

FOULSTON SIEFKIN LLP  
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316-267-6371

IN THE DISTRICT COURT OF GOVE COUNTY, KANSAS,  
TWENTY-THIRD JUDICIAL DISTRICT

JON and ANN FRIESEN; FRIESEN FARMS, LLC; )  
DOYLE SADDLER; 1885 ENTERPRISES, LLC; JUSTIN )  
SLOAN; TOM SLOAN; BERT STRAMEL; STRAMEL )  
FARMS, INC.; FRED ALBERS; MARVIN ALBERS; FRANK )  
BOUITS; DENISE J. BURROWS, TRUSTEE OF THE )  
CHARLES SCHROEDER FAMILY TRUST; GARY E. )  
COOPER; ELFRIEDE U. COOPER; GARY E. COOPER, )  
TRUSTEE OF THE GARY E. COOPER AND MARY )  
PAWLUS TRUSTS; COOPER GRAIN, INC.; CAMERON )  
EPARD; F. DOYLE FAIR, TRUSTEE OF THE A.L. ) Case No. 2018-CV-000010  
ABERCROMBIE MARITAL TRUST; LOIS L. FERGUSON; )  
BRYAN FRAHM; MEADOW LAKE FARMS, INC.; LON )  
FRAHM; FRAHM FARMLAND, INC.; LON FRAHM, )  
TRUSTEE OF THE PEGGY FRAHM EVANS TRUST; )  
SHEILA FRAHM; JAMES FRITZ; VINCENT V. GLAD and )  
TENLEY S. GLAD, doing business as GLAD FARMS; PAT J. )  
HAFFNER; WILBURN HOLLOWAY; DAVID HOUSTON; )  
DOUGLAS IRVIN; IRVIN FARMS, INC.; SHARON K. )  
MANN; JOHN P. McKENNA; BRENT MERANDA; )  
BERWYN PETERSEN; S.Q.I. FARMS, INC.; PAUL STEELE; )  
RICHARD A. STEFAN; JOSEPH G. WALDMAN; DENNIS )  
WALKER; WALKER TESTING CO., INC.; KEVIN W. )  
WARK; WARK PROPERTIES, LLC; PRAIRIE DOG )  
PROPERTIES, LLC; KEVIN W. WARK, TRUSTEE OF THE )  
BERRIE FAMILY TRUST; KEVIN W. WARK, TRUSTEE OF )  
THE FLIPSE LIVING TRUST; DARREL E. WARK; DANIEL )  
WAYAND; WENDY WEISHAAR; and DONALD RALL; )  
)  
)  
Plaintiffs, )

vs. )  
 )  
 DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE )  
 THE STATE OF KANSAS, DEPARTMENT OF )  
 AGRICULTURE, DIVISION OF WATER )  
 RESOURCES, in his official capacity, )  
 )  
 Defendant. )  
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PURSUANT TO K.S.A. CHAPTER 77

**SECOND AMENDED  
 PETITION FOR JUDICIAL REVIEW**

Come now the Plaintiffs, by and through their attorney, David M. Traster of Foulston Siefkin LLP, Wichita, Kansas, pursuant to K.S.A. 77-614(c) and K.S.A. 60-215(a)(B), and for their cause of action against the Defendant, allege and state as follows:

**The Parties**

1. Plaintiffs, Jon and Ann Friesen, are residents of Thomas County, Kansas, residing at 2267 County Road K, Colby, Kansas 67701 and own or hold an interest in agricultural land and water rights in Thomas County.

2. Plaintiff, Friesen Farms, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 2267 County Road K, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

3. Plaintiff, Doyle Saddler, is a resident of Thomas County, Kansas, residing at 1375 County Road 25, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

4. Plaintiff, 1885 Enterprises, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 1375 County Road 26, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

5. Plaintiff, Justin Sloan, is a resident of Thomas County, Kansas, residing at 1925 County Road 23, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

6. Plaintiff, Tom Sloan, is a resident of Thomas County, Kansas, residing at 545 Woofter Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

7. Plaintiff, Bert Stramel, is a resident of Thomas County, Kansas, residing at 1267 Highway K25, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

8. Plaintiff, Stramel Farms, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at Rt. 1, Box 22, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

9. Plaintiff, Fred Albers, is a resident of Thomas County, Kansas, residing at 2091 Rd. 34, Rexford, Kansas 67753 and owns or holds an interest in agricultural land and water rights in Thomas and Sheridan Counties.

10. Plaintiff, Marvin Albers, is a resident of Thomas County, Kansas, residing at 744 County Road 31, Oakley, Kansas 67748 and owns or holds an interest in agricultural land and water rights in Thomas County.

11. Plaintiff, Frank Bouts, is a resident of Sheridan County, Kansas, residing at 210 West Main Street, Selden, Kansas 67757 and owns or holds an interest in agricultural land and water rights in Sheridan County.

12. Plaintiff, Denise J. Burrows, Trustee of the Charles W. Schroeder Family Trust, is a resident of Arapahoe County, Colorado, residing at 20606 E. Ida Circle, Centennial, Colorado 80015 and owns or holds an interest in agricultural land and water rights in Thomas County.

13. Plaintiff, Gary E. Cooper, is a resident of Thomas County, Kansas, residing at 730 Woofter Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

14. Plaintiff, Elfriede U. Cooper, is a resident of Thomas County, Kansas, residing at 730 Woofter Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

15. Plaintiff, Gary E. Cooper, Trustee of the Gary E. Cooper and Mary Pawlus Trusts, is a resident of Thomas County, Kansas, residing at 730 Woofter Ave., Colby, Kansas and owns or holds an interest in agricultural land and water rights in Thomas and Sherman Counties.

16. Plaintiff, Cooper Grain, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 465 E. 8th, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

17. Plaintiff, Cameron Epard, is a resident of Maricopa County, Arizona, residing at 18171 N. 99th St., Scottsdale, Arizona 85255 and owns or holds an interest in agricultural land and water rights in Thomas County.

18. Plaintiff, F. Doyle Fair, Trustee of the A.L. Abercrombie Marital Trust, is a resident of Sedgwick County, Kansas, residing at 7309 E. 21st N. #140, Wichita, Kansas 67206 and owns or holds an interest in agricultural land and water rights in Sheridan County.

19. Plaintiff, Lois L. Ferguson, is a resident of Denver County, Colorado, residing at 760 York Street, Denver, Colorado 80206 and owns or holds an interest in agricultural land and water rights in Thomas County.

20. Plaintiff, Bryan Frahm, is a resident of Thomas County, Kansas, residing at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

21. Plaintiff, Meadow Lake Farms, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

22. Plaintiff, Lon Frahm, is a resident of Thomas County, Kansas, residing at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Logan, Sherman, and Thomas Counties.

23. Plaintiff, Frahm Farmland, is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 135 West 6th, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Sherman County.

24. Plaintiff, Lon Frahm, Trustee of the Peggy Frahm Evans Trust, is a resident of Thomas County, Kansas, residing at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

25. Plaintiff, Sheila Frahm, is a resident of Pima County, Arizona, residing at 2149 W. Escondido Canyon Drive, Green Valley, Arizona 85622 and owns or holds an interest in agricultural land and water rights in Thomas County.

26. Plaintiff, James Fritz, is a resident of Sherman County, Kansas, residing at 7102 Road 8, Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

27. Plaintiffs, Vincent V. Glad and Tenley S. Glad, doing business as Glad Farms, are residents of Thomas County, Kansas, residing at 935 South Range Ave., Colby, Kansas 67701 and own or hold an interest in agricultural land and water rights in Thomas County.

28. Plaintiff, Pat J. Haffner, is a resident of Sheridan County, Kansas, residing at 7380 E. Road 105, Hoxie, Kansas 67740 and owns or holds an interest in agricultural land and water rights in Sheridan County.

29. Plaintiff, Wilburn Holloway, is a resident of Thomas County, Kansas, residing at 2266 County Road 12, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

30. Plaintiff, David Houston, is a resident of Lyon County, Kansas, residing at 1821 Road 330, Reading, Kansas 66868 and owns or holds an interest in agricultural land and water rights in Thomas County.

31. Plaintiff, Douglas Irvin, is a resident of Thomas County, Kansas, residing at 915 Fountainview Ct., Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

32. Plaintiff, Irvin Farms, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 923 Arcade, Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

33. Plaintiff, Sharon K. Mann, is a resident of Sherman County, Kansas, residing at 1411 Arcade Ave., Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

34. Plaintiff, John P. McKenna, is a resident of Decatur County, Kansas, residing at #11-2500th Rd., Jennings, Kansas 67643 and owns or holds an interest in agricultural land and water rights in Sheridan County.

35. Plaintiff, Brent Meranda, is a resident of Gove County, Kansas, residing at 8020 County Road BB, Quinter, Kansas 67752 and owns or holds an interest in agricultural land and water rights in Gove County.

36. Plaintiff, Berwyn Petersen, is a resident of Thayer County, Nebraska, residing at 235 N. 6th Street, Hebron, Nebraska 68370 and owns or holds an interest in agricultural land and water rights in Thomas County.

37. Plaintiff, S.Q.I. Farms, Inc., is a foreign for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 214 E. 10th Street, Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Thomas County.



38. Plaintiff, Paul Steele, is a resident of Thomas County, Kansas, residing at 965 Prairie View, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

39. Plaintiff, Richard A. Stefan, is a resident of Thomas County, Kansas, residing at 615 North Chikanmauga, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Sherman County.

40. Plaintiff, Joseph G. Waldman, is a resident of Gove County, Kansas, residing at 5853 County Road Y, Park, Kansas 67751 and owns or holds an interest in agricultural land and water rights in Gove County.

41. Plaintiff, Dennis Walker, is a resident of Sheridan County, Kansas, residing at 501 13th St., Hoxie, Kansas 66740 and owns or holds an interest in agricultural land and water rights in Sheridan County.

42. Plaintiff, Walker Testing Co., Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 501 13th, Hoxie, Kansas 67740 and owns or holds an interest in agricultural land and water rights in and Sheridan County.

43. Plaintiff, Kevin W. Wark, is a resident of Thomas County, Kansas, residing at 2477 US Highway 24, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

44. Plaintiff, Wark Properties, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 1124 SE 35th Terrace, Topeka, Kansas 66605 and owns or holds an interest in agricultural land and water rights in Thomas County.

45. Plaintiff, Prairie Dog Properties, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 1124 SE 35th Terrace, Topeka, Kansas 66605 and owns or holds an interest in agricultural land and water rights in Thomas County.

46. Plaintiff, Kevin W. Wark, Trustee of the Berrie Family Trust, is a resident of Thomas County, Kansas, residing at 2477 US Highway 24, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

47. Plaintiff, Kevin W. Wark, Trustee of the Flipse Living Trust, is a resident of Thomas County, Kansas, residing at 2477 US Highway 24, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

48. Plaintiff, Darrel E. Wark, is a resident of Thomas County, Kansas, residing at 1635 Sewell Ave., Apt. 4, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

49. Plaintiff, Daniel Wayand, is a resident of Gove County, Kansas, residing at 519 West 6th Street, Quinter, Kansas 66552 and owns or holds an interest in agricultural land and water rights in Gove County.

50. Plaintiff, Wendy Weishaar, is a resident of Thomas County, Kansas, residing at 375 S. Range, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Sherman and Thomas Counties.

51. Plaintiff, Donald Rall, is a resident of Thomas County, Kansas, residing at 130 Kansas Ave., Rexford, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

52. The Defendant, David Barfield, P.E., is the Chief Engineer of the Division of Water Resources of the Kansas Department of Agriculture. He may be served at his official office located at 1320 Research Park Drive, Manhattan, Kansas 66502-5000.

53. Other parties to the administrative proceeding included the Kansas Department of Agriculture, Division of Water Resources (“DWR”) and the Northwest Kansas Groundwater Management District No. 4 (“GMD4”).

54. Plaintiffs are owners of agricultural land within the boundaries of GMD4 and within the boundaries of the recently created Local Enhanced Management Area (“LEMA”).

55. The Plaintiffs own water appropriation rights that authorize the diversion of groundwater for irrigation use within the GMD and within the LEMA.

56. Plaintiffs seek judicial review of the Chief Engineer’s April 13, 2018, Order establishing a LEMA in GMD4 and his failure to enact regulations as specifically directed by the Legislature in K.S.A. 82a-1041(k).

57. The Order is effective in Gove County and three of the Plaintiffs are residents of and own land in Gove County.

**The LEMA Statute and the proceedings  
before the Chief Engineer**

58. The 2012 Kansas Legislature enacted K.S.A. 82a-1041 (the “LEMA Statute”). L. 2012, Ch. 62.

59. Its provisions are part of and supplemental to the Kansas Groundwater Management District Act, K.S.A. 82a-1020, *et seq.* K.S.A. 82a-1041(l).

60. The LEMA Statute permits Groundwater Management Districts to propose Plans that would impose enhanced groundwater management requirements including “corrective controls” in specified geographical areas within a GMD’s boundaries.

61. There are numerous problems with the LEMA Statute, the procedure that resulted in the Chief Engineer’s April 13, 2018, Final Order, and with the Final Order itself.

a. The Chief Engineer’s decisions throughout the LEMA proceeding have been based on a statute that is unconstitutional on its face and as applied;

b. the Chief Engineer has acted beyond the jurisdiction conferred by the LEMA Statute, the Groundwater Management District Act, K.S.A. 82a-1020, *et seq.*, and the Water Appropriation Act, K.S.A. 82a-701, *et seq.*;

c. he has erroneously interpreted and applied the law;

- d. engaged in an unlawful procedure;
- e. failed to follow prescribed procedures;
- f. his actions were based on determinations of fact that are not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole; and
- g. have been unreasonable, arbitrary, and capricious.

62. GMD4 submitted a proposed district-wide LEMA Plan dated June 8, 2017, to the Chief Engineer of the Kansas Department of Agriculture, Division of Water Resources (“DWR”) pursuant to the LEMA Statute.

63. Highly summarized, the GMD4 Plan proposed that the Chief Engineer enter an Order reducing all irrigation water rights within each Township in GMD4 based on the average annual decline in the High Plains Aquifer in each Township during the period from 2004 to 2015.

64. The reductions were only imposed on irrigation water rights. Stockwatering, Municipal, and water rights that authorized use other than irrigation were treated differently.

65. The Plan called for across-the-board cuts in the quantity of water that can be diverted from existing water appropriation rights for irrigation use with no consideration of their relative priority in violation of the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*

66. On June 27, 2017, the Chief Engineer wrote a letter to GMD4 that included findings of fact and conclusions of law that concluding that the proposed Plan met the K.S.A. 82a-1041(a) requirements, including a finding that the proposed Plan complies with Kansas law, and is therefore acceptable for consideration.

67. The Chief Engineer designated Constance Owen as the hearing officer for the initial hearing required by K.S.A. 82a-1041(b) which was held on August 23, 2017.

68. On September 23, 2017, Ms. Owen issued an "Order on Initial Requirements of the Groundwater Management District No. 4 District-Wide Local Enhanced Management Plan."

69. On October 2, 2017, the Chief Engineer issued a Notice of Hearing setting the second public hearing for November 14, 2017, in Colby, Kansas.

70. On October 10, 2017, five irrigators intervened in the LEMA proceeding and filed a Motion for Continuance of the proposed November 14, 2017, hearing. The Motion asserted that:

- a. The impact the proposed Plan would have on the Intervenors' water rights was unclear;
- b. additional information was required to fully understand the Plan's impact on their water rights and farming operations;
- c. the Plan was originally proposed in June of 2017, at the beginning of the irrigation season;

- d. the LEMA process occurred entirely during the 2017 growing season when irrigators were busiest;
- e. additional time was required to gather such information;
- f. full and careful preparation for a hearing in November was not possible because of the press of other matters and greater than normal rainfall in some areas of GMD4 promised to and did, in fact, delay the fall harvest;
- g. Due Process requires that persons affected by proposed governmental action be given adequate notice, an opportunity to be heard, and to be represented by counsel;
- h. the opportunity to be heard requires adequate time for preparation; and
- i. adequate preparation for the LEMA hearing would require the gathering information in the hands of others including information from both DWR and GMD4.

71. The Chief Engineer did not directly rule on this Motion for Continuance. Instead, October 11, 2017, 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. (Emphasis added.)

72. On October 27, 2017, the Intervenor filed several pleadings including:
- a. A Motion to Provide Due Process Protections for Irrigators;
  - b. a Memorandum in Support of the Intervenor's Motion to Provide Due Process Protections for Irrigators;
  - c. Intervenor's Motion for Reconsideration, seeking reconsideration of the Chief Engineer's June 27, 2017, finding that the proposed Plan complies with state law;
  - d. a Memorandum in Support of the Intervenor's Motion for Reconsideration; and
  - e. a Petition for Review by the Secretary of Agriculture.

73. In their Petition for Review, the Intervenor asserted that:
- a. The fall harvest was far behind in Northwest Kansas documented with information from the National Agricultural Statistics Service;
  - b. the timing of the hearing could not be worse for the Intervenor and other irrigators with a stake in the outcome of the November 14, 2017, hearing; and
  - c. there was little or no time for preparation for the hearing and even attendance at the hearing was likely to be a Catch 22.

74. The Secretary denied the Petition for Review and the Chief Engineer proceeded with the hearing on November 14, 2017.



75. On February 23, 2018, the Chief Engineer issued an Order of Decision returning the proposed LEMA to GMD4 with changes he required.

76. On February 26, 2018, the Chief Engineer issued a Corrected Order of Decision also returning the proposed LEMA to GMD4.

77. On March 8, 2018, the Chief Engineer accepted GMD4's modified LEMA Plan.

78. On April 13, 2018, the Chief Engineer issued an Initial Order establishing a LEMA in GMD4.

79. On April 29, 2018, the plaintiffs filed a Petition for Administrative Review of the Chief Engineer's April 13, 2018, Initial Order.

80. On May 18, 2018, the Secretary of Agriculture declined to review the Chief Engineer's Initial Order establishing the LEMA and issued an Order making the Chief Engineer's April 13, 2018, Initial Order a Final Order.

81. On June 13, 2018, the Plaintiffs filed the Petition for Judicial Review in this case.

### **Summary of applicable Kansas water law**

82. The Chief Engineer is required to enforce and administer the laws of this state pertaining to the beneficial use of water and to control, conserve, regulate, allot, and aid in the distribution of the water resources of the state for the benefit and

beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation. K.S.A. 82a-706.

83. The 1972 Groundwater Management District Act states that it is Kansas public policy 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. K.S.A. 82a-1020.

84. The Groundwater Management District Act, is subject to, controlled by, and does not amend the Kansas Water Appropriation Act, making all of its provisions subject to the prior appropriation doctrine. *See, e.g.*, K.S.A. 82a-1020, 82a-1028(n) and (o), 82a-1029, and 82a-1039.

85. Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available for all appropriators.

86. The prior appropriation doctrine permeates the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, and is fundamental Kansas public policy that is binding on all water users and government agencies, including the Chief Engineer and GMD4. *See, e.g.*, K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a-1039; and the April 13, 2018, Order, pp. 4-5, ¶ 4.

87. The Water Appropriation Act, and especially the prior appropriation doctrine, has provided stability for landowners, water right holders, and the public since 1945. *Clawson v. State, Dep't of Agric., Div. of Water Res.*, 49 Kan. App. 2d 789, 798–99, 315 P.3d 896 (2013).

88. The importance of stability in property law has been recognized by our Courts. “The need of stability in the water laws of Kansas cannot be overstressed.” *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 232, 630 P.2d 1164 (1981) quoting *Williams v. The City of Wichita*, 190 Kan. 317 at 319, 374 P.2d 578 (1962).

89. Quoting from *Stone*, 230 Kan. at 233, 630 P.2d 1164, the *Clawson* Court went on to say:

The doctrine has provided stability for landowners, water right holders, and the public. The importance of stability in property law has been recognized by our Supreme Court:

“ ‘In a well-ordered society it is important that people know what their legal rights are, not only under constitutions and legislative enactments, but also as defined by judicial precedent, and having conducted their affairs in reliance thereon, ought not to have their rights swept away by judicial decree. And this is especially so where rights of property are involved.... And it should be left to the legislature to make any change in the law, except perhaps in a most unusual exigency.’ ” *Stone* 230 Kan. at 233, 630 P.2d 1164 (quoting *Freeman v. Stewart*, 2 Utah 2d 319, 322, 273 P.2d 174 [1954]).

*Clawson*, 49 Kan. App. 2d at 799.

90. The 1978 Legislature made it clear that water rights are still subject to the Water Appropriation Act and the prior appropriation doctrine. The Legislature

approved the corrective-control provisions set out in the 1978 Intensive Groundwater Use Control Area (“IGUCA”) legislation, K.S.A. 82a-1038, but not before amending DWR’s proposed legislation to make it clear that the control provisions are limited by and subject to the Chief Engineer’s duties and powers as provided in the Water Appropriation Act. K.S.A. 82a-1039.

91. In fact, 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.” *Id.*

92. The LEMA Plan alters the terms of all irrigation water rights in Townships with assumed annual decline rates of 0.5% or greater during the period 2004 – 2015 to 1.5 acre-feet per acre or less.

93. 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. K.S.A. 82a-711 and 82a-711a. *See, e.g., Report on the Laws of Kansas Pertaining to the Beneficial Use of Water, Bulletin No. 3, November 1956, pp. 51, 85-91.*

94. The Chief Engineer has no authority to alter Kansas public policy. That is the exclusive province of the Kansas Legislature.

95. DWR and GMD4 implemented this fundamental Kansas public policy permitting mining of groundwater in Northwest Kansas.

96. All the irrigation water rights in GMD4 with a priority date before August 19, 1991, were created under the DWR-approved GMD4 “planned-depletion” policy specifically authorized by K.S.A. 82a-711(c), K.S.A. 82a-711a, and the rules and regulations adopted by previous Chief Engineers.

97. Many of the water rights in GMD4 permitted before 1983 were allowed up to 2.25 acre-feet per acre. The reasonable quantity for irrigation use for permits issued after 1983 was reduced to 2.0 acre-feet per acre in GMD4’s 1983 “planned-depletion” regulation; applications filed after September 22, 2000 were limited to 1.5 acre-feet per acre. K.A.R. 5-3-24.

98. 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 Chief Engineer. *See* K.S.A. 82a-711(a).

99. In fact, when the Chief Engineer approves an application for a new water appropriation right, the cover letter conveying the Permit documents the fact that the Chief Engineer has made the requisite findings of fact.

100. The Chief Engineer does not have the authority to reduce the quantity of a water right, even if the reduction is limited in time. The Court in *Clawson v. DWR*, 49 Kan.App.2d 789, syl. 15, 801, 315 P.3d 896 (2013), held that the Chief Engineer does not

have the statutory power to reduce the authorized quantity of a water right after he has issued a Permit.

101. Each Permit, when issued, is an administrative Order, *Clawson, supra*, 49 Kan.App.2d at 801, and the time to challenge those Orders has long since passed.

102. Water rights are real property. K.S.A. 82a-701(g). While the Legislature can always amend or repeal its own laws it cannot unring a bell. “The past cannot be recalled by the most absolute power.” *United States v. Winstar*, 518 U.S. 839, 873 (1996) quoting *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810).

103. In *Fletcher v. Peck, supra*, the court held that the Legislature cannot undo a conveyance of real estate, divesting the owner of rights that the state has lawfully conveyed. *Id.* It can however, reacquire the property by condemning it. See *Young Partners, LLC v. Bd. of Educ., Unified Sch. Dist. No. 214, Grant Cnty.*, 284 Kan. 397, 403–405, 160 P.3d 830 (2007).

### **Incorporation by Reference**

104. The Intervenor’s previous briefing in this matter is incorporated by reference, including the:

- a. October 27, 2017, Memorandum in Support of Motion for Due Process;
- b. October 27, 2017, Memorandum in Support of Motion for Reconsideration;

- c. November 2, 2017, Reply Memo in Support of Due Process;
- d. December 22, 2017, Intervenors' Submittal in Opposition to the proposed District-Wide LEMA; and
- e. April 29, 2018, Petition for Administrative Review by the Secretary of Agriculture.

**The Chief Engineer has acted beyond the jurisdiction conferred by law and has erroneously interpreted and applied the law. K.S.A. 77-621(c)(2) and (4).**

- 105. Paragraphs 1-104 and 121-171 are incorporated by reference.
- 106. The April 13, 2018, Order, is an unlawful collateral attack on the Chief Engineer's previous findings and administrative Orders establishing water rights within GMD4.
- 107. The April 13, 2018, Order ignores the prior appropriation doctrine making across-the-board reductions in the quantities of water that can be diverted.
- 108. The LEMA corrective-control provisions violate the prior appropriation doctrine whether impairment is direct or regional.
- 109. The April 13, 2018, Order violates K.S.A. 82a-707, which mandates allocation of water based on priority and not the purpose of use.
- 110. Reducing the quantity of water that can be diverted based on the acres irrigated during recent years, ignoring the right to irrigate all of the authorized acres, is

a violation of the Water Appropriation Act in all of the same ways that reducing the quantities violates the Act.

111. The LEMA Statute is not retroactive so even if the corrective-control provisions of the LEMA Statute authorize reductions, only water rights created with notice of those corrective-control provisions, i.e. water rights with priority dates after the effective date of the LEMA Statute, can be reduced. Nevertheless, the Order exempts water rights that are still in their perfection periods. Order, p. 44, ¶ 1.(o).

112. The GMD4 Plan, as approved the Chief Engineer, does not give adequate consideration to water users who have already implemented voluntary conservation measures as required by the LEMA Statute.

113. The April 13, 2018, Order includes an erroneous finding of fact stating that “the appeals procedure . . . provides due consideration to water users who have already implemented reductions in water use resulting in voluntary conservation measures.” Order, p. 38, ¶ 9.

114. The LEMA Statute requires that the Chief Engineer review a proposed LEMA Plan to determine whether the Plan:

- (1) Proposes clear geographic boundaries;
- (2) pertains to an area wholly within the groundwater management district;
- (3) proposes goals and corrective control provisions as provided in subsection (f) adequate to meet the stated goals;



(4) gives due consideration to water users who already have implemented reductions in water use resulting in voluntary conservation measures;

(5) includes a compliance monitoring and enforcement element;  
and

(6) is consistent with state law.

K.S.A. 82a-1041(a)(1)-(6).

115. The Chief Engineer's June 27, 2017, letter states that the proposed Plan meets the K.S.A. 82a-1041(a) requirements and is acceptable for consideration based on unstated findings of fact and conclusions of law.

116. For the reasons stated, the LEMA Plan as proposed and as adopted by the Chief Engineer, does not comply with state law.

117. The even though the Chief Engineer's interpretation of the LEMA Statute was called directly and squarely into question, the Chief Engineer failed to explain how the LEMA Plan is "consistent with state law" and, in particular, how he interprets the LEMA provisions in light of multiple conflicting statutory provisions.<sup>1</sup> He stated that the April 13, 2018, Order was not the "proper place" to do so. April 13, 2018, Order, p. 33, ¶ 14.

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<sup>1</sup> See, e.g., K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a-1039.

118. The Chief Engineer failed at every turn to indicate when and where he should or would explain how the canons of statutory interpretation justify his erroneous interpretation of the LEMA Statute.

119. The Chief Engineer's refusal to explain his interpretation of the LEMA Statute and how the canons apply violates the requirement that Orders include conclusions of law that support agency action. K.S.A. 77-526(c).

120. The Chief Engineer has failed to adopt rules and regulations as required by the statute. K.S.A. 82a-1041(k). His failure to comply with this directive placed the parties at a substantial disadvantage causing them to incur substantial attorney fees to prepare multiple motions and extensive briefing to figure out how the LEMA proceeding was to be conducted. Had the Chief Engineer complied with the legislative mandate to adopt rules and regulations, review of proposed rules by the Attorney General and public comments, could have avoided this ad hoc, unreasonable, arbitrary, and capricious procedural nightmare.

**The agency action is unreasonable, arbitrary,  
and capricious. K.S.A. 77-621(c)(8).**

121. Paragraphs 1-120 and 139-171 are incorporated by reference.

122. Without reason or explanation, GMD4 and the Chief Engineer implemented this proceeding at a time that prohibited irrigators from participating in the proceeding or protecting their property rights.

123. While there is no good time of the year for a LEMA proceeding, the timing of this proceeding could not have been worse and precluded adequate preparation and participation. GMD4 sent its proposed LEMA Plan to the Chief Engineer in June. The first hearing was held on August 23, 2017, at or near the end of the irrigation season making preparation and even participation in the first hearing difficult, if not impossible.

124. The second hearing was held on November 14, 2018, in the middle of corn harvest, again making preparation and participation in the hearing problematic.

125. Moreover, the Order of Designation, making reductions effective on January 1, 2018, was issued in mid-April well after 2018 planting decisions should have been made or were made.

126. Planning for 2018 cropping was already underway when the Intervenors requested that the hearing be continued. It was grossly unfair to implement the LEMA for 2018.

127. The April 13, 2018, Order contains multiple assertions that there was little or no evidence to support various objections. *See, e.g.*, April 13, 2018, Order, p. 8, ¶ 8; p. 9, ¶¶ 9 and 10; p. 10, ¶¶ 10 and 11; pp. 10-11, ¶ 12; p. 11, ¶ 13; p. 23, ¶ 2; p. 29, ¶ 7; p. 30, ¶ 8; p. 33, ¶ 13; and p. 34, ¶ 16.

128. It is unreasonable, arbitrary, and capricious to deny the parties an opportunity to gather and analyze the evidence and to adequately prepare for a hearing and then rely on a lack of evidence to support their objections.

129. In addition, the Order is unreasonable, arbitrary, and capricious because:

a. it establishes reductions based on average depletion using sparse and unevenly spaced data; and

b. it establishes reductions based on average depletion across entire Townships solely for the ease, convenience, and exclusive benefit of GMD4 and DWR with no regard for the significant and unlawful impact on irrigators or the actual depletion experienced at individual well sites.

130. The Section-level data available to GMD4 and the Chief Engineer shows that average depletion in some Townships in the District is uniform, but the majority have varying degrees of depletion.

131. Even though GMD4 had data that allowed it to “readily” compute depletion at the Section level, GMD4 chose and the Chief Engineer approved averaging depletion across entire Townships.

132. The method used is also unreasonable, arbitrary, and capricious because it uses wholly artificial boundaries.

133. The Chief Engineer failed to address the applicable canons of statutory construction to justify his clearly erroneous interpretation of the LEMA corrective-

control provisions indicating that the April 13, 2018, Order was not the “proper place” to do so even though his interpretation of the statute was called directly and squarely into question. April 13, 2018, Order, p. 33, ¶ 14.

134. The Chief Engineer failed to indicate when and where he would or should explain how the cannons justify his erroneous interpretation.

135. It is unreasonable, arbitrary, and capricious to require the parties to speculate about how the Chief Engineer might attempt to justify his interpretation which has and will continue to increase the time, effort, and expense of this review of his Order.

136. The GMD’s allegations and the Chief Engineer’s statements in this and other Orders to the contrary, the process was less than open during the development of the LEMA Plan. The Plan was poorly explained to the public and was not made available for review before it was issued.

137. The Chief Engineer has failed to adopt rules and regulations as required by the statute. K.S.A. 82a-1041(k). His failure to comply with this directive placed the Intervenors at a substantial disadvantage causing them to incur substantial attorney fees to prepare multiple motions and extensive briefing to figure out how this proceeding was to be conducted. Had the Chief Engineer complied with the legislative mandate to adopt rules and regulations, review of proposed rules by the Attorney

General and public comments could have avoided this ad hoc, unreasonable, arbitrary, and capricious procedural nightmare.

138. The Chief Engineer's refusal to follow the Legislature's mandate is now before the Stafford County District Court although that case has been stayed.

**The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied.**

139. Paragraphs 1-138 and 152-171 are incorporated by reference.

140. Reduction of the available quantity of water under water rights that the Chief Engineer has permitted, and irrigators have perfected with significant investments of capital and hard work and upon which irrigators and their creditors have relied, is an unconstitutional taking of private property for public use.

141. In addition to violating the Water Appropriation Act, the Order denies irrigators Equal Protection of the Law.

142. The LEMA Statute is unconstitutional because it makes the April 13, 2018, Order designating a LEMA effective when it is entered into the Chief Engineer's records making no requirement that it be served on the parties who are subject to its provisions. K.S.A. 82a-1041(h); April 13, 2018, Order, p. 6, ¶ 1. In fact, the Order itself has not yet been served on all Petitioners.

143. The LEMA Statute must be read to include Due Process protections to avoid constitutional problems. The Due Process Clause applies to LEMA proceedings because any Orders issued are state action that adversely affect property rights.

144. The Chief Engineer refused to rule on the Intervenors' Motion for Continuance asserting that the statute does not require "adversarial hearings."

145. The fact that the LEMA, as proposed and as designated in the April 13 Order, alters property rights on which many Kansas families rely for their livelihood is a clear indication that the proceedings are "adversarial."

146. Owners of water rights are entitled to representation by counsel, to review and understand the LEMA Plan, to conduct discovery, and to otherwise prepare for the required hearings.

147. The Chief Engineer granted the Intervenors an opportunity to cross-examine witnesses at the second hearing but denied their request for time to gather and analyze the evidence and to adequately prepare. For example, GMD5 produced numerous documents to counsel shortly before 5:00 p.m. on November 13, 2017, the day before the second hearing began.

148. The procedures to appeal GMD4's determination of the acreage and quantities allocated to each owner violates basic Due Process. There are no provisions for hearings before a fair and impartial tribunal and no provisions for review of erroneous decisions.

149. The procedures carried a significant risk of, and have resulted in the erroneous deprivation of property interests; additional procedural safeguards would have dramatically increased the Intervenor's ability to safeguard their property interests.

150. Any additional burden caused by providing the Intervenor with their basic Due Process rights would have been minimal and, in fact, illumination of all of the facts, which is best accomplished in an adjudicative hearing, would have been to DWR's and GMD4's advantage.

151. Nevertheless, the Chief Engineer rushed through the procedure running rough-shod over significant property rights.

**The agency has engaged in an unlawful procedure  
or has failed to follow prescribed procedure. K.S.A. 77-621(c)(5).**

152. Paragraphs 1-151 and 158-171 are incorporated by reference.

153. The Chief Engineer failed to explain his interpretation of the LEMA Statute and how the canons of statutory interpretation apply in violation of the requirement that Orders include conclusions of law that support agency action. K.S.A. 77-526(c).

154. The LEMA proceeding commenced prior to July 1, 2017. April 13, 2018, Order, pp. 1-2, ¶¶ 1-3. The 2017 amendments to K.S.A. 82a-1901 were not effective until July 1, 2017, and are not retroactive. K.S.A. 82a-1901(e).



155. The April 13, 2018, Order erroneously states that a Petition for Administrative Review by the Secretary must be filed within 30 days after service of the Order (p. 52) but the time limit to seek Administrative Review is just 15 days.

156. DWR has failed to properly serve the April 13, 2018, Order as required by the Due Process Clause.

157. The Chief Engineer improperly delegated his responsibility to conduct the first public hearing. The statute specifically states that the “chief engineer shall conduct an initial public hearing” on the question of designating a proposed LEMA. K.S.A. 82a-1041(b). *See also*, April 13, 2018, Order p. 4, ¶ 3. There is no authority to delegate this statutory responsibility.

**The Chief Engineer’s Order is based on determinations of fact that are not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole. K.S.A. 77-621(c)(7).**

158. Paragraphs 1- 157 are incorporated by reference.

159. The GMD4 Plan imposes a district-wide goal limiting irrigation withdrawals to 1.7 million acre-feet over five years within Townships with an assumed annual decline rate of 0.5% or greater during the period 2004 – 2015.

160. The GMD4 Plan averages depletion across entire Townships breaking each Township into the following categories based on water-level measurements taken between 2004 and 2015: average depletion of less than 0.5%; between 0.5% and 1.0%; between 1.0% and 2.0%; and average depletion greater than 2.0%.

161. There is little or no evidence in the record establishing a factual or legal basis for any of the following:

- a. The 1.7-million-acre-foot goal;
- b. limitations on water rights in Townships with annual decline rates of 0.5% or greater during the period 2004 – 2015;
- c. for the selection of the 2004 – 2015 period;
- d. for the categories or the breaks between categories; or
- e. the reductions imposed for each category.

162. Reductions were based on annual well-measurement data provided by the Kansas Geological Survey. The data was used to estimate depletion in 4,981 Sections in the District and then average by Township. The water-level measurements themselves are reliable but over 3,000 Section-level estimates were based on measurements in wells that that were one mile or more away.

163. The Chief Engineer found that “Groundwater levels in much of the area contained within the proposed GMD4 District Wide LEMA have declined or are still declining, in some cases precipitously; these levels have declined excessively; and the rate of withdrawal of groundwater there exceeds the rate of recharge.”

164. The Chief Engineer’s finding that groundwater levels “have declined or are still declining” and that the “rate of withdrawal of groundwater there exceeds the rate of recharge” are understandable in light of K.S.A. 82a-711, 82a-711a, and the fact

that the GMD proposed, and a former Chief Engineer approved a regulation entitled “planned depletion.”

165. There are no findings of fact or conclusions of law that justify reductions based solely on declines.

166. The Chief Engineer’s finding that groundwater levels have declined “precipitously” in some cases and “excessively” has no legal or factual basis because the Chief Engineer has failed to establish objective standards defining declines that are “precipitous” or “excessive.”

167. These limitations are directly contrary to previous findings of fact and conclusions of law set out in Permits that 2.25 and 2.0 acre-feet per acre are reasonable and will not impair existing water rights.

168. Even assuming, *arguendo*, that the Permits are subject to the Chief Engineer’s collateral attack, the record contains insufficient evidence to support the reductions.

169. Every irrigation right in each Township is treated the same. While the Section-level data shows that average depletion in some Townships in the District is uniform, the majority have varying degrees of depletion.

170. The method uses wholly artificial boundaries. For example, because water rights in Sections along Township boundaries are reduced based on average reductions in that Township, adjacent landowners may have a significant economic advantage or

disadvantage depending on the differences between the average depletion in a neighboring Township.

171. The April 13, 2018, Order includes an erroneous finding of fact stating that “the appeals procedure . . . provides due consideration to water users who have already implemented reductions in water use resulting in voluntary conservation measures.”

Order, p. 38, ¶ 9.

### **Scope of Review and Authorized Remedies**

172. The Kansas Judicial Review Act, K.S.A. 77-601, *et seq.*, authorizes the Court to grant relief under any of the following circumstances:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

\* \* \*

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

K.S.A. 77-621(c).

173. Moreover, the KJRA gives this Court broad authority to grant “appropriate relief” including injunctive, declaratory, and other forms of relief. K.S.A. 77-622(b), (c) and (d).

174. In his February 23, 2018, Order the Chief Engineer stated that the plain text of the statute does not require that he adopt rules and regulations for LEMA proceedings.

175. The KJRA defines “agency action” to include each of the following:

- (1) the whole or a part of a rule and regulation or an order;
- (2) the failure to issue a rule and regulation or an order; or
- (3) an agency’s performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise.

K.S.A. 77-602(b).

176. The Plaintiffs are entitled to judicial review of the Chief Engineer’s failure to adopt regulations as required by K.S.A. 82a-1041(k) because failure to adopt regulations is final agency action and to the extent it is not, non-final agency action is reviewable pursuant to K.S.A. 77-608, 77-611(c), and 77-631(a). K.S.A. 77-607.

177. Based on his rulings in the administrative proceeding, Plaintiffs believe any rules and regulations adopted by the Chief Engineer would not address the statutory interpretation, Due Process, or equal protection requirements unless the Court so orders.

## Relief Requested

178. The Plaintiffs request that the Court set aside the April 13, 2018, Order establishing the LEMA for the reasons set out here, in the previous briefing, and the Petition for Administrative Review.

179. The Plaintiffs further request that the Court enter declaratory judgment interpreting provisions of the LEMA Statute, the Kansas Water Appropriation Act, the Kansas Groundwater Management District Act, and the United States and Kansas Constitutions holding:

- a. that K.S.A. 82a-1041(k) requires the Chief Engineer to adopt rules and regulations to effectuate and administer the provisions of the LEMA Statute;
- b. that the LEMA Statute does not permit the Chief Engineer to ignore the prior appropriation doctrine in crafting rules and regulations for LEMA Plans; and
- c. that the United States and Kansas Constitutions require the Chief Engineer to provide persons whose property rights may be affected by a LEMA Plan with Equal Protection and Due Process of law.

180. The Plaintiffs further request that the Court enter such other relief as the Court, in its discretion, deems appropriate, just, and equitable.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2018, the above and foregoing Second Amended Petition was presented to the Clerk of the Court for filing and uploading to the Kansas Courts e-Filing system that will send notice of electronic filing to counsel of record.

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