

WRITTEN TESTIMONY
OF THE WESTERN KANSAS GROUNDWATER MANAGEMENT DISTRICT #1
To Hearing Officer Earl D. Lewis, Jr., Division of Water Resources,
Kansas Department of Agriculture,
For the Second LEMA Hearing, Proposed Four County LEMA
Scheduled February 2, 2023.

Submitted by: Katie Durham, Manager

This written testimony is from the Western Kansas Groundwater Management District #1 (“GMD 1”) regarding its proposal for a Local Enhanced Management Area (“LEMA”) for Greeley, Lane, Scott, and Wallace Counties, the Four County LEMA (FC LEMA). This testimony has been approved by the GMD 1 Board of Directors.

GMD 1 submits this testimony in support of the Chief Engineer finding that the proposed Local Enhanced Management Area (LEMA) will serve the public interest by implementing necessary corrective controls to conserve water and facilitate further conservation methods to extend the life of the High Plains Aquifer.

In this testimony, GMD 1 provides a short history and overview of supporting statutes and the previous actions taken in this proceeding. Then, GMD 1 provides an overview of key elements of its FC LEMA plan, including a re-statement of its goal and shows how the corrective control measures should reach the goal. Finally, this testimony addresses specific provisions, and how those provisions are both legal and proper to achieve the FC LEMA’s goals.

1. Legal Standards and History of These Proceedings

There are three main phases to the approval of any proposed LEMA: the initiation of the proposed LEMA, the initial public hearing, and the subsequent hearing (or hearings). KAN. STAT. ANN. § 82a-1041.

a. *Initiation of the FC LEMA*

Whenever a proposed LEMA plan is submitted to the Kansas Department of Agriculture, Division of Water Resources (DWR), the Chief Engineer reviews the proposed LEMA plan to see if the plan is acceptable for consideration by including the following elements: 1) proposes clear geographic boundaries; 2) pertains to an area wholly within the groundwater management district; 3) proposes goals and corrective control provisions adequate to meet the stated goals; 4) gives due consideration to water users who already have implemented reductions in water use resulting in voluntary conservation measures; 5) includes a compliance monitoring and enforcement element; and 6) is consistent with state law. KAN. STAT. ANN. § 82a-1041(a).

On July 1, 2022, GMD 1 submitted its proposal for the Four County LEMA. The plan and corresponding documents were submitted to the Division of Water Resources (“DWR”) for consideration. On August 4, 2022, the Chief Engineer found the FC LEMA acceptable for consideration, and set the matter for the initial hearing.

b. *Initial Public Hearing*

At the initial public hearing, the Chief Engineer allows comments and evidence on the question of designating the area in the FC LEMA in accordance to the submitted plan. KAN. STAT. ANN. § 82a-1041(b). Specifically at this initial hearing, the Chief Engineer is tasked with resolving the following factual 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. *Id.*

After timely notice, on October 17, 2022, the initial hearing was held. GMD 1 submitted its written statements in support, along with further supporting written testimony from Brownie Wilson with the Kansas Geological Survey. Further written statements in support were submitted

by Lane Letourneau and Mike Meyer with the Division of Water Resources, and Alicia Allen with the Upper Smoky Hills Regional Advisory Committee. Oral testimony was provided at the hearing by some members of the same organizations.

GMD 1 specifically set forth both oral and written testimony in support of elements a) and b) of K.S.A. 82a-1036: that groundwater levels in the FC LEMA were declining and have declined excessively, and that the rate of withdrawal in the FC LEMA exceeded the rate of recharge. It further submitted both written and oral testimony that the FC LEMA was in the public interests and that its proposed geographic boundaries are reasonable. All other individuals submitting testimony spoke in support of these elements, except for Mr. John Huslig, who supported the need for a LEMA, but wished its geographic extent to be limited to recent decline areas and different corrective controls.

On December 21, 2022, the Chief Engineer issued his Findings and Order that all of the initial requirements from the initial hearing were met, and set the matter for a subsequent hearing. Specifically, based on the hearing record and its resulting findings of fact, he found that, as a matter of law, groundwater levels in the FC LEMA area are declining and have declined excessively, that the rate of withdrawal in the FC LEMA area exceeded the rate of recharge, that the FC LEMA is in the public interest, and that the geographic boundaries of the FC LEMA are reasonable.

c. *Subsequent Hearing or Hearings*

If the findings from the initial hearing are favorable, the Chief Engineer conducts a subsequent hearing, or multiple subsequent hearings if necessary. Kan. Stat. Ann. 82a-1041(b). This hearing is limited solely to the FC LEMA plan, whether it is sufficient to address any of the conditions found under K.S.A. 82a-1036 by the Chief Engineer in the initial hearing and whether it should be adopted as proposed. *Id.* at (d)(1).

So, the mixed questions of fact and law for this hearing is: whether the FC LEMA's plan and its corrective controls are sufficient to address the declining groundwater levels in the FC LEMA and the imbalance between the rate of withdrawal and the rate of recharge within the FC LEMA.

It is, and it will.

2. Proposed Clarifications and Corrections to the FC LEMA Plan.

During and after the Initial Public Hearing, two areas were identified for correction or further explanation. These areas are further identified below. In the Order of Designation, GMD 1 requests the Chief Engineer include the following corrections and clarifications to the FC LEMA.

- a.* **Uncertified Water Rights should be excluded** - The GMD 1 Board discussed and agreed that water rights still in their perfection period, which are very rare in the GMD 1 District, should NOT be included in the FC LEMA's corrective controls. However, this was omitted in the FC LEMA Plan submitted to the Chief Engineer. In the Order of Designation, the District requests the Chief Engineer exempt these water rights from the FC LEMA's corrective controls.
- b.* **LEMA Boundary** - With respect to the proposed FC LEMA Boundary, GMD 1 would like to offer a revision to *Exhibit A*, Attachment B. The Boundary has not changed, but the map is corrected for township numbers. GMD 1 continues to assert that the entire District is in need of conservation and thus the proposed boundary is reasonable for the reasons cited in our testimony for the Initial Hearing; see particularly our Supplemental Written Testimony. *See Exhibit "B"* for the corrected map.

3. Overview of the FC LEMA Plan and its corrective controls

The FC LEMA was developed in a methodology focused on providing as much flexibility as possible to the producer, consistent with achieving the FC LEMA's reduction goal and applicable Kansas Law. Thus, allocations are provide to Water Right Groups, rather than individual water rights or points of diversion. A Water Right Group consists of water rights that share the same point of diversion or have an overlapping place of use. Therefore, a Water Right Group will share a five-year LEMA allocation, however, each water right must not exceed the annual authorized quantity. A full summary of the FC LEMA Plan available at Exhibit "A" at 1-

3. Some highlights from the summary to mention are:

- a. LEMA Boundary to include all of GMD 1 outside of Wichita County,
- b. FC LEMA Period: 2023 – 2027,
- c. Vested Rights will not be restricted by the FC LEMA,
- d. Allocations based on a sliding scale percent reduction of historical use based on inches applied to a Water Right Group's Authorized Acres where:
 - i. The period of water use to be used as a basis for the allocations was updated to 2011 to 2020 (from the Wichita County LEMAs use of 2009 to 2015),
 - ii. Non-use years will be excluded from the averaging,
 - iii. Average use of less than three inches (3") per authorized acre will result in no reduction through the FC LEMA,
 - iv. A maximum reduction of 25% for average use greater than twelve inches (12") per authorized acre,
 - v. A sliding reduction scale for all use between three inches (3") per authorized acre and twelve inches (12") per authorized acre,

- e. Provide flexibility via a single, shared, five-year allocation among Water Right Groups, composed of legally overlapping water rights, and
- f. Including a robust allocation appeal process in the FC LEMA plan,
- g. Any unused FC LEMA allocation will be recommended as allowable carryover to a new 2028 LEMA plan without the carryover quantity being subjected to the new LEMA's conservation factor.

a. The Board's process for determining the FC LEMA's Goal.

As is noted in the Attached D to the LEMA plan, the GMD 1 Board worked with Dr. Nathan Hendricks of KSU to design a survey focused on determining the level of support within the District for developing a LEMA. This included a request for the individual's preference on the amount of groundwater reductions and proposed methodologies for establishing allocations. During the spring of 2021, the survey was sent to 832 individuals, all of whom were water use correspondents or water right owners on record with KDA-DWR at the time of mailing. After his analysis, Dr. Hendrick's presented his findings to the Board as well as at the 2021 annual meeting. The survey indicated significant support for a LEMA where allocations implemented reductions of approximately 10-15%.

With this level of support by the District's water right owners and operators for a LEMA with modest, but meaningful reductions, the Board undertook careful study, to develop a LEMA reduction goal that would balance meeting today's needs, while taking a serious step to extend the water resources of the District.

The Board reviewed available estimates by the Kansas Geological Survey (KGS) of "Q-stable" values for the District as a whole and by county, being the percentage reductions from recent pumping required to stabilize groundwater levels, which range

from 16% in Lane County to 46% in Wallace County, averaging 29% for the District. The table below shows the KGS' Q-stable values, half the Q-stable numbers and the overall reductions achieved by the Plan by County. *See generally* Exhibit "D".

KGS Sustainability values and LEMA reductions

| County | Q-stable | Half Q-Stable | % reduction from Proposed LEMA |
|--------------|----------|---------------|--------------------------------|
| GMD1 overall | 29 | 14.5 | 10.5 |
| Greeley | 30 | 15 | 11 |
| Lane | 16 | 8 | 9.7 |
| Scott | 18 | 9 | 8.7 |
| Wallace | 46 | 23 | 12.2 |
| Wichita | 27 | | NA |

Ultimately, based on the above factors and feedback from the District's water right owners and water users throughout the LEMA process, *see generally* Exhibit "A" at Attachment D, the Board decided the LEMA's goal of reducing overall use by 10% from the 2011-2020 average water use was the most appropriate balance of meeting today's needs and extending the water resources of the District.

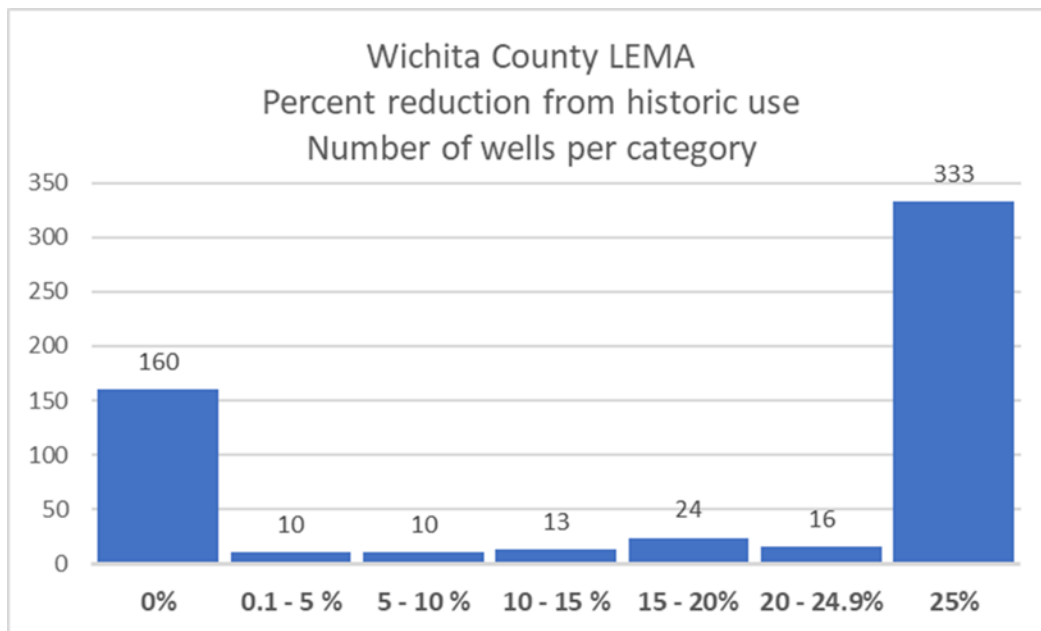
b. The Board's process to select the Plan's corrective controls

In part based on its previous Wichita County LEMA work and in part based on its deliberations for this new LEMA, the Board adopted the following general parameters of its LEMA allocations determinations:

- a. Vested Rights will not be restricted by the LEMA,

- b. the period of water use to be used as a basis for the allocations was updated to 2011 to 2020 (from the Wichita County LEMAs use of 2009 to 2015),
- c. a maximum reduction of 25% to individual water users, with smaller reductions for those with limited water users,
- d. providing flexibility via a single, shared, 5-year allocation among water right groups, and
- e. including a robust allocation appeal process in the LEMA plan.

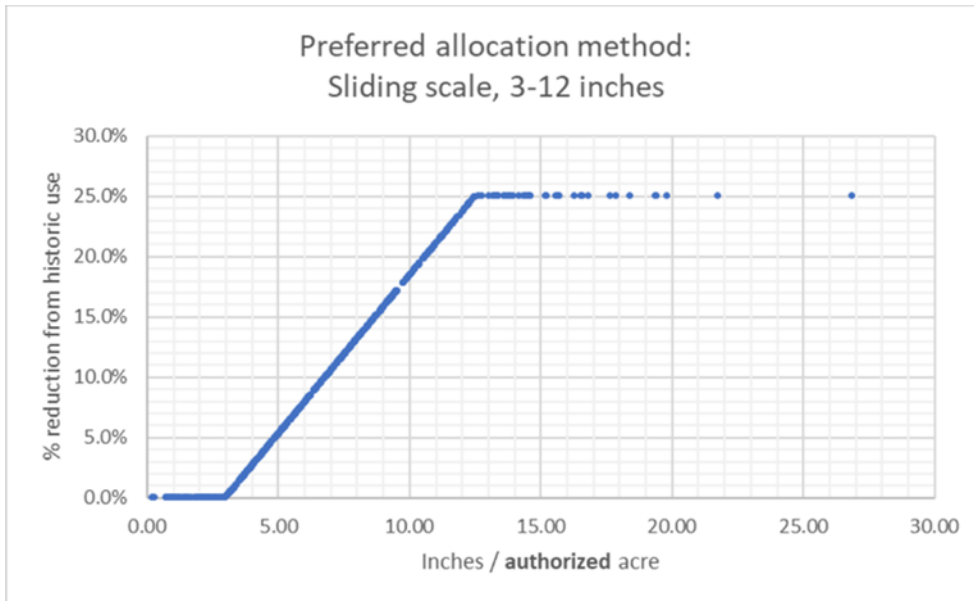
From the beginning, the Board desired to develop allocations with a method different than the Wichita County LEMA (with its flat 25% reduction from historic use, except for those pumping less than 20% of their authorized quantity). The Wichita County LEMA allocation method resulted in the following distribution of reductions among water users.



In March 2021, the Board reviewed a number of alternate allocation methods, not dependent on historic water use, including basing allocations on: 1) a percent of

authorized quantity; 2) inches on authorized acres; 3) inches on the maximum acres of a recent period; and 4) inches on the average acres of a recent period. After review of the results, the Board found all of these allocation methods to be problematic for the conditions in GMD 1. As an example, the Board found to accomplish a water use reduction goal of 10% when creating allocations based on a percent of authorized quantity, it would require allocations to be based on approx. 35% of a water right group's authorized quantity. Similarly, for allocations based on inches per authorized acres, the allocations would be based on approximately 7 inches/authorized acre. In each case, these allocation methods provided approximately 40-50% of water right groups with allocations beyond recent water use, thus requiring greater reductions from the remainder of the groups to reach the desired overall reduction goal, in some cases requiring very significant reductions, many more than 25%. The Board found this unacceptable as the Board desires almost all water users to be involved in addressing the groundwater decline problem and to limit reduction of any water users to no more than 25%.

Ultimately, the Board focused to two hybrid approaches, which base allocations on historic use but varying the required reductions based on the water right's historic use: a) as a percentage of its authorized quantity or b) as inches applied historically on authorized acres. In each case, a robust appeal process would be part of the Plan to consider voluntary water conservation in the historic records as well as parameters as outlined by the FC LEMA Plan. *See generally* Exhibit "A" at Attachment F. Rather than discreet classes, the Board adopted the use of a "sliding scale" to calculate the percent reduction, ranging the reductions from zero for water users using less than a threshold value, up to 25% at a maximum value. To illustrate, below is the sliding scale ultimately adopted in the proposed LEMA plan.

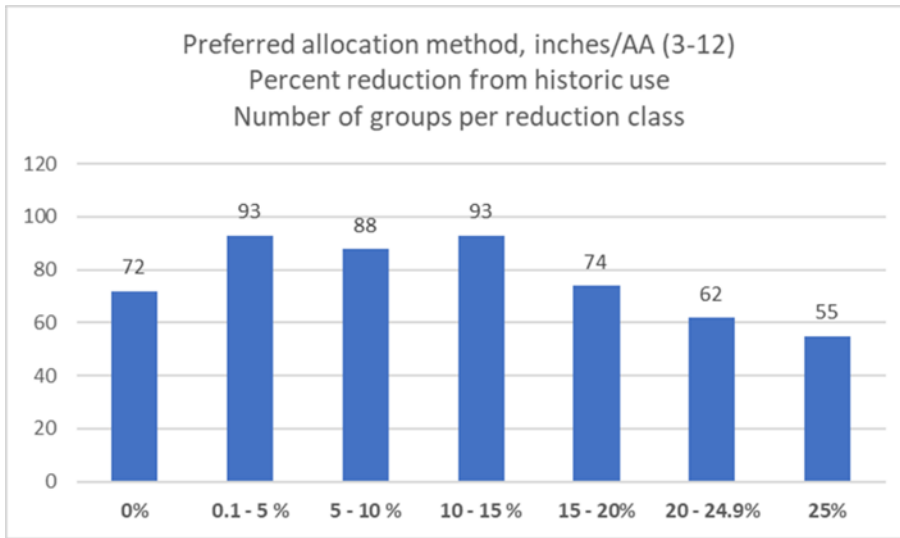


In this example, when less than 3 inches per authorized acres was applied in 2011-20, no reduction is required; where more than 12 inches per authorized acres were applied, a 25% reduction is required from historic use; in between 3 and 12 inches, the required reduction is based on a slide scale between these values.

The Board looked at a series of bottoms and tops to these sliding scales for the two alternative hybrids, determining the resulting overall water savings and how the impacts to individual water users varied. With the right end points for the sliding scale, either hybrid can achieve the Board’s reduction goal with similar effects on most water users. Initially the Board was leaning toward adopting the simpler approach of using the percent of authorized quantity applied as the basis for the sliding scale. However, DWR pointed out that this approach would negatively impact “short water rights” (water rights that were not fully perfected), which are already at a disadvantage, with greater percentage reductions as they tend to use a greater part of the authorized quantity. So the Board adopted the use of inches per authorized acres as basis of the FC LEMA’s sliding scale.

The specific sliding scale selected by the Board requires 87% of water users to

make some level of reductions and limits the number of groups with the maximum required reductions of 25% to just 10% of those water right groups. The graph below shows the number of water right groups in various required reduction classes (no reduction, 0.1-5% reduction, 5-10% reduction, etc.).



4. The corrective controls measures in the FC LEMA are sufficient to accomplish the LEMA’s stated goal.

The FC LEMA is tailored to adequately meet its goal of addressing the excessive water level declines and withdrawal rates exceeding recharge by reducing water use in the proposed boundary area within the GMD 1 District. The District has set a goal tailored specifically to reduce declines within the High Plains Aquifer of this designated region, thereby extending the aquifer’s useful life for the long-term benefit of the area. The Chief Engineer’s LEMA regulations requires that the LEMA Plan include: *“documentation, evidence, or other information indicating that the proposed corrective controls will meet each stated goal of the proposed LEMA plan.”* See Exhibit “A” at Attachment C. This evidence provides that the FC LEMA’s Corrective Controls will meet the stated goal, providing details on how the allocations

were determined for each irrigation water right group to arrive at the total FC LEMA five-year allocation. The Appendix also includes an explanation on why it is reasonable to assume that LEMA use during the five-year period will be less than this stated goal.

- a. *The corrective controls will limit irrigation withdrawals by non-Vested Rights to 472,000 acre-feet (AF) during the five-year LEMA period and are sufficient to address the declining groundwater levels and the imbalance in rate of recharge and withdrawal.*

As described above, the FC LEMA's corrective controls will reduce the historical use of Appropriation Water Right Holders ("Holders") for irrigation use in the subject area by limiting irrigation withdrawals to 472,000 AF during the five-year LEMA. *See* Exhibit "A" at 7, 8 and Attachment "C". As is described further in Attachment C to Exhibit "A", historical water use numbers assisted in the forming the basis of the allocations to develop the corrective controls for the FC LEMA. The DWR provided water right and water use data from its WRIS database for a period from 2011-2020, as well as providing Water Right Groups. After the Board's selection of its final allocation method, these data were used to determine the appropriate reduction amounts for each Water Right Group, all to accomplish the FC LEMA's stated goal. *See* Exhibit "A" at Attachment C for further description.

The goal of limiting irrigation withdrawals to 472,000 AF of withdrawals during the five-year LEMA was specifically tailored in light of available data. Based on estimates provided by the Kansas Geological Survey (KGS), reductions averaging 29% for the four counties of GMD 1 subject to the FC LEMA would be needed to fully stabilize water levels. *See* Exhibit "A" at 8. While the proposed goal of the FC LEMA will not fully attain the goal of groundwater stabilization, the District believes the goal to reduce overall water use by 10% represents a substantial step to address the declining groundwater levels.

- b. *The appeals process will give due consideration to prior conservation efforts, but will not undermine the stated goal of the FC LEMA.*

The FC LEMA allows for an appeals process for Holders who have implemented voluntary water conservation measures during the historical period, or other special considerations as outlined by the FC LEMA Plan. *See generally* Exhibit “A” at Attachment F. A further analysis of the Appeals Process is identified in Paragraph 4, below. Acknowledging it is difficult to quantify how many appeals will occur, or to what extent these appeals may impact the FC LEMA’s goal of limiting irrigation withdrawals, the District expects the impact of appeals to be minimal compared to the counterbalancing elements noted below and in the Plan’s Appendix C.

c. *It is reasonable to conclude that counterbalances noted below to potential increases in water use due to appeals will outweigh these potential increases, and thus the LEMA Plan will likely result in greater conservation than the goal of the FC LEMA.*

See the Plan’s Appendix C for a more detailed discussion. In short, this conviction is based on its experience with the Wichita County LEMA’s appeal process, the requirements and specifics of FCL LEMA appeal process, declining water levels and associated well yields, past results from multi-year allocation programs such as LEMAs and WCAs showing most participants typically use less than allocated, and the public support in GMD1 for the FC LEMA.

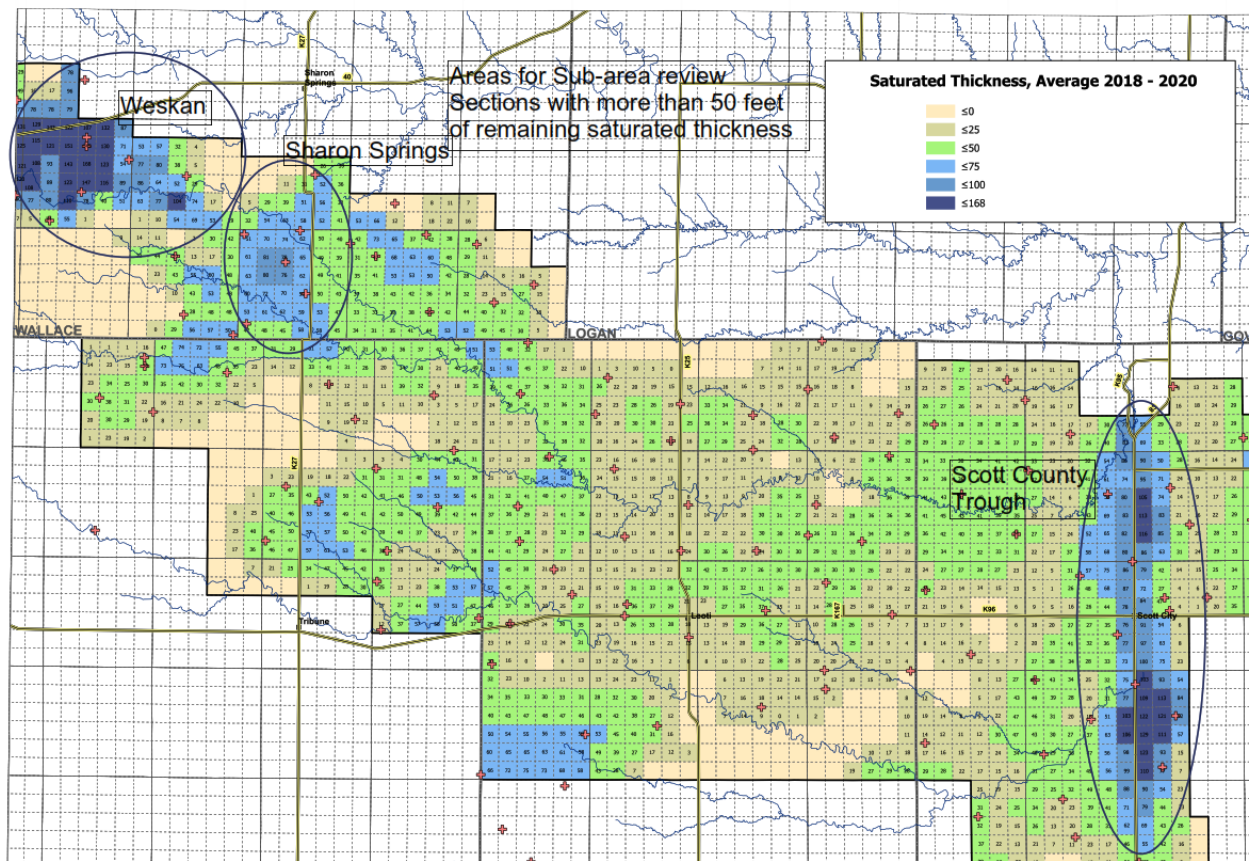
Further supporting evidence from GMD 1 that LEMAs and Water Conservation Areas (WCA) are achieving water use reductions beyond their explicit requirements, is found in the District’s recent first annual review of its Wichita County LEMA. *See* Exhibit “C”.

For the Wichita Count Water Conservation Area, it shows that water use within the WCA, for the years 2017-2021, is 65.5% of the WCA allocation (which includes a 30% reduction from the baseline period of 2009-2015). During 2021, the first year of the LEMA, water use was 69% of the average allocation allowed under the LEMA.”

d. *The corrective control measures of the FC LEMA will result in greater reductions in areas of greater use and need of conservation.*

As has been noted previously, the FC LEMA’s corrective controls accomplish more reductions, as a percentage of historic use, in areas of higher water use, and less reductions in areas of low water use. The following illustrates this principle:

Early in the District’s LEMA considerations, the Board looked at how remaining saturating thickness and density of use varied within the four counties. Three sub-areas of higher saturated thickness and use were identified: the Weskan area of Wallace County, the Scott County Trough, and an area in Wallace County south of Sharon Springs. See the map below.



For these three sub-areas (high-use areas), as well as the portions of the counties outside these sub-areas (low-use areas), use statistics were tabulated and the required percent reductions from the final FC LEMA’s corrective controls were determined. See the table below.

Sub-area review statistics

| | Historic Use | Proposed Allocations basis | | |
|---------------------------------|--------------------------------|-------------------------------------------|---------------------------------------|-------------------------------|
| | Average Wateruse 2011-20 | Average Group Inches on Auth. Acres | Average Group Percent reduction | Total Group Allocations |
| County totals/averages | | | | |
| Greeley | 16,360 | 6.94 | 11.0% | 14,557 |
| Lane | 14,652 | 6.69 | 9.7% | 13,231 |
| Scott | 39,151 | 5.14 | 8.7% | 35,730 |
| Wallace | 42,277 | 7.13 | 12.2% | 37,116 |
| Total | 112,441 | 6.22 | 10.5% | 100,634 |
| Wallace County Sub areas | | | | |
| Weskan | 15,900 | 9.27 | 18.5% | 12,956 |
| Sharon Springs | 8,513 | 7.74 | 16.8% | 7,084 |
| Outside | 17,864 | 5.73 | 4.4% | 17,076 |
| Scott County Sub areas | | | | |
| Trough | 17,194 | 5.52 | 9.3% | 15,592 |
| Outside Trough | 21,957 | 4.88 | 8.3% | 20,138 |

Note that while the average required reductions in Wallace County are 12.2%, already higher than the four-county average, the high-use areas have significant higher required reductions: 18.5% for the Weskan sub-area and 16.8% for the area south of Sharon Springs. Conversely, in the parts of Wallace County outside these high-use sub-areas, the required reduction averages 4.4%. Thus the FC LEMA’s corrective controls accomplish more reductions in high-use areas. This is consistent with KGS’ findings on the need for larger reductions to stabilize groundwater levels in in areas of higher use.

5. The Appeal Process is reasonably tailored to give due consideration to voluntary conservation measures and protect property rights, while ensuring the goals of the FC LEMA are met.

The FC LEMA's Appeal Procedures were developed to provide due consideration for voluntary conservation as several producers have already implemented water saving technologies or have adjusted their on-farm management practices to promote local conservation. Should a producer choose to appeal years where conservation has taken place, a detailed appeals process is required with supplemental information indicating how and when the voluntary conservation took place. Within the FC LEMA's Appeal Procedures, there are specific examples that indicate what management practices may qualify for this method of appeals. *See generally* Exhibit "A" at Attachment F. The Board reserved the ability to review each appeal on a case by case basis. *Id.*

Additionally, the FC LEMA's Appeals Procedures have other mechanisms or methods of appealing a LEMA allocation should there be a new change in ownership or operation and the application of NIR values as outlined by the FC LEMA Plan. *See generally* Exhibit "A" at Attachment F.

6. Non-irrigation water users are not given allocations under the FC LEMA because their impact on aquifer use is minimal.

Like other LEMAs, non-irrigation uses, which make up a small percentage of the District's use, will not be regulated by the LEMA. The FC LEMA will encourage these users to conserve water with specific suggestions for each use made of water. In addition, the Board will annually review non-irrigation use.

However, as outlined by the FC LEMA Plan. *See generally* Exhibit "A" at Attachment F there are parameters that pertain to a Water Right Group, that has had use but also has an individual point of diversion with non-use and is appealed, a pump test to demonstrate the ability to pump is required to provide an allocation of the pump test multiplied by 150 days.

Finally, stock and industrial users are not assigned an allocation under the FC LEMA because of their minimal percentage of total water use within the FC LEMA boundary. The FC LEMA provides efficiency recommendations for such users to utilize, but the FC LEMA will not require reduction by these users. *See* Exhibit “A” at 8, 10 and 11.

A Vested Right is a Water Right which was put to beneficial use prior to June 28, 1945. Under Kansas law, they are afforded additional protection from regulation by the Chief Engineer. Thus, Vested Rights will not be regulated by the proposed LEMA. Water users with vested rights are only required to operate according to the terms of their existing orders. Exhibit “A” at 9. Where a Water Right Group has both vested rights and appropriation rights, the appropriation right(s) of the group will be provided an allocation based on the reduction computed for the Group and the vested rights of the group will be able to operate without additional restrictions. Exhibit “A” at 2, 3.

7. While the FC LEMA does not contain specific consideration of the priority of water rights in its allocations, it contains sufficient explicit and implicate provisions to consider priority and protect property rights.

While the FC LEMA does not specifically address the priority of water right users in its corrective controls (allocations) other than exempting Vested Rights, priority of water rights are explicitly and implicitly considered and protected in the plan.

Explicit in the plan is that, should any user under the FC LEMA claim impairment, the plan expects the Chief Engineer to investigate and exercise his authority to address that impairment, *including giving consideration to water right priority*. Exhibit “A”, at 13. This provides the Chief Engineer the ability to make decisions regarding impairment on a priority basis, thus safeguarding the priority rights of users.

Beyond that, however, the FC LEMA implicitly safeguards priority rights. The FC LEMA’s proposed corrective controls will reduce pumping from the aquifer—and the resulting

effect of moving towards stabilization of the aquifer—delays and reduces potential future impairment, as it continues to allow users to withdraw water from the aquifer at the quantities allotted. Priority of water rights become legally important when impairment occurs, and one user asserts a legally superior claim to water use over another. But if no impairment occurs, then there is no need to consider priority: and that is what the FC LEMA will accomplish through stabilization measures for the aquifer.

Finally, this FC LEMA need not explicitly address priority beyond the considerations noted above, because the term of the FC LEMA is a temporary five-year period, and it does not require any water use to reduce use more than 25% while providing a benefit of extending the life of the aquifer. The FC LEMA is not a government taking that would rise to the level of a constitutional violation. Under the *Penn Central* test, a regulatory restriction is only considered a government taking when the taking is permanent, or when the taking completely deprives the owner from use of their property. *Frick v. City of Salina*, 290 Kan. 869, 885 (Kan. 2010) (confirming Kansas's following of Supreme Court precedent in *Penn Central* on governmental taking). When those elements do not exist, a Court may look to other factors to determine if a property owner is owed other compensation; but critically, "[w]here the government reasonably concludes that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, compensation need not accompany a reasonable prohibition." *Garrett v. City of Topeka*, 259 Kan. 896, 916 (Kan. 1996).

Here, there is no governmental taking: the FC LEMA's plan is temporary—only five years—and it does not completely deprive any user in the four counties from complete withdrawals from the aquifer, with a maximum reduction to water users of 25% but providing a benefit of extending the life of the aquifer. And there is no need for further analysis under

Penn Central test: the entire purpose of this FC LEMA is for the general welfare of all GMD 1 District residents by ensuring the long-term health of the High Plains Aquifer.

So, because the Chief Engineer still retains the authority to address impairment through water right priority should it occur, and because the FC LEMA implicitly avoids any such impairment claim by moving the aquifer towards stabilization, the plan need not specifically set out a scheme for addressing water right priority. And legally speaking, it is not required to: because there is no governmental taking that would give rise to a constitutional claim, and because this FC LEMA exists to secure the general welfare of all residents and users under its plan, there is no need for the FC LEMA to contain special provisions to address the priority rights of its users.

8. The FC LEMA contains a compliance monitoring and enforcement element sufficient to ensure the goals of the FC LEMA is met.

The FC LEMA requires all monitoring to continue under state guidelines. This includes individual responsibility for ensuring water flowmeters are in good working order, and that annual reporting is completed. Should these items not be met, the well in question shall be assumed to have pumped its full authorized quantity of water, along with any other corrective provisions recommended by the Chief Engineer.

Additionally, should a Holder be found to have exceeded their allocation, or otherwise intentionally disrupted the discovery of actual water withdrawals, the Holders are subject to the provisions of K.A.R. 5-14-10 and K.A.R. 5-14-12, which include potential civil penalties and monetary fines. Kan. Admin. Regs. §§ 5-14-10, 12.

These compliance monitoring and enforcement elements should not cause undue burdens on the Holders under this FC LEMA, as they are requirements these users have or should have been in compliance with prior to LEMA implementation. Additionally, the

penalties are ones already established by state statute and regulation, and thus impose no additional measures that could potentially be found punitive or otherwise unenforceable.

9. While the FC LEMA’s proposed corrective controls will bring short-term restrictions, they are necessary due to the current status of the water supply and are carefully crafted to meet short-term needs while extending the life of the Ogallala Aquifer for the benefit of both individual water users and the Region.

The proposed controls in the FC LEMA are necessary to reduce pumping within the four counties to protect existing water rights and extend the useful life of the Ogallala Aquifer. Water levels within the proposed boundary have been declining at an excessive rate. *See* Exhibit “A” at 7, and Attachment E. The Board has carefully crafted a plan to reduce use. Allocations under the FC LEMA were determined based on Water Rights Groups, which were created with the assistance of the DWR. Exhibit “A” at 9 and Attachment A.

An important element of the FC LEMA is the five-year allocation determination. Water users, under the flexibilities of the FC LEMA, can plan for the use of their allocation in a way to maximize their productivity of the course of the term. Exhibit “A” at 9. As has been demonstrated in the Sheridan 6 LEMA, Wet Walnut Creek IGUCA, and elsewhere, in such cases, water users adapt from the mindset of maximum annual returns to maximizing economic return per acre-foot pumped. *See* Exhibit “E” at 6 (indicating a 23% reduction in groundwater use resulting in a mere 1.2% reduction in corn output). Also, results from those areas indicate users often employing a strategy of maintaining as many acres as possible, using less inches per acre and increasing the value of water per acre-foot applied. *See* Exhibit “F” at 183 (noting users adapting to water restrictions by utilizing water- and cost-saving irrigation technology and other efficiency-improving techniques). Finally, statistical analysis from the Walnut Creek IGUCA showed no significant short-term or long-term decreases in property values due to water-use restrictions. *Id.* at 183-84.

From all the above data, it is reasonable to expect the long-term benefits of the FC LEMA outweigh any potential short-term limitations, economic or otherwise.

10. Conclusion

This FC LEMA should be accepted and approved by the Chief Engineer. It has been specifically designed around reliable scientific data which support's the FC LEMA's Plan of corrective controls to reduce irrigation water use to reduce declines in the High Plains Aquifer of the four designated counties, extending the life of the aquifer there. The corrective controls are sufficient to meet the Plan's stated goal, contains counterbalances to increases in allocations from the Plan's appeal process.

Additionally, the FC LEMA complies with the law, and with the LEMA statute. It contains appeal provisions to ensure each Holder's constitutional rights are respected, and has compliance and enforcement provisions to ensure the rules of the LEMA are respected as well.

This FC LEMA represents a long and thoughtful process by GMD 1, and the water users of the four counties located with the GMD 1 boundary, to conceive of a plan that will preserve the High Plains Aquifer, while still allowing productive and profitable agricultural use of the land. This FC LEMA also represents thoughtful input by the DWR, as it was able to provide invaluable input throughout the planning process, and is included in implementation and enforcement procedures during the life of the FC LEMA. This involvement and input, we hope, will allow the High Plains Aquifer to benefit the four counties designated in the FC LEMA for years to come.

Thank you in advance for your consideration.

Respectfully Submitted,

/s/ Katie Durham
Katie Durham
Manager, GMD #1

Exhibit List

- Exhibit A:** *GMD1 Proposal for Four County LEMA*, submitted to the Division of Water Resources July 1, 2022, *also available at:*
https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/gmd1-four-county-lemma_proposal.pdf?sfvrsn=93319bc1_0
- Exhibit B:** Western Kansas Groundwater Management District No. 1, “Proposed Four County LEMA boundaries” revised map of boundary.
- Exhibit C:** Wichita County LEMA Annual Review for 2022, dated January 12, 2023.
- Exhibit D:** *Written Testimony from Brownie Wilson*, KAN. GEOLOGICAL SURV., submitted October 12, 2022, *also available at:*
chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://agriculture.ks.gov/docs/default-source/dwr-water-appropriation-documents/kgs_testimony_gmd1_4cnty_lemma.pdf?sfvrsn=356298c1_0
- Exhibit E:** Bill Golden, *Monitoring the Impacts of Sheridan County 6 Local Enhanced Management Area*, Kan. St. Ag. Policy, November 15, 2018 (*selected provisions*).
- Exhibit F:** Bill Golden, *Impact Analysis of the Walnut Creek Intensive Groundwater Use Control Area*, 47 J. Reg. Analysis & Pol. 177 (2017) (*selected provisions*).