FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
316-267-6371

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

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO ALTER OR AMEND AND TO AMEND AND MAKE ADDITIONAL FINDINGS

Contents

I. Introduction.

While Plaintiffs disagree with the Agencies' and the Court's interpretation and application of *Wheatland Elec. Co-op., Inc. v. Polansky*[1] and *Clawson v. Division of Water Resources,*[2] they do not contend that the Chief Engineer is prohibited from placing new limitations on existing water rights so long as the limitations are authorized by a constitutional statute and are lawfully applied, which in this case requires application of the prior appropriation doctrine.

Plaintiffs contend that the limitations placed on their perfected water appropriation rights in the Northwest Kansas Groundwater Management District No. 4 ("GMD4" or the "District") district-wide Local Enhanced Management Plan ("LEMA Plan"),[3] do not comply with Kansas law, including especially the LEMA statute,[4] the Groundwater Management District Act ("GMD Act"),[5] and the Kansas Water Appropriation Act ("KWAA").[6]

---

[1] 46 Kan. App. 2d 746, 265 P.3d 1194 (2011). *See* Section III. below.

[2] 49 Kan. App. 2d 789, 315 P.3d 896 (2013). *See* Section IV. below.

[3] R. 2792-2803.

[4] K.S.A. 82a-1041.

[5] K.S.A. 82a-1020, *et seq.*

[6] K.S.A. 82a-701, *et seq*.

Whether properly characterized as a "collateral attack," an "indirect attack," a "direct attack," or some other way, the LEMA Plan is the result of the administrative proceeding under review in this case that impermissibly changes the terms of the Plaintiffs' water appropriation rights which were created by final non-appealable orders issued by former Chief Engineers.

Plaintiffs request that the Court alter, amend, or modify its Memorandum Decision but do not waive their right to raise other or additional issues in subsequent appeals.

The Plaintiffs' prayer for relief requests that the Court set aside the April 13, 2018, Order establishing the LEMA Plan.[7] However, Plaintiffs are the only parties who have requested relief and cannot speak for other water users in the District. The Plaintiffs respectfully request that the LEMA Plan be set aside as applied to their lands.

[7] Second Amended Petition, ¶ 178.

II. The Court's Memorandum Decision does not address the Legislature's direct, clear, and unambiguous provisions that make the IGUCA and LEMA provisions subject to the prior appropriation doctrine.

The Court acknowledges that it is reasonable to conclude that the LEMA Plan, the LEMA statute, and the IGUCA statutes must be consistent with the prior appropriation doctrine.[8] Because the LEMA corrective control used here[9] conflicts with the prior appropriation doctrine,[10] that interpretation would make the LEMA Plan unlawful[11] but, contrary to the Court's holding, it would not make any of the LEMA or IGUCA corrective controls useless[12] nor would it "hamstring" the agency.[13] The Court concludes:

> It should be presumed that the Legislature writes laws the way they are for a reason. Had the Legislature meant for the prior appropriation to apply to LEMA's and IGUCA's then ***there would have been mention of it within the statute***. Instead, the Legislature authorized the corrective controls that directly and unambiguously contravene with the prior appropriation doctrine. ***The statutes are only unclear once they are read in tandem with the KWAA.***[14]

---

[8] Memorandum Decision, p. 23.

[9] K.S.A. 82a-1041(f)(3).

[10] *Id.*, p. 24.

[11] *Id.*, p. 22.

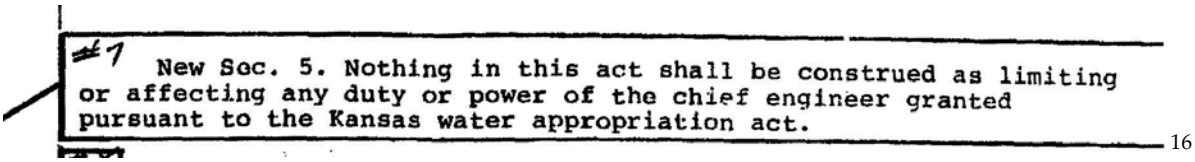
[12] *Id.*, p. 23. *See* Section II. E. below.

[13] *Id.*, p. 24. *See* Section II. E. below.

[14] *Id.*, p. 24 (emphasis added).

However, as discussed below, the IGUCA and LEMA corrective controls are consistent with the prior appropriation doctrine. The corrective controls, as they are applied in the LEMA Plan,[15] are inconsistent with the prior appropriation doctrine. This is true for several reasons.

The Court's Memorandum Decision does not address the Legislature's addition of the following section to the IGUCA provisions:


#7 New Sec. 5. 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.

[16]

Nor, does the Court address the fact that the Legislature specifically made the LEMA and IGUCA provisions "part of and supplemental to" the GMD Act.[17] Thus, they must be read in conjunction with and conform to the entire Act, including K.S.A. 82a-1020, 82a-1028(n) and (o), and 82a-1029.

In addition, the LEMA statute requires that LEMA Plans be in the "public interest" as articulated in K.S.A. 82a-1020. The policy of the GMD Act is "to

[15] R. 2792-2803.

[16] Plaintiffs' Memorandum, Ex. 1, p. 5, codified at K.S.A. 82a-1039. A copy of Ex. 1 is attached. *See also* Plaintiffs' Memorandum, pp. 21-23.

[17] K.S.A. 82a-1020, *et seq*.

preserve basic water use doctrine" and to give local water users some control over groundwater use but only "insofar as it does not conflict with the basic laws and policies of the state of Kansas."[18] This LEMA Plan violates the public interest articulated in K.S.A. 82a-1020 and cannot stand.

A. Legislative intent cannot be determined from isolated text or a single provision but must consider the entire statutory scheme.

The text and the context of the LEMA statute make it clear that its corrective control provisions are part of the GMD Act and are subject to the KWAA. That does not, however, render them useless.[19]

The Legislature specifically made the LEMA and IGUCA provisions "***part of*** and ***supplemental to***" the GMD Act,[20] which is, in turn, subordinate to the KWAA.[21]

---

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

[19] *See* Memorandum Decision at p. 23. *See also*, Section II. E. below.

[20] K.S.A. 82a-1040 and 82a-1041(l).

[21] *See* K.S.A. 82a-1020, 82a-1028(n) and (o), and 82a-1029.

The LEMA statute makes a specific requirement that the corrective control provisions comply with the "public interest" as expressed in K.S.A. 82a-1020, which states that the public interest requires preservation of the "basic water use doctrine," *i.e.*, prior appropriation.[22]

The LEMA and IGUCA provisions are "nearly identical"[23] and the 1978 Legislature added a provision making it clear that the corrective control provisions are subject to the KWAA.[24]

Prior appropriation is mentioned in the LEMA subsection (f)(2) and the IGUCA subsection (b)(2) corrective controls, [25] which, to have any meaning at all, must be reconciled with subsections (f)(3) and (b)(3).[26]

---

[22] K.S.A. 82a-1041(b)(2).

[23] Memorandum Decision, p. 24.

[24] K.S.A. 82a-1039.

[25] K.S.A. 82a-1038(b)(2) and K.S.A. 82a-1041(f)(2).

[26] Plaintiffs' Memorandum, Section V. A., pp. 14-20.

The LEMA statute, the IGUCA provisions, the entire GMD Act, and the KWAA are *in pari materia.* For these and other reasons discussed below, the LEMA statute must be read together with, and reconciled and harmonized[27] with, the IGUCA provisions, with the entire GMD Act, and the KWAA.[28]

However, the Memorandum Decision does not apply the rules of statutory interpretation that impose a duty to, as far as practicable, reconcile the provisions of statutes relating to the same subject matter to make them "consistent, harmonious, and sensible."[29] There is a difference between ascertaining the Legislature's intent by interpreting the language used and statutory construction of an ambiguous or unclear statute.[30] As stated in the Plaintiffs' Reply Memorandum:

---

[27] Plaintiffs' Memorandum, pp. 16-20.

[28] Plaintiffs' Memorandum, Appendix B, A.—J., p. 101, *et seq*.

[29] Plaintiffs' Memorandum, Appendix B, § E. Plaintiffs' Reply Memorandum, p. 8, citing *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).

[30] *Higgins v. Abilene Mach., Inc.,* 288 Kan. 359, 362, 204 P.3d 1156, 1158 (2009).

> 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. . . .
>
> 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***.[31]

Whether the LEMA and IGUCA corrective controls are ambiguous or not, the Legislature's intent controls and that intent is determined by examining the words used in their context.

Thus, in *Cochran v. DWR*,[32] the Court said:

> We ascertain the legislature's intent behind a particular statutory provision 'from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.

---

[31] Plaintiffs' Reply Memorandum, p. 1-2, citing 73 Am. Jur. 2d *Statutes* § 105 (emphasis added).

[32] *Cochran v. State, Dep't of Agr., Div. of Water Res.*, 291 Kan. 898, 904-5, 249 P.3d 434, 440 (2011), citing *In re Marriage of Ross*, 245 Kan. 591, 594, 783 P.2d 331 (1989) and *State ex rel. Morrison v. Oshman Sporting Goods Co.,* 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003).

There are nearly 100 Kansas Supreme Court cases imposing a duty on the Court to reconcile different provisions of a statute to make them consistent, harmonious, and sensible.[33] If an agency is mistaken as to question of law, Courts have an obligation to cure the agency's action.[34]

The Court also states that "the plain meaning of the words [of a statute] are not as important as the legislature's intent,"[35] citing *State v. Reider.*[36] But the Court's restatement of the rule is incomplete.[37] The *Reider* panel stated:

> When a statute is clear and unambiguous, a court must give effect to the intent of the legislature, not determine what the law should or should not be. The court must apply the plain language of statutes since ***the statutory language represents the express legislative intent and the legislature, presumably, understood the language's meaning.*** It is a fundamental rule of statutory construction, to which all other

---

[33] *See*, *e.g.*, *Board of County Commissioners of Sumner County v. Bremby*, 286 Kan. 745 189 P.3d 494 (2008); *Babe Houser Motor Co., Inc. v. Tetreault*, 270 Kan. 502 14 P.3d 1149 (2000); *Appeal of Boeing Co.,* 261 Kan. 508 930 P.2d 1366 (1997); *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); *Gilger v. Lee Const., Inc*., 249 Kan. 307 820 P.2d 390 (1991); and *State v. Adee*, 241 Kan. 825, 829, 740 P.2d 611 (1987).

[34] *Citizens' Utility Ratepayer Bd. v. State Corp. Com'n of State of Kan.* 264 Kan. 363, 411, 956 P.2d 685 (1998); *Radke Oil Co., Inc. v. Kansas Dept. of Health and Environment*, 23 Kan.App.2d 774, 936 P.2d 286, 288 (1997); *National Council on Compensation Ins. v. Todd,* 258 Kan. 535, 539, 905 P.2d 114 (1995).

[35] Memorandum Decision, p. 23.

[36] 31 Kan. App. 2d 509, 67 P.3d 161 (2003).

[37] Memorandum Decision, p. 23.

> rules are subordinate, that the intent of the legislature governs, if that intent can be ascertained.[38]

The *Reider* panel cited *State ex rel. Stovall v. Meneley,*[39] stating that "The legislature is presumed to have expressed its intent ***through the language of the statutory scheme*** it enacted." *Stovall v. Meneley*[40] and numerous other cases[41] make it clear that legislative intent is to be ascertained from the statutory "scheme."

The Plaintiffs respectfully request that the Court alter or amend its October 15, 2019, Memorandum Decision or amend and make additional findings to hold that the corrective control provisions in K.S.A. 82a-1041 are subject to the prior appropriation doctrine.

In the alternative, the Plaintiffs respectfully request that the Court alter or amend its October 15, 2019, Memorandum Decision or amend and make additional findings by interpreting the corrective control provisions in the LEMA

---

[38] 31 Kan. App. 2d at 511 (citations omitted; emphasis added).

[39] 271 Kan. 355, 378, 22 P.3d 124 (2001). *State v. Reider*, 31 Kan. App. 2d 509, 511, 67 P.3d 161, 163 (2003).

[40] 271 Kan. at 357, syl. ¶ 11 (emphasis added).

[41] *See* cases cited in Plaintiffs' Memorandum, Appendix B.

and IGUGA statutes in light of the entire "statutory scheme" instead of isolating a single provision[42] in the LEMA statute.

B. There is no conflict between the prior appropriation doctrine and the subsection (f)(3) corrective control provision; it is only inconsistent with prior appropriation *as applied* in the LEMA Plan.

The Court asserts that the IGUCA and LEMA corrective control provisions "***directly conflict*** with the prior appropriation doctrine"[43] and that they "***directly and unambiguously contravene*** with the prior appropriation doctrine."[44]

Not so.

There is no textual basis for a direct conflict because, as the Court states in the same paragraph, the Legislature did not mention prior appropriation in the LEMA or IGUCA statutes.[45]

Instead, there is a direct and unambiguous conflict between the prior appropriation doctrine and the improper application in the LEMA Plan of the

---

[42] K.S.A. 82a-1041(f)(3).

[43] Memorandum Decision, p. 24 (emphasis added).

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

[45] *Id*. *But see* K.S.A. 82a-1038(b)(2) and K.S.A. 82a-1041(f)(2).

subsection (f)(3) corrective control that permits reduction of permissible withdrawals.[46]

The Plan applies subsection (f)(3)[47] because the Agencies wanted to side-step the subsection (f)(2) requirement to apportion permissible withdrawals "insofar as may be reasonably done . . . in accordance with the relative dates of priority."[48]

Their attempt to avoid prior appropriation must fail because subsections (f)(2) and (f)(3) are separate but closely related[49] and must be read together, reconciled, and harmonized.[50] Thus, in previous briefing, the Plaintiffs asserted that "subsection (f)(3) permits corrective controls only after the agencies have complied with subsection (f)(2)."[51]

But the Chief Engineer's argument that subsections (f)(2) and (f)(3) are separate and distinct[52] is fatal to the LEMA Plan because there is nothing in

---

[46] K.S.A. 82a-1041(f)(3).

[47] R. 462-3; GMD Memorandum, pp. 6, 23, and 25; DWR Memorandum, p. 26-29.

[48] K.S.A. 82a-1041(f)(2).

[49] Plaintiffs' Reply Memorandum, p. 29.

[50] Plaintiffs' Memorandum, pp. 16-20.

[51] *Id.*, at 19.

[52] DWR Memorandum, pp. 26-29.

subsection (f)(3), standing alone, that requires equal reductions of groundwater withdrawals. And subsection (f)(3) does not prohibit the reduction of groundwater withdrawals in accordance with the relative dates of priority. That is just how it was applied here.

Instead, K.S.A. 82a-1039, discussed below, requires the application of the prior appropriation doctrine when the permissible withdrawal of groundwater by any one or more appropriators or wells in a LEMA is reduced pursuant to K.S.A. 82a-1038(b)(3) or K.S.A. 82a-1041(f)(3).

Thus, subsection (f)(3) of the LEMA statute is not the problem; the problem is the direct and unambiguous conflict between the prior appropriation doctrine and the improper reductions of permissible withdrawals in the LEMA Plan.

C. The Chief Engineer has the power and an affirmative duty to enforce and administer the laws of this state, including the LEMA statute, in accordance with the prior appropriation doctrine.

The Memorandum Decision does not address the Legislature's addition of the direct, clear, and unambiguous provision,[53] discussed extensively in the

[53] K.S.A. 82a-1039.

Plaintiffs' briefing,[54] making the IGUCA and LEMA provisions subject to the prior appropriation doctrine. Instead, the Memorandum Decision states: "Had the Legislature meant for the prior appropriation to apply to LEMA's and IGUCA's then there would have been mention of it within the statute."[55]

But there are, in fact, several indirect but clear references to prior appropriation.[56]

The Court notes that the Legislature "passed the IGUCA statute in 1978 with the conservation as its goal."[57] That is true. The IGUCA provisions proposed in 1978 House Bill No. 2702, included four sections focused on conservation.[58]

However, the Legislature added a fifth section, codified at K.S.A. 82a-1039, to make it clear that the IGUCA corrective control provisions are tools that promote "conservation" but, as with the rest of the GMD Act, only "insofar as it

---

[54] Plaintiffs' Memorandum, p. 21, footnote 80, and p. 23; Plaintiffs' Memorandum, Ex. 1, p. 5; and Plaintiffs' Reply Memorandum, pp. 12, 14-16, and 25-26.

[55] Memorandum Decision, p. 24.

[56] *See* Section I. A. above.

[57] Memorandum Decision, p. 23.

[58] *See* Plaintiffs' Memorandum, Ex. 1, p. 5, attached.

does not conflict with the basic laws and policies of the state of Kansas."[59] That provision reads:[60]

> 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.[61]

Thus, the Legislature decreed that "nothing" in the 1978 IGUCA amendments to the GMD Act, including the corrective control that authorizes reduction in groundwater withdrawals by one or more appropriators or wells,[62] can be "construed as limiting or affecting" the Chief Engineer's duty and power 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 . . . in accordance with the rights of priority of appropriation."[63]

---

[59] *See*, K.S.A. 82a-1020.

[60] *Id.*

[61] K.S.A. 82a-1039 (emphasis added).

[62] K.S.A. 82a-1038(b)(3).

[63] K.S.A. 82a-706.

Note that the Chief Engineer's duty extends to all of the "laws of this state pertaining to the beneficial use of water"[64] including the GMD Act because that entire Act pertains to the beneficial use of water.

K.S.A. 82a-1039 is clear;[65] the Legislature made the IGUCA and LEMA corrective controls subject to the prior appropriation doctrine. Therefore, the K.S.A. 82a-1038(b)(3) and K.S.A. 82a-1041(f)(3) corrective control provisions do not conflict with prior appropriation. Instead, they add to the Chief Engineer's duty to enforce and administer the laws of this state in accordance with the rights of priority of appropriation, which is arguably the Chief Engineer's most important duty.[66]

---

[64] *Id.*

[65] The Chief Engineer's arguments are inconsistent. He argues that K.S.A. 82a-1039 is unambiguous and therefore not subject to statutory construction. DWR Memorandum, pp. 29-30. He then raises issues outside of the text arguing that the plain meaning of the statute (a) fails to account for the full scope of the Chief Engineer's duties without identifying the duties that are not accounted for and (b) fails to account for the Chief Engineer's relationship with the GMDs, again without explaining how or why that affects the plain meaning of the statute. He also seems to assert that Plaintiffs had an obligation to mention a debate that was occurring in 1978 about the extent of the GMDs' authority and how they should interact and be overseen by the Chief Engineer. DWR Memorandum, pp. 30-31.

[66] K.S.A. 82a-706. *See also*, Plaintiffs' Memorandum, § V. D. 4., pp. 31-33 (The Kansas Water Appropriation Act imposes a statutory duty on the Chief Engineer to enforce the Prior Appropriation Doctrine.); and K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e;

D. The LEMA statute requires that LEMA plans comply with Kansas public policy to preserve basic water use doctrine.

The LEMA statute requires that the Chief Engineer hold an initial public hearing to determine whether "the ***public interest of K.S.A. 82a-1020*** . . . requires that one or more corrective control provisions be adopted."[67]

The plain and unambiguous expression of the "public interest" in K.S.A. 82a-1020 requires the application of the prior appropriation doctrine. That provision states, in part:

> It is the policy of this act to ***preserve basic water use doctrine*** and to establish the right of local water users to determine their destiny with respect to the use of the groundwater ***insofar as it does not conflict with the basic laws and policies of the state of Kansas***.[68]

Thus, K.S.A. 82a-1041(b)(2) requires that LEMA plans "preserve basic water use doctrine." And the rights granted by the GMD Act to local water users remain subject to the "basic laws and policies of the state of Kansas."

82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-734(e)(4); 82a-736(e)(7); 82a-742(a); 82a-745(b)(2) and (e)(4); 82a-1020; 82a-1028(n) and (o); and 82a-1029.

[67] K.S.A. 82a-1041(b)(2) (emphasis added).

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

The "basic water use doctrine" and "the basic laws and policies of the state of Kansas" include the prior appropriation doctrine established in the KWAA and to which the GMD Act is subordinate. *See* 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-734(e)(4); 82a-736(e)(7); 82a-742(a); 82a-745(b)(2) and (e)(4); 82a-1020; 82a-1028(n) and (o); and 82a-1029.

The District, the Hearing Officer, and the Chief Engineer ignored the K.S.A. 82a-1020 provisions that mandate application of prior appropriation. They focused instead on the "right of local water users to determine their destiny with respect to the use of the groundwater."

On June 27, 2017, the Chief Engineer issued a letter after the initial review required by K.S.A. 82a-1041(a), finding that the LEMA Plan was "consistent with state law."[69] On October 27, 2017, the Intervenors filed a Motion with an extensive Memorandum in Support requesting reconsideration of the Chief

[69] R. 134.

Engineer's finding that the LEMA Plan complied with state law.[70] The Motion was summarily denied on November 1, 2017.[71]

The Chief Engineer appointed Connie Owen to serve as the hearing officer for the initial LEMA hearing.[72]

Ms. Owen's September 23, 2017, Order[73] acknowledged that she was required to determine whether the "public interest of K.S.A. 82a-1020" requires one or more corrective controls.[74] The Order also acknowledged that GMDs are prohibited from taking "local action" that conflicts with state law.[75] Her Order even quotes K.S.A. 82a-1020 in full.[76]

Thus, the Chief Engineer could proceed with the second public hearing "only if" Ms. Owen's September 23, 2017, Order included a valid finding that the

[70] R. 309-348.

[71] R. 358-360.

[72] R. 134.

[73] R. 260-281.

[74] R. 260, 261, 262, and 268, 270-75.

[75] R. 271 and 272.

[76] R. 271.

public interest of K.S.A. 82a-1020 requires that one or more corrective control provisions be adopted.[77]

Ignoring the phrases "preserve basic water use doctrine" and "insofar as it does not conflict with the basic laws and policies of the state of Kansas," Ms. Owen states that the "'public interest' is comprised of two primary considerations: proper management of groundwater and local input in that management."[78]

The Order concludes that the "public interest" inquiry is fully satisfied if the LEMA Plan addresses "proper management of groundwater and local input in that management," that is, that "local water users determine their destiny with respect to the management of groundwater."[79]

Ms. Owen's Order specifically acknowledged that Bert Stramel[80] and Doyle Saddler,[81] who were Intervenors in the administrative proceeding[82] and

---

[77] K.S.A. 82a-1041(b).

[78] R. 273.

[79] R. 273.

[80] R. 266.

[81] R. 268

[82] R. 286

are Plaintiffs in this case,[83] objected to the LEMA Plan because it does not comply with prior appropriation.

Ms. Owen addressed public concerns about characterizing the recent election of GMD Board members as general support for the LEMA; lack of public information; insufficient public involvement in the development of the Plan, including the fact that the Plan was developed by the Board rather than individual water users; and that there was no public vote to determine support for or resistance to the LEMA Plan.[84]

But Ms. Owen's Order ignored comments by Mr. Stramel and Mr. Saddler that correctly asserted that the LEMA Plan does not comply with the prior appropriation doctrine.[85]

Based on Ms. Owen's finding that it is in the public interest to require corrective controls, the Chief Engineer issued a Notice of Hearing stating that the

[83] Second Amended Petition, ¶¶ 3 and 7.

[84] R. 272-273.

[85] R. 266 and 268.

second hearing required by the LEMA statute would take place on November 14, 2017.[86]

But the LEMA statute itself makes it clear that a LEMA plan that violates the public interest as expressed in K.S.A. 82a-1020 cannot stand.

E. Application of prior appropriation to the IGUCA and LEMA corrective controls would not render them useless[87] nor would it hamstring the agency.[88]

DWR has issued eight IGUCA Orders[89] and at least one other LEMA Order.[90] In the Walnut Creek IGUGA, the former Chief Engineer found that "no more than approximately 22,700 acre-feet per year" could be diverted from the control area.[91] The other terms of the Walnut Creek IGUGA and the terms of the other seven IGUCAs are not included in the Agency Record so they are not before the Court. But the record clearly indicates that the tool has been used and there are no reported cases challenging them.

---

[86] R. 282.

[87] *Id*., p. 23.

[88] *Id*., p. 24.

[89] R. 339.

[90] R. 2527

[91] R. 2366.

Moreover, the record indicates that the Sheridan 6 LEMA was formulated by a group of local users[92] where, "after months of discussion and consideration of various concepts, a consensus was reached that the LOCAL group would accept restrictions on their water use."[93] The actions taken by the local water users in Sheridan HPA 6 LEMA have been a "resounding success."[94]

To be sure, the application of prior appropriation to the LEMA and IGUCA corrective controls restricts the Chief Engineer's options. But the Legislature added K.S.A. 82a-1039 to the proposed IGUCA provisions and courts presume that the Legislature acts with full knowledge and information about the statutory subject matter and prior and existing law[95] and that it expressed its intent in the language it used.[96]

---

[92] R. 166.

[93] R. 247-248.

[94] R. 166; 247-248. *See also*, R. 436.

[95] *Ed DeWitte Ins. Agency, Inc. v. Fin. Assocs. Midwest, Inc.*, 308 Kan. 1065, 1071–72, 427 P.3d 25, 30 (2018)

[96] Plaintiffs' Memorandum, Appendix B, Section C.

III. *Wheatland* only allows the Chief Engineer to reduce the quantity of a Kansas water right when the owner files an application to change the type of use.

Wheatland Elec. Co-op, Inc. v. Polansky[97] does not permit the Chief Engineer to unilaterally change the terms or conditions of a water right. Instead, it only affirms the Chief Engineer's authority to adopt rules and regulations that recognize that when changing a water right from one type of use to another, as permitted by K.S.A. 82a-708b, only the quantity consumed by the original beneficial use can be changed to a new beneficial use.

The issue in *Wheatland*, was whether DWR regulations allowing the Chief Engineer to reduce the quantity of water that can be changed to a new use exceeded the agency's statutory authority.[98] The Court held that the KWAA gives the Chief Engineer explicit authority to adopt rules and regulations[99] and to place limits on water rights, including vested water rights, when the owner applies to change the water right's characteristics.[100]

---

[97] 46 Kan. App. 2d 746, 265 P.3d 1194 (2011) (rev. denied). *See* Memorandum Decision, pp. 10-11.

[98] *Wheatland*, 46 Kan. App. 2d at 751.

[99] *Id*. at 752 citing K.S.A. 82a-706a.

[100] *Id*. at 752 citing K.S.A. 82a-708b(a).

DWR regulations state that changing a water right for irrigation use to any other type of beneficial use must not cause the net consumptive use from the local source of water supply to be greater than the net consumptive use from the same local source of water supply by the original irrigation use.[101]

DWR regulations tacitly recognize that the owner of a perfected water right has a "vested property right," as distinguished from a "vested water right,"[102] in the total quantity of water perfected but only as long as water is applied to the original authorized beneficial use. The regulations state that the approval of an application to change the type of use must include conditions that protect the public interest and ensure that the "extent of consumptive use" does not increase substantially after the perfection period of a water appropriation right has expired.[103]

When an owner applies for, and the Chief Engineer approves, a change in the type of use, the owner must relinquish the portion of the "vested property

---

[101] K.A.R. 5-5-9(a), effective Nov. 28, 1994. That subsection was amended in 2017 to simplify the determination of the quantity that can be converted to a new use.

[102] *See* discussion in Section VIII. B. below.

[103] K.A.R. 5-5-8(b) and K.A.R. 5-5-3.

right" in the total quantity diverted by the original use that returned to the source of supply because that quantity became and was available for appropriation by others. The owner retains a vested property right in the portion of the authorized quantity that was consumed by the original beneficial use and, if other requirements are met, the KWAA allows the conversion of that quantity to a new beneficial use.

The *Wheatland* Court concluded that DWR's consumptive-use regulations are valid and that the Chief Engineer may limit consumptive use ***in connection with the approval of a change-of-use application.***[104]

The KWAA allows the creation of water rights that, when perfected, are real property.[105] There is nothing in the *Wheatland* opinion supporting a right to make temporary or permanent reductions in the quantity of water authorized by a water right over the owner's objection.

[104] *Id.* at 755.

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

IV. The LEMA statute does not permit temporary reductions in the authorized quantity of a water appropriation right in violation of the prior appropriation doctrine.

It is true that the LEMA statute gives the Chief Engineer express authority to make certain changes to perfected water rights so long as the restrictions comply with the statute.[106] As demonstrated above, the LEMA and IGUCA corrective control provisions are subject to the prior appropriation doctrine.

In *Clawson v. Div. of Water Resources*,[107] the Court held that the Chief Engineer does not have *carte blanche* authority to alter a water appropriation right unless authorized by statute.[108] In other words, after the Chief Engineer issues a permit, he or she can no longer engage in active consideration of the water appropriation request but is merely enforcing the conditions of the permit and the KWAA. [109]

The attempt to distinguish *Clawson* fails because the Chief Engineer can make those *temporary* and *permanent* changes that are authorized by statute.

---

[106] Memorandum Decision, p. 11.

[107] 49 Kan.App.2d 789, 315 P.3d 896 (2013).

[108] *Id.*, at 807.

[109] *Id.*, at 804.

The Chief Engineer argues that *Clawson* "specifically dealt with" the Chief Engineer's inability to retain jurisdiction to make "permanent" changes to a water right[110] by taking a single word in the opinion out of context. First, the passage is complete and accurate with or without the gratuitous addition of "permanently." Eliminating that word does not change the meaning.

Moreover, to support its holding, the *Clawson* Court provides three examples, including K.S.A. 82a-770, which gives the Chief Engineer the authority to *temporarily* "suspend use under a water right for the failure to comply with the KWAA."[111] The *Clawson* Court could have cited a number of other examples of statutes that allow the Chief Engineer to make temporary changes.[112] The Court went on to provide two examples of statutes (the change-of-use statute at issue in

[110] DWR Memorandum, p. 15.

[111] 49 Kan. App. 2d at 807.

[112] *See, e.g.*, K.S.A. 82a-726 (requiring permits for the use of water in another state to include provisions allowing the Chief Engineer to suspend, modify, or revoke the permit if the water is necessary to protect the public health and safety of Kansas citizens); K.S.A. 82a-732(b) (allowing the Chief Engineer to suspend the use of water until an annual water use report has been submitted); K.S.A. 82a-736 (authorizing term permits that suspend base water rights during the term of a multi-year flex account); and K.S.A. 82a-737(d) (allowing the Chief Engineer to modify or suspend a water right or the use of water for violation of the KWAA).

Wheatland[113] and the forfeiture statute,[114]) that allow "permanent" changes.[115] The Chief Engineer's focus on "permanently" is wrong.

Finally, there is nothing in the broad language that the Chief Engineer included in Clawson's new water appropriation permits suggesting that he was retaining authority to make permanent but not temporary changes. In fact, the reservation is broadly worded to allow any change or limitation that the Chief Engineer deems to be in the "public interest."[116]

V. The LEMA Plan will not end, if at all, "when the aquifer is sufficiently recharged."

Plaintiffs have legitimate concerns about long-term restrictions on their water rights even though the LEMA Plan states that the "base water rights will not be altered . . . but will be subject to the additional terms and conditions . . .

---

[113] K.S.A. 82a-708b.

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

[115] 49 Kan. App. 2d at 807.

[116] 49 Kan. App. 2d at 807. The Clawson permits included the following provision:

> "That the Chief Engineer specifically retains jurisdiction in this matter with authority to make such 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 and permit to proceed as may be deemed in the public interest."

for the duration of the LEMA."[117] The LEMA Plan contemplates a new LEMA "beyond the first five-year period"[118] and the Sheridan 6 LEMA was renewed after its initial term.[119]

Moreover, the LEMA Plan will not recharge the aquifer so the conditions on which it is based will not go away. The Court states that the LEMA Plan is not permanent in nature and will end for several reasons, including "when the aquifer is sufficiently recharged."[120]

The opening sentence of the LEMA Plan states that it will merely "reduce decline rates."[121] The GMD4 Board deemed decline rates of less than 0.5 percent to be "acceptable for now."[122]

In her Order issued after the first public hearing, Ms. Owen made a finding of fact that between 126,910 acre-feet of water per year and 160,320 acre-feet of water per year return to the aquifer.[123]

---

[117] R. 2794, ¶ (c).

[118] R. 2795, ¶ (n).

[119] R. 2527

[120] Memorandum Decision, p. 18.

[121] R. 2792.

[122] R. 152.

[123] R. 269, citing GMD4's Exhibit 1.1. at R. 236.

The LEMA Plan limits irrigation use to 1.7 million acre-feet, or 553,947,380,000 gallons of water, during calendar years 2018 through 2022 in the GMD4 townships with declines that exceeded 0.50% during 2001-2015.[124] Thus, the LEMA Plan permits the diversion of an average of 340,000 acre-feet of water per year for irrigation use in those townships. That is more than twice the highest annual district-wide recharge[125] of 160,320.2018 acre-feet per year.[126]

Because there are no reductions for irrigation in other townships or for livestock, municipal, or any other non-irrigation uses,[127] the LEMA Plan permits 340,000 acre-feet of water per year for irrigation use in restricted townships, plus full irrigation in all other townships; plus all municipal use; plus all livestock use; plus all other non-irrigation use.

The Court also states that because the GMD is a political and legislative body, it can vote on an earlier review or water users can elect new board members in order to change it.[128] While a LEMA Plan is developed and proposed

[124] R. 2794.

[125] R. 201.

[126] R. 269, citing GMD4's Exhibit 1.1. at R. 236.

[127] R. 2795-6.

[128] Memorandum Decision, p. 17.

by a GMD, the LEMA statute requires that the plan be adopted by the Chief Engineer in an Order.[129] Because the Chief Engineer adopted the LEMA Plan in an Order of Designation,[130] it can only be changed by the Chief Engineer.

The Plaintiffs respectfully request that the Court alter or amend its October 15, 2019, Memorandum Decision or amend and make additional findings to the extent that the Court's holdings are based on the notion that the LEMA Plan will "end when the aquifer is sufficiently recharged."

VI. The Court did not decide whether the LEMA Plan violates K.S.A. 82-707(b).

The Court holds that the LEMA Plan meets the equal protection standards of the Federal and State Constitutions because there is a rational basis to treat irrigators and all other water users differently.[131] However, the Court did not address the fact that the LEMA Plan violates K.S.A. 82a-707(b) which states that the "date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is

[129] K.S.A. 82a-1041(d)-(j).

[130] R. 2740-2791.

[131] Memorandum Decision, p. 16.

not sufficient to satisfy all water rights." Thus, even if the LEMA complies with the Federal and State Constitutions, it fails to comply with this statute and should be struck.[132]

VII. The Court did not decide whether the Chief Engineer has an obligation to adopt rules and regulations as mandated by K.S.A. 82a-1041(f).[133]

The Court held that the Legislature's use of "shall" when it directed the Chief Engineer to preside over the initial LEMA hearing is directive but that the error was harmless.[134] Thus "shall" means "must," not "may."

The Court did not rule on the very important question of whether the Chief Engineer is in violation of the Legislative directive to adopt rules and regulations to effectuate the LEMA statute.

And, this was not harmless error. The Intervenors incurred significant attorney fees attempting to determine how the proceeding was to be managed and conducting discovery.[135]

---

[132] *See* Plaintiffs' Reply Memorandum, pp. 27-29.

[133] Plaintiffs' Memorandum, pp. 79-83.

[134] Memorandum Decision, p. 26.

[135] For example, Plaintiffs filed several pre-hearing motions attempting to determine how the proceeding would be handled: Motion for Continuance, R. 283-285; Notice of Intervention, p. 286-288; Motion to Provide Due Process Protections and Memorandum

VIII. Matters for Clarification.

A. The LEMA Plan is an "Order."

The LEMA Plan[136] adopted by the Chief Engineer in his April 13, 2018, Order of Designation[137] is referred to throughout the Memorandum Decision as a "regulation."

Because the LEMA Plan is an "order" and not a "rule and regulation" as those terms are defined by the KJRA,[138] the Plaintiffs respectfully request that the Court alter or amend its October 15, 2019, Memorandum Decision or amend and make additional findings to eliminate any confusion that could be caused by the use of "regulation" when the Court is referring to an "order."

B. Vested water rights and the vested-rights doctrine.

The Court appears to draw a distinction between the way vested water rights and water appropriation rights are treated by the LEMA statute.[139] The Plaintiffs do, in fact, claim that water appropriation rights become vested

---

in Support, R. 290-308; Motion for Reconsideration and Memorandum in Support, pp. 309-348; and Motion to Provide Due Process Reply Memorandum, R. 368-382.

[136] R. 2792-2803.

[137] R. 2739-91

[138] K.S.A. 77-602(e) and (i).

[139] Memorandum Decision, p. 17.

property rights when resources are committed and the rights are perfected.[140] To be clear, the Plaintiffs contend that perfected water appropriation rights are "vested property rights," as distinguished from "vested water rights" and can only be adversely affected if and to the extent that a LEMA Plan applies the prior appropriation doctrine.

As the Court states, the KWAA permitted pre-1945 diversion and beneficial use of water to continue by applying for a vested water right.[141] The terms "vested right," "appropriation right"[142] and "water right" are defined in the KWAA.[143] A "water right" is either a "vested right" or an "appropriation right" and both are real property.[144]

---

[140] *Id.*

[141] Memorandum Decision, pp. 2 and 17. The term "vested right" is defined at K.S.A. 82a-701(d) and the process used to recognize vested rights is set out in K.S.A. 82a-704a.

[142] The Court states that the KWAA "divided" water users into three categories, including "junior holders without priority." Memorandum Decision, p. 2. The use of the past tense suggests that the Court is aware that when originally enacted, the KWAA did not require a permit to divert water. *Williams v. City of Wichita*, 190 Kan. 317, 338, 374 P.2d 578, 594 (1962). In an abundance of caution, the Plaintiffs note that KWAA was amended in 1977 to make it unlawful, with minor exceptions not relevant here, to divert water from any source without a permit. K.S.A. 82a-728. The KWAA no longer recognizes common law water appropriation rights without priority. *Id*.

[143] K.S.A. 82a-701(d), (f), and (g).

[144] *Id.*

The Plaintiffs do not claim that the LEMA Plan had any impact on "their vested water rights"[145] because the LEMA Plan does not require owners of "vested rights," *i.e.*, "water rights" based on pre-1945 water use, to curtail diversion.[146]

Instead, the Plaintiffs' briefing refers to vested property rights when it should have referred to the "vested-rights doctrine"[147] defined in Black's Law Dictionary as follows:

> **vested-rights doctrine** (1924) *Constitutional law*. The rule that the legislature cannot take away a right that has been vested by a social compact or by a court's judgment; esp., the principle that it is beyond the province of Congress to reopen a final judgment issued by an Article III court. — Also termed *doctrine of vested rights*.

[145] Memorandum Decision, p. 16.

[146] R. at 2794.

[147] *Vested-Rights Doctrine,* Black's Law Dictionary (11th ed. 2019).

> "The doctrine of vested rights most often found expression in the early national era by its infusion into the obligation of contracts clause in Article I, Section 10, of the Constitution. It was in this connection that the doctrine achieved its most positive and specific limitations upon legislative authority. *Vanhorne's Lessee v. Dorrance* (1795) [2 U.S. 304], wherein Justice Paterson condemned a Pennsylvania statute as a violation of the 'primary object of the social compact,' the protection of property, arose under the contract clause. It will be recalled that the doctrine was again identified with the contract clause in *Fletcher v. Peck* (1810) [10 U.S. 87] and in *Dartmouth College v. Woodward* (1819) [17 U.S. 518]. And again, in *Terrett v. Taylor* (1815) [13 U.S. 43], a case involving Virginia's attempt to take title to certain lands of the disestablished Episcopal Church, Justice Story discoursed at length upon the doctrine of vested rights, which he identified with the contract clause in imposing limitation upon the state's legislative authority. In brief, in the early nineteenth century the contract clause played somewhat the same role in the embodiment of the doctrine of vested rights as the due process clause was to play after 1890." Alfred H. Kelly & Winfred A. Harbison, *The American Constitution* 471 (5th ed. 1976).

The Plaintiffs respectfully request that the Court alter or amend its October 15, 2019, Memorandum Decision or amend and make additional findings to the Memorandum Decision to the extent that the Court's holdings are based on the notion that the Plaintiffs claim that the LEMA Plan had any impact on "vested water rights" instead of the very real impact on their "water appropriation rights" under the vested-rights doctrine.

Conclusion

Article 2, § 1 of the Kansas Constitution vests the legislative power of the State in the House of Representatives and the Senate. There is a long line of Kansas cases holding that public policy is the province of the Legislature.[148] Thus, Kansas public policy is established by the Legislature, not by administrative agencies or the Courts.

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

In this case, the agencies have refused to give effect to the express language of the statute and imposed their own views of what the law should be.

The LEMA Plan should be overturned.

[148] *See, e.g. State ex rel. Londerholm v. Columbia Pictures Corp.*, 197 Kan. 448, 417 P.2d 255 (1966)

Respectfully submitted,

FOULSTON SIEFKIN LLP
Daniel J. Buller, KS #25002
9225 Indian Creek Parkway, Suite 600
Overland Park, KS 66210-2000
Telephone: 913-498-2100
Facsimile: 913-498-2101 Facsimile
Email: dbuller@foulston.com

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
Telephone: 316-291-9725
Facsimile: 866-347-3138
Email: dtraster@foulston.com

By: */s/ David M. Traster*
David M. Traster, KS #11062
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November 2019, the above and foregoing 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 as follows:

Adam C. Dees
adam@clinkscaleslaw.com
Clinkscales Elder Law Practice, PA
718 Main Street, Suite 205
P.O. Box 722
Hays, KS 67601

and

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

Attorneys for Defendant

/s/ David M. Traster
David M. Traster, KS #11062

As Amended by House Committee

Session of 1978

HOUSE BILL No. 2702

By Special Committee on Natural resources

Re Proposal No. 57

12-7

AN ACT relating to water; concerning designation of certain groundwater use areas as intensive control areas; prescribing duties for the chief engineer of the division of water resources of the state board of agriculture relating thereto; amending K.S.A. 82a-1028 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 82a-1028 is hereby amended to read as follows: 82a-1028. Every groundwater management district organized under this act shall be a body politic and corporate and shall have the power to:

(a) Adopt a seal;

(b) sue and be sued in its corporate name;

(c) rent space, maintain and equip an office, and pay other administrative expenses;

(d) employ such legal, engineering, technical, and clerical services as may be deemed necessary by the board;

(e) purchase, hold, sell and convey land, water rights and personal property, and execute such contracts as may, in the opinion of the board, be deemed necessary or convenient;

(f) acquire land and interests in land by gift, exchange or eminent domain, the power of eminent domain to be exercised within the boundaries of the district in like manner as provided by K.S.A. 26-501 to 26-516, inclusive, and any acts amendatory thereof or supplemental thereto;

(g) construct, operate and maintain such works as may be determined necessary for drainage, recharge, storage, distribution or importation of water, and all other appropriate facilities of

EXHIBIT 1

concern to the district;

(h) levy water user charges and land assessments, issue general and special bonds and incur indebtedness within the limitations prescribed by this act;

(i) contract with persons, firms, associations, partnerships, corporations or agencies of the state or federal government, and enter into cooperative agreements with any of them;

(j) take appropriate actions to extend or reduce the territories of the district as prescribed by this act;

(k) construct and establish research, development, and demonstration projects, and collect and disseminate research data and technical information concerning the conservation of groundwater;

(l) install or require the installation of meters, gauges, or other measuring devices and read or require water users to read and report those readings as may be necessary to determine the quantity of water withdrawn;

(m) provide advice and assistance in the management of drainage problems, storage, groundwater recharge, surface water management, and all other appropriate matters of concern to the district;

(n) adopt, amend, promulgate, and enforce by suitable action, administrative or otherwise, reasonable standards and policies relating to the conservation and management of groundwater within the district which are not inconsistent with the provisions of this act or article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto;

(o) recommend to the chief engineer rules and regulations necessary to implement and enforce the policies of the board. Such rules and regulations shall be of no force and effect unless and until adopted by the chief engineer to implement the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto. All such regulations adopted shall be effective only within a specified district and shall be exempt from the filing requirements of K.S.A. 77-416, and all acts amendatory thereof or supplemental

thereto;

(p) enter upon private property within the district for inspection purposes, to determine conformance of the use of water with established rules and regulations, including measurements of flow, depth of water, water wastage and for such other purposes as are necessary and not inconsistent with the purposes of this act; and

(q) select a residence or home office for the groundwater management district which shall be at a place in a county in which the district or any part thereof is located and may be either within or without the boundaries of the district. The board shall designate the county in which the residence or home office is located as the official county for the filing of all official acts and assessments; *and*

(r) recommend to the chief engineer the initiation of proceedings for the designation of a certain area within the district as an intensive groundwater use control area.

New Sec. 2. The chief engineer, whenever a groundwater management district recommends the same, shall initiate, as soon as practicable thereafter, proceedings for the designation of a specifically defined area within such district as an intensive groundwater use control area. The chief engineer upon his or her own investigation may initiate such proceedings whenever said chief engineer has reason to believe that any one or more of the following conditions exist in a groundwater use area: (a) Groundwater levels in the area in question are declining or have declined excessively; or (b) the rate of withdrawal of groundwater within the area in question exceeds the rate of recharge in such area; or (c) preventable waste of water is occurring or may occur within the area in question; or (d) other conditions exist within the area in question which require regulation in the public interest.

New Sec. 3. In any case where proceedings for the designation of an intensive groundwater use control area are initiated, the chief engineer shall hold and conduct a public hearing on the question of designating such an area as an intensive groundwater use control area. Written notice of the hearing shall be given to

#1 or whenever a petition signed by at least twenty-five percent (25%) of the eligible voters of a groundwater management district is submitted to the chief engineer

#2 ,

#3 which is located outside the boundaries of an existing groundwater management district

#4 equals or

#5 (d) unreasonable deterioration of the quality of water is occurring or may occur within the area in question;

#6 (e)

every person holding a water right in the area in question and notice of the hearing shall be given by one publication in a newspaper or newspapers of general circulation within the area in question at least thirty (30) days prior to the date set for such hearing. The notice shall state the question and shall denote the time and place of the hearing. At the hearing, documentary and oral evidence shall be taken, and a full and complete record of the same shall be kept.

New Sec. 4. (a) In any case where the chief engineer finds that any one or more of the circumstances set forth in section 2 exist and that the public interest requires that any one or more corrective controls be adopted, said chief engineer shall designate, by order, the area in question, or any part thereof, as an intensive groundwater use control area.

(b) The order of the chief engineer shall define specifically the boundaries of the intensive groundwater use control area and shall indicate the circumstances upon which his or her findings are made. The order of the chief engineer may include any one or more of the following corrective control provisions: (1) A provision closing the intensive groundwater use control area to any further appropriation of groundwater in which event the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area; (2) a provision determining the permissible total withdrawal of groundwater in the intensive groundwater use control area each day, month or year, and, insofar as may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights; (3) a provision reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the intensive groundwater use control area; (4) a provision requiring and specifying a system of rotation of groundwater use in the intensive groundwater use control area; (5) any one or more other provisions making such additional requirements as are necessary to protect the public interest.

(c) The order of designation of an intensive groundwater use

control area shall be in full force and effect from the date of its entry in the records of the chief engineer's office unless and until its operation shall be stayed by an appeal therefrom in accordance with the provisions of K.S.A. 1977 Supp. 60-2101. ~~Whenever an appeal is taken from any such order, the district court shall hear the same de novo and may reverse, vacate or modify such order.~~ The chief engineer upon request shall deliver a copy of such order to any interested person who is affected by such order, and shall file a copy of the same with the register of deeds of any county within which such designated control area lies.

New Sec. [5.] The provisions of sections 2 to [4], inclusive, of this act shall be a part of and supplemental to the provisions of K.S.A. 82a-1020 to 82a-1035, inclusive, and acts amendatory thereof or supplemental thereto.

Sec. 6. K.S.A. 82a-1028 is hereby repealed.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

#7 New Sec. 5. 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.

#5

#6