistent with the Kansas Water Appropriation Act and constitutes a ministerial act only. Once a water appropriation permit has been issued, the chief engineer is no longer actively considering whether such permit is in the public interest.

15. The chief engineer does not have the statutory power to retain jurisdiction to reduce the approved rate of diversion or quantity of the water rights authorized to be perfected once the Kansas Department of Agriculture issues a final order granting a water appropriation permit. *The Kansas Water Appropriation Act does not authorize the chief engineer to reevaluate and reconsider an approval once a permit has been issued.*

49 Kan.App.2d at syl. 15 (emphasis added).

While the form of DWR's cover letter sending a water appropriation permit for irrigation use has changed over the years, the basic message has been the same. The letter confirms that the Chief Engineer has examined the application and made each of the required findings listed above:

Your application has been examined and is found to be in *proper form*. Further, we find that the proposed use is for a *beneficial purpose* and is within *reasonable limitations*. If priorities are observed and respected, the proposed use will *neither impair any use* under existing water rights *nor prejudicially and unreasonably affect the public interest*. It is presumed that the application is made in *good faith*, and that you are ready to proceed with the proposed diversion works and the application of water to the proposed use. The application has, therefore, been approved.

See, e.g., Ex. 4 which is a series of cover letters transmitting permits. The cover letters confirm that the Chief Engineer makes the required findings when issuing permits to appropriate water.

The administrative policies and regulations discussed above provided DWR staff with standards that were applied to make the statutory determination regarding the reasonable quantities that would be permitted for irrigative use in the area that became GMD4.

Thus, water appropriation rights with priorities before September 26, 1983 were permitted up to 2.5 acre-feet per acre. Between 1983 and 2000, the limit was 2.0 acre-feet per acre. Water rights with priority dates after September 22, 2000 were limited to 1.5 acre-feet per acre. K.A.R. 5-3-24.

Clawson stands for the proposition that once made, the Chief Engineer is without authority to reduce the permitted quantity except to the extent that the appropriator fails to fully perfect that quantity or by applying prior appropriation doctrine. In *Clawson*, the Court said:

Our court has specifically held that where an agency has no specific statutory authority to retain jurisdiction, it has no ability to reconsider or modify its final orders once the time for seeking judicial review has passed.

The GMD4 plan violates these fundamental principles. There is nothing in the Kansas Water Appropriation Act that permits the Chief Engineer to reduce the quantity of water that can be diverted under a water right other than impairment of a senior water right.

VIII. All of the water rights in GMD4 with a priority date before August 19, 1991, were created under the DWR and GMD planned depletion policy specifically authorized by K.S.A. 82a-711(c), K.S.A. 82a-711a, and the regulations in effect within GMD4.

As of May 1, 1983, the date the GMD's planned depletion regulation became effective, there were approximately 3,400 irrigation rights with in GMD4 permitting diversion of up to 809,781.9 af/y. Each of these water rights was applied for and approved under legal authority that tacitly (before the 1957 amendments) and explicitly (after the 1957 amendments) permitted overdrafting groundwater resources in this area.

The GMD4 "Planned depletion" regulation mentioned above was amended in 1987 to reduce the depletion rate from 2% to 1% as of May 1, 1987. Kansas Register, Vol. 6, No. 10, March 5, 1987, p. 306. Between May 1, 1983 and May 1, 1987, another 35 irrigation water rights were permitted increasing the total by 4,136.0 af/y to 813,917.9 af/y.

In 1991, K.A.R. 5-24-2 was amended and renamed "Allowable withdrawals." As of August 19, 1991, new applications would be granted only if the sum of the proposed appropriation, the vested rights, prior appropriation rights, and earlier priority applications within a defined area did not exceed the calculated quantity of annual recharge. Kansas Register, Vol. 10, No. 27, July 4, 1991, p. 976.

Between May 1, 1987 and August 19, 1991, another 44 water irrigation water rights were permitted increasing the total by 5,486.0 af/y to 819,578.9 af/y. Another 188

irrigation rights were permitted after August 19, 1991, increasing the total by 10,528.49 af/y to 830,107.43 af/y.

Most of the water rights in GMD4 were permitted under a planned depletion policy and the vast majorities were permitted before there was a 2% regulatory limitation on depletion.

Conclusion

The Intervenors request that the Chief Engineer reconsider his opinion that the Plan complies with Kansas state law.

Respectfully submitted,

FOULSTON SIEFKIN LLP

By: 
David M. Traster, #11062
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206
Telephone: (316) 291-9725
Facsimile: (866) 347-3138
Email: dtraster@foulston.com

ATTORNEY FOR INTERVENORS

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:

David W. Barfield, Chief Engineer
Division of Water Resources
Kansas Dept. of Agriculture
1320 Research Drive
Manhattan, KS 66502
David.Barfield@ks.gov

and true and correct copies were sent by the same methods to:

Kenneth B. Titus, Chief Counsel
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
kenneth.titus@ks.gov

Aaron Oleen, Staff Attorney
Kansas Department of Agriculture
1320 Research Drive
Manhattan, KS 66502
Aaron.Oleen@ks.gov

Ray Luhman, District Manager
Northwest Kansas Groundwater Management District No. 4
P.O. Box 905
1175 S. Range
Colby, KS 67701
rluhman@gmd4.org

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718 Main Street, Suite 205
P.O. Box 722
Hays, KS 67601
adam@clinkscaleslaw.com



David M. Traster, #11062

Kansas State Board of Agriculture
Division of Water Resources

ADMINISTRATIVE POLICY
NO. 83-33

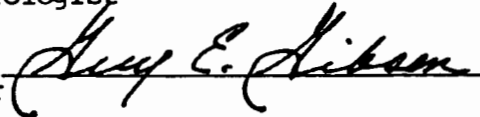
Subject: Allowable Quantities/Certificates of
Appropriation/Irrigation use

Reference: K.S.A. 82a-714 and K.A.R. 5-3-8

Date:

Supersedes: Memorandum of 1-5-79 and Memorandum of 6-22-79,
by Warren D. Lutz, Hydrologist

Approved by: Guy E. Gibson
Chief Engineer-Director



During the preparation of Certificates of Appropriation which set forth the extent a water right has been perfected for irrigation use within the terms, limitations, and conditions of the approval of applications for permits to appropriate water, the following policy shall be adhered to:

In that area of Kansas located between the Kansas/ Missouri border and Township 5 East, the allowable quantity shall be based on the maximum annual usage within the time allowed to perfect the right, not to exceed an average of 1.15 acre-feet per acre irrigated, and shall not exceed the quantity set forth by the approval of the application.

In that area of Kansas located between the Township 5 East/Township 6 East line and the Township 20 West/Township 21 West line, the allowable quantity shall be based on the maximum annual usage within the time allowed to perfect the right, not to exceed an average of 1.7 acre-feet per acre irrigated, and shall not exceed the quantity set forth by the approval of the application.

In that area of Kansas located between the Township 20 West/Township 21 West line and the Colorado border, the allowable quantity shall be based on the maximum annual usage within the time allowed to perfect the right, not to exceed an average of 2.25 acre-feet per acre irrigated, and shall not exceed the quantity set forth by the approval of the application.

NOTE: For good cause based on unique circumstances such as the irrigation of specialty crops, exceptions to the policy set forth herein may be made by the Chief Engineer.

EXHIBIT

1

Kansas State Board of Agriculture
Division of Water Resources

ADMINISTRATIVE POLICY
- NO. 83-33

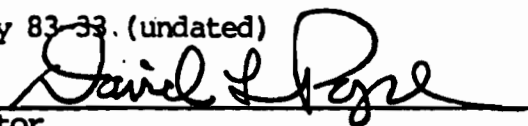
Subject : Allowable Quantities/Certificates of
Appropriation/Irrigation use

Reference : K.S.A. 82a-714 and K.A.R. 5-3-8

Date : September 26, 1983

Supersedes : Administrative Policy 83-33 (undated)

Approved by: David L. Pope, P.E.
Chief Engineer-Director



During the preparation of Certificates of Appropriation which set forth the extent a water right has been perfected for irrigation use within the terms, limitations, and conditions of the approval of applications for permits to appropriate water, the following policy shall be adhered to:

In that area of Kansas located between the Kansas/ Missouri border and the Range 5 East/Range 6 East line, the allowable quantity shall be based on the maximum annual usage within the time allowed to perfect the right, not to exceed an average of 1.00 acre-feet per acre irrigated, and shall not exceed the quantity set forth by the approval of the application.

In that area of Kansas located between the Range 5 East/Range 6 East line and the Range 20 West/Range 21 West line, the allowable quantity shall be based on the maximum annual usage within the time allowed to perfect the right, not to exceed an average of 1.50 acre-feet per acre irrigated, and shall not exceed the quantity set forth by the approval of the application.

In that area of Kansas located between the Range 20 West/Range 21 West line and the Kansas/Colorado border, the allowable quantity shall be based on the maximum annual usage within the time allowed to perfect the right, not to exceed an average of 2.00 acre-feet per acre irrigated, and shall not exceed the quantity set forth by the approval of the application.

NOTE: For good cause based on unique circumstances such as the irrigation of specialty crops, exceptions to the policy set forth herein may be made by the Chief Engineer.

EXHIBIT

2

Kansas State Board of Agriculture
Division of Water Resources

ADMINISTRATIVE POLICY
No. 86-8

Subject: Allowable Rates of Diversion and Maximum Annual Quantities for Irrigation Use - Permits and Approvals

Reference: K.S.A. 82a-708a and K.A.R. 5-3-1

Date: November 5, 1986

History: Effective November 5, 1986

Approved by: David L. Pope
Chief Engineer *David L. Pope*

During the review of an APPLICATION FOR PERMIT TO APPROPRIATE WATER FOR BENEFICIAL USE for irrigation purposes the following guidelines shall be considered in determining the maximum reasonable rate of diversion to be allowed under any APPROVAL OF APPLICATION AND PERMIT TO PROCEED:

<u>Area, Place of use</u>	<u>Max. Allowable Rate</u>	
up to 10 acres	450 g.p.m.	450
10 - 40 acres	(+) 450 g.p.m.	900
40 - 120 acres	(+) 8 g.p.m./acre	580 + 8X
more than 120 acres	(+) 7 g.p.m./acre	700 + 7X

EXAMPLES:

A. 37 acres requested; since this area is less than 40 acres, a rate of up to 900

B. 83 acres requested;

10 acres	= 450 g.p.m.	} 900 g.p.m.
(+) 40 acres (10 + 30)	= 450 g.p.m.	
(+) 43 acres @ 8 g.p.m./acre	= 344 g.p.m.	
	1,244	(allow 1,245 g.p.m.)

A further limiting factor of this procedure is the availability of water from the proposed source of supply. In those instances whereby the source of supply is incapable of yielding a reasonably, sustainable (computed) rate, then the source becomes a further limiting factor.

A further limiting factor is well design and equipment, which shall be reasonable to divert the requested rate.

EXHIBIT

3

Further, the rate authorized should not impair senior water rights in the area, including domestic rights.

In reviewing an APPLICATION FOR PERMIT TO APPROPRIATE WATER FOR BENEFICIAL USE for irrigation purposes, the following guidelines shall be considered when determining a maximum allowable annual quantity of water request:

In that area of Kansas located between the Kansas/Missouri border and the Range 5 East/Range 6 East line, the maximum allowable quantity shall not exceed an average of 1.00 acre-foot per acre to be irrigated.

In that area of Kansas located between the Range 5 East/Range 6 East Line and the Range 20 West/Range 21 West line, the maximum allowable quantity shall not exceed an average of 1.50 acre-feet per acre irrigated.

In that area of Kansas located between the Range 20 West/Range 21 West line and the Kansas/Colorado border, the maximum allowable quantity shall not exceed an average of 2.00 acre-feet per acre irrigated.

A further limiting factor to maximum allowable quantity is the availability of water from the proposed source of supply. If the source of supply is incapable of yielding a reasonably, sustainable (computed) quantity during the irrigation season in that area of the state, then the source becomes a further limiting factor.

That if an applicant can show that his or her system design is reasonable for the use intended and approval of the proposed rate and/or maximum annual quantity will not impair any senior water right or prejudicially and unreasonably affect the public interest, the Chief Engineer may waive the above guidelines. Documentation shall be placed in the file clearly demonstrating any exceptions to the above policy.

4

January 10, 1968

Redacted
Satanta, Kansas

Re: Appropriation of Water
Application No. Redacted

Dear Mr. Redact:

Your application has been examined and is found to be in proper form. Further, we find that the proposed use is for a beneficial purpose and is within reasonable limitations. If priorities are observed and respected, the proposed use will neither impair any use under existing water rights nor prejudicially and unreasonably affect the public interest. The application has therefore been approved.

There is enclosed the approval of the application, which constitutes a permit, authorizing you to proceed with construction of the proposed diversion works, to apply the water and otherwise perfect the proposed appropriation. There is also enclosed a memorandum setting forth the procedure to obtain a certificate of appropriation and containing other information which may be helpful to you. If you are unable to develop the project to the extent desired within the time allowed, you should request such extension of time as may be needed. An extension may be given for good cause shown on your request.

Should you have any questions or if we can be of any assistance to you, please feel free to write or call us.

Very truly yours,

R. V. Smrha
Chief Engineer

RVS:WHS:cap
Enc.

RECEIVED
JAN 22 1968

MICROFILMED

Division of Water Resources
GARDEN CITY

EXHIBIT

4

December 20, 1972

Redacted

Garden City, Kansas 67846

Re: Appropriation of Water
Application Nos. Redacted

Gentlemen:

Your Application No. Redacted has been examined and is found to be in proper form. Further, we find that the proposed use is for a beneficial purpose and is within reasonable limitations. If priorities are observed and respected, the proposed use will neither impair any use under existing water rights nor prejudicially and unreasonably affect the public interest. It is presumed that the application is made in good faith, and that you are ready to proceed with the proposed diversion works and the application of water to the proposed use. The application has, therefore, been approved.

There is enclosed the approval of the application authorizing you to proceed with construction of the proposed diversion works, to divert such unappropriated water as may be available from the source and at the location specified in the approval of application, and to use it for the purpose and at the location described in the application.

There is also enclosed a memorandum setting forth the procedure to obtain a certificate of appropriation which will establish the extent of your water rights.

Our records under Application No. Redacted show Redacted as owners of the Redacted in Haskell County, Kansas.

Information submitted with Application No. Redacted shows Redacted Redacted as the owner of the Redacted Redacted, and on this basis we will change our records under Application No. Redacted accordingly.

RECEIVED
JAN 4 1973

MICROFILMED

Division of Water Resources
GARDEN CITY

February 12, 1976

Redacted

Satanta, Kansas 67870

Re: Appropriation of Water
Application No. Redacted

Dear Mr. Redacted

Your application has been examined and is found to be in proper form. Further, we find that the proposed use is for a beneficial purpose and is within reasonable limitations. If priorities are observed and respected, the proposed use will neither impair any use under existing water rights nor prejudicially and unreasonably affect the public interest. It is presumed that the application is made in good faith, and that you are ready to proceed with the proposed diversion works and the application of water to the proposed use. The application has, therefore, been approved.

There is enclosed the approval of the application authorizing you to proceed with construction of the proposed diversion works, to divert such unappropriated water as may be available from the source and at the location specified in the approval of application, and to use it for the purpose and at the location described in the application.

There is also enclosed a memorandum setting forth the procedure to obtain a certificate of appropriation which will establish the extent of your water rights.

Should you have any questions or if we can be of any assistance to you, please feel free to write or call us.

Very truly yours,

Riley M. Dixon
Hydrologist

RECEIVED
FEB 23 1976

Division of Water Resources
GARDEN CITY

RMD:ee1

Encs Redacted
cc: Redacted

MICROFILMED

Redacted

Redacted

3

RECEIVED
FEB 17 1981

FIELD OFFICE
DIVISION OF WATER RESOURCES
STOCKTON

January 26, 1981

Redacted

Hays, Kansas 67601

Re: Appropriation of Water
Application No. Redacted

Gentlemen:

Your application has been examined and is found to be in proper form. Further, we find that the proposed use is for a beneficial purpose and is within reasonable limitations. If priorities are observed and respected, the proposed use will neither impair any use under existing water rights nor prejudicially and unreasonably affect the public interest. It is presumed that the application is made in good faith, and that you are ready to proceed with the proposed diversion works and the application of water to the proposed use. The application has, therefore, been approved.

There is enclosed the approval of the application authorizing you to proceed with construction of the proposed diversion works, to divert such unappropriated water as may be available from the source and at the location specified in the approval of application, and to use it for the purpose and at the location described in the application.

Your attention is particularly directed to Paragraph Nos. 12 and 14 of the approval of application. Paragraph No. 12 stipulates that failure to comply with any of the provisions of the approval of your application will result in the revocation of the approval of your application, dismissal of your application, and forfeiture of the application's priority. Paragraph No. 14 requires that you install a meter on each of the well pump discharge pipes before you pump water. A copy of the minimum meter specifications is enclosed.

There is also enclosed a memorandum setting forth the procedure to obtain a certificate of appropriation which will establish the extent of your water rights.

MICROFILMED

Redacted

Page 2

Should you have any questions or if we can be of any assistance to you, please feel free to write or call us.

Very truly yours,

Paul C. Clark,
Hydrologist

PCC:ERW:eel

Encs.

cc: Stockton Field Office

RECEIVED
FEB 17 1981

FIELD OFFICE
DIVISION OF WATER RESOURCES
STOCKTON

DWR 01438

MICROFILMED

DIVISION OF WATER RESOURCES
KANSAS STATE BOARD OF AGRICULTURE

Redacted

Re: Appropriation of Water, Application No. _____

It is my judgment that

1. The application (was) (~~was not~~) made in good faith.
2. The application (is) (~~is not~~) in proper form.
3. The proposed use of water (is) (~~is not~~) for a beneficial purpose.
4. The proposed rate of diversion (is) (~~is not~~) within reasonable limitations for the proposed use.
5. The proposed quantity (is) (~~is not~~) within reasonable limitations for the proposed use.
6. The proposed use (~~will~~) (will not) impair a use under an existing water right.
7. The proposed use (~~will~~) (will not) prejudicially and unreasonably affect the public interest.

Comments boundary irrigation, well is located approx.
Redacted _____, but

Recommendations Approve it not in valley alluvium

Date January 8, 1986

Robert F. Tuttle Jr.
Hydrologist

List other applications or vested rights covering same diversion points or land covered by this application.

If an additional paragraph needs to be added to the approval of application, limiting the quantity and/or rate combined with other rights, then show the quantity and rate and how computed.

RECEIVED

MICROFILMED

FEB 27 1986

DIVISION OF WATER RESOURCES
KANSAS STATE BOARD OF AGRICULTURE

Redacted

Re: Appropriation of Water, Application No. _____

It is my judgment that

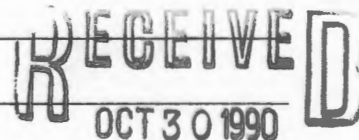
1. The application (was) (~~was not~~) made in good faith.
2. The application (is) (~~is not~~) in proper form.
3. The proposed use of water (is) (~~is not~~) for a beneficial purpose.
4. The proposed rate of diversion (is) (~~is not~~) within reasonable limitations for the proposed use.
5. The proposed quantity (is) (~~is not~~) within reasonable limitations for the proposed use.
6. The proposed use (~~will~~) (will not) impair a use under an existing water right.
7. The proposed use (~~will~~) (will not) prejudicially and unreasonably affect the public interest.

Comments

See memo

Recommendations

Approve



Date

9-19-90

Division of Water Resources
GARDEN CITY

Douglas E. Bush
Hydrologist

List other applications or vested rights covering same diversion points or land covered by this application.

If an additional paragraph needs to be added to the approval of application, limiting the quantity and/or rate combined with other rights, then show the quantity and rate and how computed.