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CASE NUMBER: 2018-CV-000010

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

JON and ANN FRIESEN, *et al*.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2018-CV-000010
	)	
DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, in his official capacity,	)	
	)	
Defendant.	)	
	)	

PURSUANT TO K.S.A. CHAPTER 77

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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A. Errata.

The word "bar" in the last sentence of the first full paragraph on page 19 of the Petitioners' Brief should be "bare." That sentence should read: "Subsection (f)(3) provides bare authority but does not provide instructions and is therefore more general."

B. The rules of statutory interpretation.

1. Ambiguity can arise when the broader context of a statute is considered.

Both the Chief Engineer and the GMD assert that the LEMA statute is unambiguous and for that reason, the Court cannot or should not apply the canons.[1] Petitioners agree that on its face and in isolation, subsection (f)(2) seems clear. Likewise, when read in isolation, subsection (f)(3) is understandable. But Courts do not wear blinders.

> The plainness or ambiguity of statutory language is determined by reference to the language itself, the ***specific context*** in which that language is used, and the ***broader context*** of the statute as a whole. . . .
>
> Use may be made by the courts of aids to the construction of the meaning of words used in a statute even where, on superficial examination, the meaning of the words seems clear. . . .

[1] DWR Brief, pp. 13, 26, 28, 29, 30, 31, 35, and 43; GMD Brief, pp. 4 and 7.

> An ambiguity justifying the interpretation of a statute is not simply that arising from the meaning of particular words but includes such as ***may arise in respect to the general scope and meaning of a statute when all its provisions are examined***.[2]

2. There is no need to show that the statute is ambiguous in a judicial review proceeding.

Even if the Chief Engineer and the GMD were correct, the Court can grant relief if the agency has, as is the case here, "erroneously interpreted or applied the law."[3] This standard does not require the Petitioners to show that the statute is ambiguous.

In fact, as the GMD points out, citing *State v. Trautloff,*[4] a statute need only be "unclear" for the Courts to apply the canons of construction and look to legislative history.[5]

In *Redd v. Kansas Truck Ctr.*,[6] the Kansas Supreme Court held that relief is required under the KJRA when an agency "erroneously interpreted or applied

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[2] 73 Am. Jur. 2d *Statutes* § 105 (emphasis added).

[3] K.S.A. 77-621(c)(4).

[4] *State v. Trautloff*, 289 Kan. 793, 796, 217 P.3d 15, 19 (2009).

[5] GMD Brief, p. 4-5, footnote 13. *See also*, *State v. Haskell*, 50 Kan. App. 2d 1146, syl. ¶ 4, 337 P.3d 705, 706 (2014).

[6] 291 Kan. 176, 187–88, 239 P.3d 66, 74–75 (2010).

the law," and, in the next sentence, stated that statutory interpretation is subject to unlimited appellate review.

In *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs*,[7] the Court was asked to resolve a question of statutory interpretation in a KJRA proceeding that did not involve ambiguity. In fact, no form of the word "ambiguous" appears in the opinion. Nevertheless, the Court held that "[a]n appellate court exercises unlimited review on questions of statutory interpretation without deference to an administrative agency's or board's interpretation of its authorizing statutes."[8]

3. The rules of statutory interpretation.

The following principles of statutory interpretation were provided to the Court and counsel in Appendix B of Petitioners' Brief. The Chief Engineer and the GMD each cite rules of construction. Based on the Petitioners' research, the following list contains all of the applicable rules followed by Kansas courts.

[7] 290 Kan. 446, 228 P.3d 403 (2010).

[8] *Id.* at syl. ¶ 2.

A. The proper interpretation of a statute is a question of law.[9]

B. The fundamental rule of statutory construction is that the intent of the Legislature governs.[10]

C. Legislative intent is determined from the language of the statute.[11]

D. Statutes must be read in their entirety and all of their provisions given effect.[12]

E. Statutes relating to the same subject matter must be interpreted to create a rational, coherent, and consistent body of law.[13]

F. There is a presumption that the Legislature intends statutes to be given a reasonable construction.[14]

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[9] *NCCI v. Todd,* 258 Kan. 535, 540, 905 P.2d 114, 118 (1995), quoting from *Todd v. Kelly,* 251 Kan. 512, 515–516, 837 P.2d 381 (1992) and citing *State ex rel. Stephan v. Kan. Racing Comm'n,* 246 Kan. 708, 719, 792 P.2d 971 (1990).

[10] *In re Lietz Constr. Co*., 273 Kan. 890, 897–98, 47 P.3d 1275, 1282 (2002), citing *West v. Collins*, 251 Kan. 657, Syl. ¶ 3, 840 P.2d 435 (1992); *Heckert Constr. Co. v. City of Fort Scott*, 278 Kan. 223, 225, 91 P.3d 1234, 1236 (2004); *Merryfield v. Sullivan,* 301 Kan. 397, 399, 343 P.3d 515, 516–17 (2015); *State v. Looney*, 299 Kan. 903, 906, 327 P.3d 425 (2014) *Cochran v. State, Dept. of Agric., Div. of Water Res.*, 291 Kan. 898, 249 P.3d 434 (2011), citing *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378, 22 P.3d 124 (2001). *See* Appendix B, Section E, demonstrating that the Kansas Constitution vests the legislative power of the State in the Legislature.

[11] *Cochran v. State, Dept. of Agric., Div. of Water Res.*, 291 Kan. 898, 249 P.3d 434 (2011), citing *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378, 22 P.3d 124 (2001), *Heckert Constr. Co. v. City of Fort Scott*, 278 Kan. 223, 225, 91 P.3d 1234, 1236 (2004). *Merryfield v. Sullivan*, 301 Kan. 397, 399, 343 P.3d 515, 516–17 (2015) citing *State v. Looney*, 299 Kan. 903, 906, 327 P.3d 425 (2014) and *Casco v. Armour Swift–Eckrich*, 283 Kan. 508, 524–26, 154 P.3d 494 (2007); *Perry v. Board of Franklin Cty. Comm'rs*, 281 Kan. 801, 808–09, 132 P.3d 1279 (2006); *Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 822, 104 P.3d 378 (2005); *Lane v. Nat'l Bank of the Metropolis,* 6 Kan. 74, 80–81 (1870).

[12] *Heckert Constr. Co. v. City of Fort Scott*, 278 Kan. 223, 225, 91 P.3d 1234, 1236 (2004) citing *GT, Kan., L.L.C. v. Riley Cty. Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

[13] *See* Paragraph B. 4., *infra.*

[14] *Tobin Constr. Co. v. Kemp,* 239 Kan. 430, 436, 721 P.2d 278 (1986).

G. The Legislature does not enact meaningless statutes.[15]

H. Specific provisions within a statute control over its general provisions.[16]

I. Repeal by implication is not favored.[17]

J. Amendment by implication, like repeal by implication, is not favored.[18]

K. Courts may look to the historical background of a statute.[19]

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[15] *Nat'l Council on Comp. Ins. v. Todd*, 258 Kan. 535, 540, 905 P.2d 114, 118 (1995), quoting from *Todd v. Kelly*, 251 Kan. 512, 515–516, 837 P.2d 381 (1992) and citing *In re Adoption of Baby Boy L.*, 231 Kan. 199, Syl. ¶ 7, 643 P.2d 168 (1982). *City of Olathe v. Bd. of Zoning Appeals*, 10 Kan.App.2d 218, 221, 696 P.2d 409 (1985). *Martindale v. Robert T. Tenny, M.D., P.A.*,250 Kan. 621, 632, 829 P.2d 561, 568–69 (1992). *Clark v. Murray*,141 Kan. 533, Syl. ¶ 1, 41 P.2d 1042 (1935).

[16] *In re Adoption of H.C.H.*, 297 Kan. 819, 833, 304 P.3d 1271 (2013); *In re Mental Health Ass'n of Heartland*, 289 Kan. 1209, 1209, 221 P.3d 580, 582 (2009); *In re K.M.H.*, 285 Kan. 53, 82, 169 P.3d 1025 (2007), cert. denied 555 U.S. 937, 129 S.Ct. 36, 172 L.Ed.2d 239 (2008).

[17] *In re City of Wichita*, 274 Kan. 915, 929, 59 P.3d 336, 347 (2002), quoting from *State v. Roderick*, 259 Kan. 107, 911 P.2d 159 (1996); *Hainline v. Bond*, 250 Kan. 217, 217, 824 P.2d 959, 961 (1992); *City of Salina v. Jaggers*, 228 Kan. 155, Syl. ¶ 2, 612 P.2d 618 (1980); *Ferrellgas Corp. v. Phoenix Ins. Co.*, 187 Kan. 530, 534, 358 P.2d 786, 790 (1961).

[18] Singer, *Statutes and Statutory Construction*, 6th ed. 2002, §22:13, pp. 292-295 and 297.

[19] *In re Lietz Const. Co.*, 273 Kan. 890, 897–98, 47 P.3d 1275, 1282 (2002), *Steele v. City of Wichita*, 250 Kan. 524, 529, 826 P.2d 1380, 1385 (1992) (superseded by statute on other grounds) citing *Read v. Miller*, 247 Kan. 557, 561–62, 802 P.2d 528 (1990). *See* Section V.E., discussing the Oregon statues that were the source.

L. Statutes must be read to avoid unconstitutional results.[20]

The GMD incorrectly asserts that the Petitioners failed to point out that constitutionality of a statute is presumed.[21]

M. Courts no longer give deference to an administrative agency's interpretation of a statute.[22]

N. Courts have a duty to correct erroneous interpretations by an administrative agency.[23]

O. Statutes in derogation of private property rights and rights of individual ownership must be strictly construed.[24]

P. Statutes do not have retroactive effect unless there is clear language in the statute and even then, retroactive statutes cannot affect vested rights.[25]

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[20] *In re K.M.H.*, 285 Kan. 53, 63, 169 P.3d 1025, 1033 (2007); S*tate v. Rupnick,* 280 Kan. 720, 736, 125 P.3d 541 (2005). *See also, Unified Sch. Dist. No. 380, Marshall Cty. v. McMillen,* 252 Kan. 451, 457–58, 845 P.2d 676, 681 (1993).

[21] GMD, p. 5. *See also*, Pet. Brief , p. 59 at footnote 227; p. 62 at footnote 237; and pp. 74-75, at footnote 285.

[22] *Cochran v. State, Dep't of Agric., Div. of Water Res.*, 291 Kan. 898, 249 P.3d 434 (2011), *Kan. Dep't of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010); *Redd v. Kan. Truck Ctr.*, 291 Kan. 176, 187–88, 239 P.3d 66, 75 (2010) citing *Ft. Hays St. Univ. v. Univ. Ch., Am. Ass'n of Univ. Profs*, 290 Kan. 446, 457, 228 P.3d 403 (2010).

[23] *Citizens' Utility Ratepayer Bd. v. State Corp. Comm'n of State of Kan.* 264 Kan. 363, 411, 956 P.2d 685 (1998); *Radke Oil Co., Inc. v. Kan. Dep't of Health and Env't* 23 Kan.App.2d 774, 936 P.2d 286, 288 (1997).

[24] *NCCI. v. Todd*, 258 Kan. 535, syl. 5, 543, 905 P.2d 114 (1995); *Babb v. Rose,* 156 Kan. 587, 589, 134 P.2d 655 (1943); 59 C.J. 1124–1127; *Gray v. Stewart*, 70 Kan. 429, 432, 78 P. 852 (1904).

[25] *State v. Smith*, 56 Kan. App. 2d 343, 350, 430 P.3d 58, 64 (2018) citing *Norris v. Kan. Emp't Security Bd. of Review*, 303 Kan. 834, 841, 367 P.3d 1252 (2016) and *Brennan v. Kan. Ins. Guar. Ass'n*, 293 Kan. 446, 460, 264 P.3d 102 (2011). *Brennan v. Kan. Ins. Guar. Ass'n*,

4. Statutes relating to the same subject matter must be interpreted to create a rational, coherent, and consistent body of law.

Both the GMD and the Chief Engineer ignore the requirement that statutes must be read in their entirety and all of their provisions given effect.[26] Courts determine the Legislature's intent behind a particular statutory provision from a general consideration of the entire act.[27] Courts are not permitted to consider only an isolated part or parts of an act, but are required to consider and construe together all parts thereof *in pari materia*.[28]

> When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law.[29]

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293 Kan. 446, 264 P.3d 102 (2011) citing *Resolution Trust Corp. v. Fleischer,* 257 Kan. 360, 365, 892 P.2d 497 (1995).

[26] *Heckert Constr. Co. v. City of Fort Scott*, 278 Kan. 223, 225, 91 P.3d 1234, 1236 (2004) citing *GT, Kan., L.L.C. v. Riley Cty. Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

[27] *In re Lietz Const. Co*., 273 Kan. 890, 897–98, 47 P.3d 1275, 1282 (2002).

[28] *Cochran v. State, Dep't of Agric., Div. of Water Res.*, 291 Kan. 898, 249 P.3d 434 (2011), *Kan. Cmm'n on Civil Rights v. Howard*, 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975), *Board of Sumner Cty. Comm'rs v. Bremby*, 286 Kan. 745, at 754–55, 189 P.3d 494 (2008).

[29] *Nat'l Council on Comp. Ins. v. Todd*, 258 Kan. 535, 541, 905 P.2d 114, 118–19 (1995) quoting from *Todd v. Kelly*, 251 Kan. 512, 515–516, 837 P.2d 381 (1992) and citing *Kan. Cmm'n on Civil Rights v. Howard*, 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975). (Emphasis added.)

Ostensibly repugnant statutes are to be read together and harmonized, if at all possible, so both can be given force and effect.[30]

Where there is an apparent conflict between two sections of an act, a simplistic and narrow reading of the statute is not an option. Statutes may not be read in isolation; they must be considered in connection with the other relevant provisions.[31] So when two statutes cannot both be literally applied, the Court must determine, as best it can, the legislative intent of the two statutes when read in context.[32]

It is the Court's duty to, as far as practicable, reconcile the provisions of a statute to make them "consistent, harmonious, and sensible."[33]

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[30] *Harrah v. Harrah*, 196 Kan. 142, 409 P.2d 1007 (1966).

[31] *NCCI. v. Todd*, 258 Kan. 535, 541, 905 P.2d 114 (1995), citing *Todd v. Kelly*, 251 Kan. 512, 515–516, 837 P.2d 381 (1992).

[32] *NCCI. v. Todd*, 258 Kan. 535, 541, 905 P.2d 114 (1995), citing *Todd v. Kelly*, 251 Kan. 512, 515–518, 837 P.2d 381 (1992).

[33] *Cochran v. State, Dep't of Agric., Div. of Water Res.*, 291 Kan. 898, 249 P.3d 434 (2011); *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas,* 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003); *Nat'l Council on Comp. Ins. v. Todd*, 258 Kan. 535, 541, 905 P.2d 114, 118 (1995); *Todd v. Kelly,* 251 Kan. 512, 515–516, 837 P.2d 381 (1992); *Steele v. City of Wichita*, 250 Kan. 524, 529, 826 P.2d 1380, 1385 (1992); *In re Marriage of Ross,* 245 Kan. 591, 594, 783 P.2d 331 (1989); and *State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611 (1987).

Statutes are *in pari materia* and must be read together when interpreting them when they relate to closely allied subjects or objects;[34] when they make up the same general scheme or plan, attempt to accomplish the same results, or address the same problems;[35] and when they are enacted in the same session of the Legislature, have the same effective date, and have a common purpose.[36]

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another.[37]

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[34] *Martindale v. Robert T. Tenny, M.D., P.A.*, 250 Kan. 621, 631–32, 829 P.2d 561, 568–69 (1992) citing 73 Am.Jur.2d, Statutes § 189; *Newman Mem'l Hosp. v. Walton Constr. Co.*, 37 Kan. App. 2d 46, 67, 149 P.3d 525, 538–40 (2007) citing 2B Singer, *Statutes and Statutory Construction* § 51:03, p. 202 (6th ed.2002).

[35] *Martindale v. Robert T. Tenny, M.D., P.A.*, 250 Kan. 621, 631–32, 829 P.2d 561, 568–69 (1992) citing 73 Am. Jur. 2d, Statutes § 189.

[36] *Newman Mem'l Hosp. v. Walton Const. Co.*, 37 Kan. App. 2d 46, 66–69, 149 P.3d 525, 538–40 (2007) citing *State v. Bradley*, 215 Kan. 642, Syl. ¶ 5, 527 P.2d 988 (1974) and *In re Adoption of Baby Girl H,* 12 Kan.App.2d 223, 227–28, 739 P.2d 1 (1987).

[37] *Newman Mem'l Hosp. v. Walton Const. Co.*, 37 Kan. App. 2d 46, 66–69, 149 P.3d 525, 538–40 (2007) quoting *In re Adoption of Baby Girl H,* 12 Kan.App.2d 223, 227, 739 P.2d 1 (1987), which in turn quotes *Clark v. Murray*, 141 Kan. 533, Syl. ¶ 1, 41 P.2d 1042 (1935), which in turn quotes Black on Interpretation of Laws (2d Ed.).

Statutes relating to the same subject are *in pari materia* and should be construed together even when they are enacted at different times.[38] However, the doctrine of *in pari materia* applies with peculiar force to statutes enacted at the same legislative session with the same effective date. [39]

> Statutes *in pari materia,* although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms.[40]
>
> The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislation, or to discover how the policy of the legislature with reference to the subject matter has been changed or modified from time to time. In other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have expired or have been repealed."[41]

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[38] *Cochran v. State, Dep't of Agric., Div. of Water Res.*, 291 Kan. 898, 249 P.3d 434 (2011), *Howard v. Edwards*, 9 Kan.App.2d 763, 689 P.2d 911 (1984) citing *Claflin v. Walsh, 212 Kan. 1, 8, 509 P.2d 1130 (1973).*

[39] *State v. Bradley,* 215 Kan. 642, 527 P.2d 988 (1974) citing 82 C.J.S. Statutes § 367.

[40] *Matter of Adoption of Baby Girl H.,* 12 Kan. App. 2d 223, 227–28, 739 P.2d 1, 4–5 (1987), quoting *Clark v. Murray,* 141 Kan. 533, 537, 41 P.2d 1042 (1935).

[41] *Matter of Adoption of Baby Girl H.,* 12 Kan. App. 2d 223, 227–28, 739 P.2d 1, 4–5 (1987), quoting *Clark v. Murray,* 141 Kan. 533, 537, 41 P.2d 1042 (1935).

Even conflicting or overlapping statutes within separate acts that are not strictly *in pari materia* are to be read together and reconciled to reach sensible and rational results.[42]

5. Petitioners Rely on more than two provisions in the GMD Act.

The Chief Engineer asserts that the Petitioners "pick and choose" provisions of the WAA that the Legislature "failed to mention."[43] And that they rely on three "handpicked" statutes.[44] The Chief Engineer does not identify the statutes he claims the Petitioners overlooked, without which it is not possible for the Petitioners to respond to (or the Court to evaluate) the Chief Engineer's argument.

Petitioners do not suggest that the reference to the appropriation doctrine in (f)(2) means that it must be read into the other corrective controls as the Chief Engineer incorrectly suggests.[45] It is the Legislature's decision to place the IGUCA and LEMA provisions into the GMD Act instead of the WAA; the text of

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[42] *Martindale v. Robert T. Tenny, M.D., P.A.*, 250 Kan. 621, 631–32, 829 P.2d 561, 568–69 (1992), *see also, Felten Truck Line, Inc. v. State Bd. of Tax Appeals,* 183 Kan. 287, 296, 327 P.2d 836, 844 (1958) citing *Clark v. Murray*, 141 Kan. 533, 537, 41 P.2d 1042 (1935).

[43] DWR Brief, p. 30.

[44] DWR Brief, p. 31.

[45] DWR Brief, p. 31.

K.S.A. 82a-1020, 82a-1028(n), 82a-1028(o), K.S.A. 82a-1029, and 82a-1039, and the WAA itself require that the LEMA corrective controls be read into the corrective controls.

Contrary to the Chief Engineer's assertions,[46] the Petitioners rely on K.S.A. 82a-1020 and 82a-1039, and on every other section of the GMD Act that has anything to do with the management of groundwater within a GMD.[47]

In K.S.A. 82a-1020, the 1972 Legislature declared that it is the public policy of the State of Kansas and especially the GMD Act, to "***preserve basic water use doctrine***" and to allow local water users to determine their destiny but only "***insofar as it does not conflict with the basic laws and policies of the state of Kansas.***"[48] This legislative declaration, read together with K.S.A. 82a-1028(n), 82a-1028(o), and 82a-1029, makes it abundantly clear that from its passage in

[46] DWR Brief, p. 29.

[47] The following provisions of the GMD Act address important issues but do not directly address the management of groundwater. K.S.A. 82a-1021 provides a series of definitions; K.S.A. 82a-1022 through 82a-1027 deal with organization of GMDs, meetings, voting, and internal governance; K.S.A. 82a-1030 through 82a-1035 deal with funding, boundaries, dissolution, and related issues; and K.S.A. 82a-1042 requires that the Chief Engineer notify GMDs if he plans to adopt rules and regulations that conflict with a management plan or impact the use of groundwater within a GMD.

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

1972, the GMD Act was subject to the WAA, including its prior appropriation and beneficial use provisions.

K.S.A. 82a-1028(n) permits GMDs to adopt "administrative standards and policies relating to the management of the district," but they must not conflict with the WAA.[49]

K.S.A. 82a-1028(o) allows GMDs to recommend rules and regulations for adoption by the Chief Engineer relating to conservation and management of groundwater only when the following conditions are met: (a) they must be within the Chief Engineer's authority; (b) they must be consistent with the WAA; and (c), they must "implement the provisions of" the WAA.[50]

K.S.A. 82a-1029 prohibits GMDs from undertaking active management before the board has prepared, and the Chief Engineer has reviewed and approved, the District's management plan. The Chief Engineer cannot approve a plan that is incompatible with the WAA. [51]

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[49] *See*, Pet. Brief , p. 24, footnote 88.

[50] *See*, Pet. Brief , p. 25, footnote 89 and p. 51, footnote 196.

[51] *See*, Pet. Brief , p. 25, footnote 90.

K.S.A. 82a–1036 through 82a–1040 are the IGUCA provisions of the GMD Act and K.S.A. 82a–1041 permit the formation of LEMAs.

Thus, when the Legislature enacted the IGUCA provisions[52] in 1978,[53] it made it clear that they were and are part of, supplemental to, and subordinate to the GMD Act. Likewise, when the Legislature enacted the LEMA statute, it specified that it was and is part of, supplemental to, and subordinate to the GMD Act.[54] These provisions express the Legislature's directive that the IGUCA and LEMA provisions, like all of the rest of the GMD Act, are and remain subject to the WAA.

And, if that was not sufficiently clear, during the 1978 session the Legislature added a belt to suspenders by amending proposed HB 2702,[55] adding what is now K.S.A. 82a-1039, which state:

> Nothing 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.

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[52] K.S.A. 82a-1036 to 82a-1039.

[53] L. 1978, ch. 437.

[54] L. 2012, ch. 62, § 1(l).

[55] Pet. Brief , Exhibit 1. *See* discussion at Pet. Brief , p. 21-2.

The Chief Engineer points out that the IGUCA and LEMA corrective controls statutes "are nearly identical."[56] So it appears that the Chief Engineer agrees that K.S.A. 82a-1039 must be interpreted along with the other provisions of the GMD Act, so as to create a "rational, coherent, and consistent body of law."[57] Likewise, the GMD admits that the LEMA statute borrows parts of the IGUCA provisions and are therefore similar.[58] Thus, it is undisputed that the LEMA statute is *in pari materia* with the rest of the GMD Act, including K.S.A. 82a-1039.

Without explaining how these factors affect its interpretation, which precludes the Petitioner's ability to reply, the Chief Engineer argues that K.S.A. 82a-1039 does not mean what it says because the Petitioners do not "take into account the full scope of the Chief Engineer's duties," his relationship to groundwater management districts, and the debate about how much authority GMDs should have.[59] Likewise, the Chief Engineer concludes that Petitioners ignore "relevant policy concerns" but it is unclear which policy concerns and

[56] DWR Brief, p. 31.
[57] DWR Brief, p. 30.
[58] GMD Brief, p. 9.
[59] DWR Brief, pp. 30-1.

duties are being referenced or how his relationship to GMDs affects the plain text of K.S.A. 82a-1039 and its relationship to the LEMA statute—not that that would impact the Court's interpretation of the statutory text in any event.

Ignoring K.S.A. 82a-1039 and the other GMD Act provisions cited above, the Chief Engineer argues that if the Legislature intended for the prior appropriation doctrine to be applied to all IGUCA and LEMA corrective controls, they would have "said as much" and they would have "said as much in a few words."[60] The Legislature said precisely as much—and concisely so—when it made the otherwise broad powers in K.S.A. 82a-1038 specifically subject to the WAA in the few words contained in K.S.A. 82a-1039.

Likewise, the GMD asserts that the Petitioners do not show that the LEMA statute is ambiguous "because the LEMA statute is clear and unambiguous."[61] The GMD then explains some of the mechanics of the LEMA statute in almost three single-spaced pages never mentioning how K.S.A. 82a-1020, 82a-1028(n), 82a-1028(o), 82a-1029, or 82a-1039 affect the interpretation of the LEMA statute.

[60] DWR Brief, p. 31.

[61] GMD Brief, p. 5.

In fact, the GMD does not address the effect of these provisions on the LEMA statute anywhere in its brief.[62]

The GMD points to distinctions between IGUCAs and LEMAs focusing on the fact that, unlike IGUCAs, the GMD Board must propose and agree to the corrective controls, which are actually imposed by the Chief Engineer, not the Board.

Contrary to the GMD's assertions, LEMAs do not permit GMDs to control their destiny.[63] The Chief Engineer is in absolute control of the terms of both IGUCAs and LEMAs. He can scuttle a LEMA plan at inception if he finds that it is not "adequate to meet the stated goals," K.S.A. 82a-1041(a)(3), or after the two hearings, if he decides that the plan is "insufficient to address any of the [IGUCA] conditions." K.S.A. 82a-1041(d)(2). If the Chief Engineer does not like a LEMA plan, he can reject it and impose an IGUCA. Or not. But regardless of his decision, he cannot contravene the WAA.

For these reasons and for the other reasons set out in the Petitioners' Brief , the IGUCA and LEMA statutes do not grant the Chief Engineer authority to

[62] The GMD cites K.S.A. 82a-1020 to point out that the LEMA statute, K.S.A. 82a-1041, allows the GMDs to "control the destiny of their water use." GMD, p. 9, footnote 27.
[63] GMD Brief, pp. 7, 9, and 27.

reduce groundwater withdrawals without applying the prior appropriation doctrine.

C. This is not an inverse condemnation proceeding.

This is not an inverse condemnation action.[64] As the Chief Engineer points out, inverse condemnation is not a remedy available in a KJRA proceeding.[65]

D. The parties agree that the Legislature has the power to set public policy and to change the common law but its power to change vested property rights is limited.

The Chief Engineer and the GMD cite *Williams v. City of Wichita*.[66] The case does not help them.

The Chief Engineer cites *Williams* for the well understood fact that all water is dedicated to the use of the people of the state, subject to the control and regulation of the state.[67] He goes on to point out that the *Williams* Court, quoting *State ex rel. Emery v. Knapp*,[68] stated that this dedication is the "heart" of the WAA.[69] The Chief Engineer also notes that 1945 WAA abrogated the common

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[64] DWR Brief, p. 14; GMD Brief, pp. 2 and 10.

[65] DWR Brief, p. 14.

[66] 190 Kan. 317, 374 P.2d 578, 581 (1962).

[67] DWR Brief, p. 17.

[68] 167 Kan. 546, 207 P.2d 440 (1949).

[69] DWR Brief, p. 19, *Williams*, 190 Kan. at 336 and 344.

law doctrine holding that landowners have an absolute right to divert groundwater.[70] The Petitioners do not and have not suggested that the Legislature has restored the absolute ownership doctrine.[71]

Likewise, the GMD cites *Williams* for the proposition that the Legislature has the authority to change the principles of common law, abrogate decisions, and change public policy.[72] The GMD relies on *Williams* to argue that the Legislature "moves away from, but does not abandon, the prior appropriation doctrine" based on the criteria in K.S.A. 82a-1036.[73]

Petitioners do not attack the usufructuary nature of Kansas water rights; in fact, they cannot because *Williams* makes it clear that the "absolute ownership" doctrine was never about ownership of groundwater. Instead, citing an 1843 English case, *Williams* holds that because groundwaters are "percolating" they are "migratory and fugitive."[74] So it was always the usufructuary "use" of subterranean water that belonged to the surface owner, not the water itself.[75]

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[70] DWR Brief, p. 17.

[71] *See* DWR Brief, p. 16.

[72] GMD Brief, p. 8.

[73] GMD Brief, p. 8.

[74] *Williams*, 190 Kan. at 325.

[75] *Williams*, 190 Kan. at 329.

As the Chief Engineer and the GMD point out, the Legislature has the power to modify and change "common-law rules" and "the legislature may change the principle of the common law and abrogate decisions made thereunder when in its opinion it is necessary to the public interest."[76]

When the Legislature declared that all water is dedicated to the use of the people,[77] it took no property away from landowners because they had no property interest in the water itself. All they ever had was a right to use the water. The Legislature also created an opportunity for those who had already been appropriating water to establish vested rights.[78] Thus, the most that the Legislature took from landowners was an unused right to use groundwater.

Moreover, the Legislature substituted the ability to obtain water appropriation rights defined as follows:[79]

> "Appropriation right" is a right, acquired under the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated and amendments thereto, to divert from a definite water supply ***a specific quantity of water*** at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate

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[76] Id at 331.

[77] K.S.A. 82a-702.

[78] K.S.A. 82a-701(d), 82a-703, and 82a-704a.

[79] *See*, e.g., K.S.A. 82a-705.

to such supply, and to apply such water to a ***specific beneficial use or uses in preference to all appropriations right of later date***.[80]

And while a water right is a usufruct, it is still "a real property [usufruct] appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other disposal, or by inheritance."[81]

The Legislature's power to change common-law rules, to amend its own statutes, and to alter previously established public policy does not include a right to "undo a conveyance of real estate, divesting the owner of rights that the state has lawfully conveyed.[82] It can however, reacquire the property by condemning it.[83]

However, *Williams* is helpful for another reason. The Court took judicial notice of the many years of protracted litigation in state and federal courts over Wichita's efforts to obtain water from the Equus Beds in Harvey County.[84] The

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[80] K.S.A. 82a-701(f) (emphasis added).

[81] K.S.A. 82a-701(g).

[82] *See* Pet. Brief , Section VIII. D., pp. 74-6 and *United States v. Winstar*, 518 U.S. 839, 873 (1996) quoting *Fletcher v. Peck*, 6 Cranch 87, 3L.Ed. 162 (1810).

[83] *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).

[84] *Williams*, 190 Kan. at 319.

Court stated that resolving the constitutionality of the WAA would have a "settling effect on the general controversy which has too long kept ground water users throughout the state in uncertainty and confusion. ***The need of stability in the water laws of Kansas cannot be overstressed.***"[85]

F. Arthur Stone & Sons v. Gibson[86] and *Clawson v. Div. of Water Res*.[87] echo this critically important principle. In *Clawson*, the Court quoted from *Stone*:

> This doctrine of water appropriation has become a rule of property law relied upon by the entire state. The doctrine has provided stability for landowners, water right holders, and the public.
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> > " '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.' "[88]

The interpretation of the IGUCA and LEMA corrective control provisions advanced by the Chief Engineer and the GMD reintroduce the uncertainty that

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[85] *Id.* (emphasis added).

[86] 230 Kan. 224, 232, 630 P.2d 1164, 1170–71 (1981).

[87] 49 Kan. App. 2d 789, 798-99, 315 P.3d 896 (2013).

[88] *Id*., *F. Arthur Stone & Sons v. Gibson,* 230 Kan. at 233 (quoting *Freeman v. Stewart*, 2 Utah 2d 319, 322, 273 P.2d 174 [1954]).

the Williams Court intended to put to rest. Because the Chief Engineer has absolute control over the terms and conditions of any LEMA or IGUCA, irrigators across western Kansas do not know if, when, to what extent, or for how long their water rights will be curtailed.

E. The Chief Engineer and the GMD incorrectly assert this LEMA is the only way the LEMA statute can be applied to achieve their goals.

The Chief Engineer asserts that the WAA and the LEMA corrective controls are mutually exclusive. He argues that if he is constrained by the WAA, he cannot address groundwater depletion and the LEMA and IGUCA statutes are rendered "useless legislation."[89] This conclusion is necessarily based on the false notion that this LEMA is the one and only way to apply the corrective controls to reduce groundwater withdrawals in GMD4.

F. Conservation is a purpose but not the only purpose and not the primary purpose of the GMD Act.

Citing K.S.A. 82a-1020, the Chief Engineer states that the Petitioners ignore the GMD's "primary purpose," which he asserts is "conservation of

[89] DWR Brief, p. 32.

groundwater."[90] It appears that the GMDs disagree with the Chief Engineer. It seems that ability to "control" their "destiny" is more important.[91]

In fact, "conservation" is only mentioned 5 times in the 23 sections that make up the GMD Act and while it is certainly one of the purposes, it is not fair to suggest that it is "the primary purpose." Instead, the Legislature said that GMDs are needed for several reasons including "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."[92]

This list is preamble for the Legislature's statement of Kansas public policy which is focused on the local control and the sanctity of the WAA, not conservation.

> 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***

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[90] DWR Brief, p. 32.

[91] GMD Brief, p. 7, 9, and 27.

[92] K.S.A. 82a-1020.

> 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.

Given this text and the provisions of K.S.A. 82a-1028(n), 82a-1028(o), K.S.A. 82a-1029, and 82a-1039, discussed above, providing some local control while holding the WAA inviolate is "primary purpose" of the GMD Act.

G. K.S.A. 82a-1020 and 82a-1039 protect water right holders from overreaching by the Chief Engineer.

The Chief Engineer asserts that K.S.A. 82a-1020 and 82a-1039 were enacted because of the Legislature's supposed concern about local units of government usurping power granted to state agencies.[93] He argues that because GMDs tend to run amok, K.S.A. 82a-1020 and 82a-1039 protect the Chief Engineer's WAA authority, ensuring his continuing ability to administer water rights in GMDs.[94]

The Chief Engineer cites no authority for this bizarre notion. He cites nothing in the GMD Act that places his WAA authority in jeopardy. And GMD's have very little real power. As the GMD correctly states, "under the GMD Act

[93] DWR Brief, p. 32.

[94] *Id*.

and LEMA statute, the GMDs, on their own, do not have the enforcement power to require individuals adhere to a LEMA management plan."[95]

And, as has been discussed, GMDs must rely on the Chief Engineer to adopt their rules and regulations,[96] must have their management plans approved by the Chief Engineer,[97] and he has complete control of the terms of all LEMAs.[98] If a GMD refuses to adopt a LEMA with terms that he finds acceptable, he can force his will by imposing an IGUCA.[99]

As stated in the previous section, when the GMD Act is read in its entirety, is it must be, it is clear that at least one of its primary purposes is to preserve the WAA. None of the provisions of the GMD Act suggest that it amends any part of the WAA; K.S.A. 82a-1039 clearly says that it does not; and as discussed in the Petitioners' Brief and noted in Section B above, amendment and repeal by implication are never favored and statutes in derogation of private property rights and rights of individual ownership must be strictly construed.

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[95] GMD Brief, p. 7. *See also*, p. 8 stating that the state, not GMDs retain authority to regulate the use of water.

[96] K.S.A. 82a-1028(o).

[97] K.S.A. 82a-1029.

[98] K.S.A. 82a-1041(a)(3) and (d)(2) discussed above.

[99] K.S.A. 82a-1036 through 82a-1038.

H. Kansas prohibits discrimination between different authorized beneficial uses of water.

Both the Chief Engineer[100] and the GMD[101] raise policy arguments to support their assertions that they need not comply with the Legislative mandate to apply the prior appropriation doctrine without favoring one authorized beneficial use over another. Policy arguments must be made to the Legislature, not the Courts. This discrimination violates K.S.A. 82a-707(b) and denies the Petitioners due process and equal protection.

The Chief Engineer states that the LEMA statute allows distinctions to be made if they are in the public interest citing the Chief Engineer's Order of Designation, AR 2531-2532.[102] The LEMA statute is not mentioned at the cited location. Instead, the Chief Engineer's erroneous conclusions about priority are cited as authoritative. As noted in Section B above, his interpretation of K.S.A. 82a-707(b) is not entitled to deference.

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[100] DWR Brief p. 22.

[101] GMD Brief, p. 15-16.

[102] DWR Brief, p. 22, footnote 80.

The Chief Engineer argues that K.S.A. 82a-707(b) does not prohibit different treatment of different types of use in the absence of "impairment."[103] As discussed in the Petitioners' Brief, the Chief Engineer's regulations recognize that impairment can be direct or "regional."[104]

The Chief Engineer has not and cannot explain how senior water rights are not impaired by junior water rights when both senior and junior water rights are withdrawing water from the same source. In *Garetson Bros. v. Am. Warrior, Inc.*,[105]

> The common definition of the word "impair" is "to cause to diminish, as in strength, value, or quality." The American Heritage Dictionary 878 (4th ed.2006). This definition is similar to the definition of impair used by the district court, which looked to Black's Law Dictionary 752 (6th ed.1990) to define "impair" to mean "to weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner." See Humana Inc. v. Forsyth, 525 U.S. 299, 309–10, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Thus, using the ordinary definition of impair, we conclude that the legislature intended that the holder of a senior water right may seek injunctive relief to protect against a diversion of water by a holder of a junior water right when that diversion diminishes, weakens, or injures the prior right.

[103] DWR Brief, p. 22.

[104] Pet. Brief, pp. 70-72.

[105] 51 Kan. App. 2d 370, 389, 347 P.3d 687, 698–99 (2015).

The *Garetson Bros.* Court's definition of "impair" applies to direct well-to-well impairment and to "regional" declines that diminish, weaken, make worse, to lessen in power, and injure senior water rights.

I. Petitioners do not combine corrective controls.

While subsections (f)(2) and (f)(3) of the LEMA statute are closely related, the Petitioners do not and have not stated that that they are a single corrective control divided into two-parts as the Chief Engineer asserts.[106]

The Chief Engineer states that it "does not make sense to pick and choose which corrective controls are really merged together when they all present different ways to reduce water use."[107] Petitioners are unaware of any basis for the merger of corrective controls. While the Petitioners' Brief states that "subsection (f)(3) permits corrective controls only after the agencies have complied with subsection (f)(2),"[108] the context makes it clear that the subsections are separate and distinguishable.

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[106] DWR Brief, p. 26.

[107] DWR Brief, p. 28.

[108] Pet. Brief, p. 19.

The Chief Engineer asserts that Petitioners "apparently" argue "that the prior appropriation doctrine does not apply" to (f)(1), (f)(4), or (f)(5).[109] The Petitioners do not so assert.

Wheatland Elec. Co-op., Inc. v. Polansky,[110] does not stand for the proposition that the WAA provides the Chief Engineer with specific authority to unilaterally evaluate and make changes to perfected water appropriation rights.[111] In that case, Wheatland applied for changes to its water rights as permitted by K.S.A. 82a-708b. Wheatland asked the Chief Engineer to make changes but did not like the result after the fact. That case involved reductions that resulted from an application by the holder of the water right. The Petitioners did not request the changes contained in the GMD4 LEMA.

J. "Beneficial Use" and reasonable quantity are distinct concepts in Kansas and Western Water Law.

Both the Chief Engineer and the GMD argue that water appropriation rights are subject to continuing regulation by the State.[112] While the Petitioners agree that water rights are subject to some regulation, they do not agree that the State can make unilateral temporary or permanent changes to their perfected

[109] DWR Brief, p. 26.

[110] 46 Kan. App. 2d 746, 265 P.3d 1194 (2011).

[111] DWR Brief, p. 15.

[112] DWR Brief, p. 18., GMD Brief, p. 10

water appropriation rights. The agencies have not provided statutory authority that permits reductions in quantity of water that can be diverted because there is none.

The Chief Engineer's attempt to equate "beneficial use" and reasonable quantity is without merit. He correctly states that there are "two primary elements at play when considering how water should be distributed within Kansas. The first is beneficial use and the second is the prior appropriation doctrine."[113] He points out that K.S.A. 82a-707(a) and (e) state that appropriation rights "remain subject to the principle of beneficial use," and that "appropriation rights in excess of the reasonable needs" are not allowed.[114] He then quotes selected portions of K.S.A. 82a-707(b) which, in its entirety, reads:

> 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***

[113] DWR Brief, p. 18.

[114] *Id.*, quoting K.S.A. 82a-707(a) and (e).

> ***the terms and conditions of such holder's water right and the laws of this state***, other than through condemnation.[115]

"Beneficial use" refers to the purpose for which water is to be appropriated and the requirement that water be put to that use. While the WAA act says that a valid water appropriation right requires an application and a permit, at common law establishing a water appropriation right required the actual diversion and application of water to a beneficial use.[116] To keep a water right required that the beneficial use continue. Hence, the first sentence of the Kansas abandonment statute reads: "All appropriations of water must be for some beneficial purpose."[117]

> A beneficial use, for purposes of the right to appropriate water, is not limited to a use that generates a profit, or even income. Indeed, the particular purpose for which water is appropriated and used is not material provided that it is for some useful industry or to supply a well-recognized want. . . . Beneficial use, however, is more than use alone, and a diversion of water merely to serve purposes of speculation or monopoly will not constitute a beneficial use.[118]

Because water in the arid west was often in short supply, the prior appropriation doctrine included a use-it-or-lose it component. The Kansas

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[115] K.S.A. 82a-707(b) (emphasis added).

[116] 78 Am. Jur. 2d *Waters* § 365.

[117] K.S.A. 82a-718(a).

[118] 78 Am. Jur. 2d *Waters* § 365.

version of that element of the prior appropriation doctrine is found in the abandonment statute that has been amended several times over the last several years.[119]

The closely related "anti-speculation" doctrine requires that water rights be exercised by putting the water to a beneficial use rather than held speculatively.

The WAA lists six "beneficial uses": "domestic, municipal, irrigation, industrial, recreational and water power uses."[120] And the Chief Engineer's regulations define the term:

> (o) "Beneficial uses of water" are the following:
>
> (1) Domestic uses;
> (2) stockwatering;
> (3) municipal uses;
> (4) irrigation;
> (5) industrial uses;
> (6) recreational uses;
> (7) waterpower;
> (8) artificial recharge;
> (9) hydraulic dredging;
> (10) contamination remediation;
> (11) dewatering;
> (12) fire protection;
> (13) thermal exchange; and

[119] K.S.A. 82a-718.

[120] K.S.A. 82a-707(b).

(14) sediment control in a reservoir.[121]

The Chief Engineer argues that "principles of beneficial use cannot be completely ignored by the presence of the prior appropriation doctrine"; that water rights are subject to "regulation by the state"; and what is "reasonable" changes over time.[122] Violating the canon that prohibits "reading language into the statute or adding language that is not there,[123] he states that "all water rights remain subject to beneficial ***and reasonable use***" which is "just as important as . . . priority."[124]

"Beneficial use" is used throughout the WAA and DWR regulations, but the term "reasonable use" does not appear in the Act.[125] What is certainly a very important principle of Kansas and Western water law—beneficial use—is somehow transformed to "reasonable use" and then further modified to "reasonable quantity." The Chief Engineer argues that the phrase "appropriation

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[121] K.A.R. 5-5-1(o).

[122] DWR Brief, p. 18.

[123] GMD Brief, p. 4 and Pet. Brief , Appendix B, Section D.

[124] DWR Brief, p. 18 (emphasis added).

[125] "Beneficial use" occurs 51 times in the WAA; "beneficial purpose" occurs 4 times. The terms "reasonable use" and "reasonable quantity" do not appear in the Act, which is not to suggest that the Chief Engineer can grant permits to appropriate water in quantities that exceed the reasonable needs.

rights shall remain subject to the principle of beneficial use" in K.S.A. 82a-707(a) really means that appropriation rights remain subject to the principle of "reasonable quantity" instead of "beneficial use."

This is the best evidence the Chief Engineer can muster in support of his claim that "the Legislature intended to confer ongoing authority to regulate water appropriation rights on [the] Chief Engineer."[126] The Chief Engineer then uses this spurious word play to lay the foundation for his claim that he has authority to reduce quantities of perfected water rights via a LEMA. He states:

> Therefore, the Legislature has specifically authorized through K.S.A 82a-1041, a method by which the Chief Engineer can continue to regulate existing water rights in the public interest while not destroying the usufructuary property interest that exists.[127]

The Chief Engineer provides no other statutory basis in support of his claimed ongoing authority to reduce the quantity of a perfected water appropriation right. As discussed in the following Section, the WAA does not allow the Chief Engineer "to make permanent changes to a water [right]" because there is no "explicit statutory authority to allow such . . . changes."[128]

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[126] *Id.*

[127] *Id.*

[128] DWR Brief, p. 15.

There are other problems with the Chief Engineer's argument. He ignores the text in K.S.A. 82a-707(b) that prohibits depriving the beneficial use of the water "***either temporarily or permanently***."[129] This statute does not support the assertion that reductions can be made for a few years because the underlying water right is not affected.

He does not explain why the Legislature included subsection (e), prohibiting appropriation rights in excess of reasonable needs, if "the principle of beneficial use" in subsection (a) really means "the principle of reasonable quantity."

Elsewhere, he quotes K.S.A. 82a-702, which states that water is "subject to the control and regulation of the state ***in the manner prescribed herein***."[130] Thus, to the extent that there is some authority to reduce a water appropriation right "either temporarily or permanently," it must be found in the WAA, not in the GMD Act.

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[129] K.S.A. 82a-707(b) (emphasis added).

[130]DWR Brief, p. 17.

K. The LEMA Order is a collateral attack on the Chief Engineer's orders establishing each water appropriation right.

If there is a distinction between this case and *Clawson v. Div. of Water Res.*,[131] it is a distinction without a difference. The Chief Engineer argues that *Clawson* can be distinguished because the WAA does not allow the Chief Engineer to "retain jurisdiction to make permanent changes to a water [right] without any explicit statutory authority to allow such . . . changes.[132]

In reality, the Chief Engineer is mounting a collateral attack on the final orders that establish each of the water appropriation rights in GMD4. "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it."[133]

In *Clawson*, DWR cited, among other statutes, K.S.A. 82a–712, which gives the Chief Engineer the authority to "approve an application upon such terms, conditions, and limitations as he or she shall deem necessary for the protection of the public interest."[134] Before *Clawson*, DWR believed that K.S.A. 82a-712 gave

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[131] 49 Kan. App. 2d 789, 315 P.3d 896, 904–06 (2013).

[132] DWR Brief, p. 15.

[133] *Williams v. Nylund*, 268 F.2d 91, 93 (10th Cir. 1959).

[134] *Clawson v. Div. of Water Res.*, 49 Kan. App. 2d 789, 800, 315 P.3d 896, 905 (2013).

the Chief Engineer explicit statutory authority to impose any term, condition, or limitation that would protect the public interest, including a provision purporting to retain jurisdiction "to make reasonable reductions in the approved rate of diversion and quantity authorized to be perfected, and such changes in other terms, conditions, and limitations set forth in this approval as may be deemed to be in the public interest."[135]

Clawson put a stop to DWR's long-running practice of including this language in its orders.

In *Clawson*, the Court held that the Chief Engineer's broad authority to enforce and administer the WAA[136] does not include the power to retain jurisdiction to make changes to a Permit after it is issued. A Permit to appropriate water is a "final order" and "final agency action" under the Kansas Judicial Review Act.[137] Citing *Kansas Energy Grp. v. State Corp. Comm'n,*[138] the *Clawson* Court said that final orders resolve matters on the merits and leave

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[135] *Id. at* 794.

[136] *See*, e.g., K.S.A. 82a–706 and 82a-712,

[137] K.S.A. 77-601, *et seq*. *Clawson,* 49 Kan. App. 2d at 801–02.

[138] 30 Kan. App. 2d 57, 60, 40 P.3d 310, 312 (2002),

nothing to be done except to enforce the result.[139] In other words, the Chief Engineer's issuance of a Certificate of Appropriation is a ministerial act—one not subject to the Chief Engineer's ongoing discretion or authority.[140] Thus, final orders are "conclusive as to the matters involved."[141]

The *Clawson* Court summarized the nature of a Kansas water right:

> Once perfected, water rights are considered real property. However, a water right does not constitute ownership of the water itself; it is only a usufruct, a right to use water. Moreover, the water right remains subject to the principle of beneficial use. Other than for domestic use, the KWAA eliminated the notion that a landowner had absolute title to water in contiguous streams or underground; it based water rights upon the time of use and the actual application of water for beneficial use. No longer could a landowner simply own water without using it. Adequate administrative controls also ensured the public interest was protected by preventing overdevelopment. This doctrine of water appropriation has become a rule of property law relied upon by the entire state. The doctrine has provided stability for landowners, water right holders, and the public.[142]

Continuing, the *Clawson* Court emphasized the importance of stability in property law by quoting *F. Arthur Stone & Sons v. Gibson*:[143]

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[139] *Clawson*, 49 Kan. App. 2d at 801.

[140] *Id. at* Syl. ¶¶ 12 & 14.

[141] *Kan. Energy Grp. v. State Corp. Comm'n*, 30 Kan. App. 2d 57, 60, 40 P.3d 310, 312 (2002).

[142] *Clawson*, 49 Kan. App. 2d at 798 (citations and internal quotes omitted).

[143] 230 Kan. 224, 228–30, 630 P.2d 1164 (1981).

> " '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.' " 230 Kan. at 233, 630 P.2d 1164 (quoting *Freeman v. Stewart*, 2 Utah 2d 319, 322, 273 P.2d 174 [1954]).[144]

The Petitioners' water appropriation rights are real property rights created by final orders and final agency action. The time limits to challenge the terms, conditions, and limitations set out in those final orders has long since passed. As discussed above and in *Clawson*, the "explicit statutory authority" to make reductions in the authorized quantity of a water right in the LEMA is limited by the language of the LEMA statute itself and the other provisions of the GMD Act and the WAA. The Chief Engineer's power to make reductions in a LEMA or an IGUCA is limited by the prior appropriation doctrine.

L. Improper delegation of authority to serve as the presiding officer at the initial LEMA hearing.

With no citation to authority—because there is none—the Chief Engineer asserts that he has "inherent power" to delegate his statutory responsibility to

[144] *Clawson*, 49 Kan. App. 2d at 798-99.

serve as the presiding officer at the hearings mandated by the LEMA statute. He does not.

Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors,[145] *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*,[146] and a long list of other cases make it clear that the Chief Engineer has no "inherent power" to do anything. Instead, any and all of the Chief Engineer's authority must be expressly conferred in a statute or be clearly implied from the powers granted by statute.[147]

When he initiates a LEMA proceeding, "the chief engineer shall conduct an initial public hearing" on the following issues:

> (1) Whether one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d), and amendments thereto, exist;
>
> (2) whether the public interest of K.S.A. 82a-1020, and amendments thereto, requires that one or more corrective control provisions be adopted; and
>
> (3) whether the geographic boundaries are reasonable.

K.S.A. 82a-1041(b).

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[145] 290 Kan. 446, 455–56, 228 P.3d 403, 410 (2010).

[146] 234 Kan. 374, 378, 673 P.2d 1126 (1983).

[147] *See also*, GMD Brief, p. 7 at footnote 21.

As stated in the Petitioners' Brief, the factors that allow the imposition of a LEMA require the exercise of expertise and discretion. And while the Chief Engineer has statutory authority to delegate his duties to members of his staff, he has no authority to delegate duties to individuals who are not employed by the Secretary of Agriculture.[148]

The KJRA limits "[j]udicial review of disputed issues of fact . . . to the agency record . . . as supplemented by additional evidence taken pursuant to this act." This Court's review may only rely on the agency record. *Winston v. State Dep't of Soc. & Rehab. Servs*., 274 Kan. 396, 404, 49 P.3d 1274, 1281 (2002).

The record is replete with references to Ms. Owen's findings but Petitioners have found nothing in the record setting out her qualifications to make those findings. There is no evidence that Ms. Owen is an engineer or is otherwise qualified to determine that the "public interest" requires "corrective controls" or that the geographic boundaries are reasonable. In fact, there is

[148] K.S.A. 74-510a. K.S.A. 2018 Supp. 82a-1901(b) provides the Chief Engineer with the authority to appoint a hearing officer in some cases not including LEMA proceedings. Moreover, this administrative proceeding commenced prior to July 1, 2017. R. 134. The 2017 amendments do not "affect" this matter. K.S.A. 82a-1901(e).

absolutely nothing in the record to indicate that Ms. Owen has any qualifications to serve in any capacity.

The Chief Engineer cites his own regulation for authority to delegate his statutory duty.[149] He does not cite any statute that either expressly confers or clearly implies that he has the power to delegate his statutory duty to serve as the presiding officer at the initial LEMA hearing.

Respectfully submitted,

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[149] K.A.R. 5-14-3a(d) and K.A.R. 5-20-1.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2019, the above and foregoing PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW was presented to the Clerk of the Court for filing and uploading to the Kansas Court's e-Filing system that will send notice of electronic filing to counsel of record.

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