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CLERK OF THE GOVE COUNTY DISTRICT COURT
CASE NUMBER: 2018-CV-000010

In the Twenty-Third Judicial District
District Court of Gove County, Kansas

JON and ANN FRIESEN; FRIESEN FARMS, LLC, et. al., Petitioners, vs. DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, in his official capacity, Defendant.	Case No. 2018-CV-10

Pursuant to K.S.A. Chapter 77

Northwest Kansas Groundwater Management
District Number 4's Response to
Petitioners' Memorandum in Support of Petition for Judicial Review

1. Summary

In the 1945 Kansas Water Appropriation Act (KWAA), the Kansas Legislature unambiguously dedicated the water within the state of Kansas to the use of the people, subject to the control and regulation of the state.[1] The Local Enhanced Management Area (LEMA) statute, as a part of the KWAA, describes one method of control and regulation allowed by the state of Kansas.[2] The LEMA statute further describes the hydrological and policy conditions required to implement a LEMA; the process the Chief Engineer (CE) would use to adopt the corrective controls of a LEMA; and the ability of the CE, and those he delegates his authority to, to monitor and enforce the LEMA's corrective controls.

[1] K.S.A. 82a-701.
[2] K.S.A. 82a-1041.

The Court reviews LEMAs under the Kansas Judicial Review Act (KJRA). The Petitioners argue that the specific LEMA in question violates the KJRA in four main respects:

1. The LEMA is unconstitutional for four reasons:[3]

    1.1. The LEMA statute is a collateral attack or taking of their water rights;

    1.2. The LEMA statute violates the separation of powers doctrine by granting too much authority to the CE;[4]

    1.3. As applied, the LEMA violates the equal protection clause by treating irrigation rights differently than other water rights; or

    1.4. As applied, the LEMA violates the due process clause because the appeals process does not have court review.

2. The LEMA does not meet the statutory requirements of the KWAA[5] because:

    2.1. The KWAA requires the LEMAs include the prior appropriation doctrine; or

    2.2. The LEMA allegedly does not incorporate the prior appropriation doctrine within the LEMA management plan.

3. The process by which the LEMA was created violated the Petitioners' due process rights.[6]

4. The LEMA is otherwise unreasonable, arbitrary, and capricious.

Each of these arguments fail because of the plain and unambiguous nature of the local enhanced management plans the Legislature allows in K.S.A. 82a-1041 to control and regulate the use of water in the State of Kansas to the benefit of the people. The arguments fail because the Legislature did not, and the LEMA statute does not,

[3] *See* K.S.A. 77-621(c)(1)
[4] As the KDA-DWR appropriately addresses the separation of powers doctrine (argument 1.2), the GMD4 will not directly discuss the separation of powers.
[5] *See* K.S.A. 77-621(c)(2) or (4)
[6] *See* K.S.A. 77-621(c)(5)

require the prior appropriation doctrine to be incorporated into a LEMA plan. The arguments fail because the Legislature set forth a specific procedure to be followed to establish a LEMA, which that procedure was adhered to in creating the LEMA before the Court. And, they fail because the LEMA is reasonable

2. Facts

The Kansas Department of Agriculture-Division of Water Resources (KDA-DWR) provided the pertinent facts to the issues before the Court. Rather than restate those facts, the Northwest Kansas Groundwater Management District No. 4 (GMD4) cites to the agency record where applicable.

3. Arguments and Authorities

3.1. Standard of Review

While the Petitioners correctly cite the KJRA as the act under which the Court may grant relief, Petitioners fail to provide the standard of review the Court will use to assess whether the KJRA was violated.

In this case, three standards of review apply. First, the Court has *de novo* review of the agency action alleged to have violated K.S.A. 77-621(c)(1), (2), (4), and (5).[7] The Court will review Petitioners' arguments regarding the constitutionality of the LEMA statute under *de novo* review because those arguments consist of the appropriate interpretation of the LEMA statute. The Court has *de novo* review because it is determining the proper statutory interpretation.

Second, when presented with a challenge to agency action under K.S.A. 77-621(c)(7) (whether the evidence supports the agency decision), a court engages in a three-step review:

1. A review of all of the evidence—evidence supporting and contradicting the agency's findings;

[7] *See Katz v. Kan. Dep't of Rev.* 45 Kan. App. 2d 877, 895 (2011) for de novo review to determine if an agency's action was unconstitutional. *See Friedman v. Kan. State Bd. Of Healing Arts*, 296 Kan. 636, 620 (2013) for de novo review to determine if an agency's action exceeded its authority. *See Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362 (2015) for de novo review to determine if the agency erroneously interpreted or applied the law. *See Sheldon v. Kan. Pub. Employees Ret. Sys.*, 40 Kan. App. 2d 75, 81 (2008).

2. An examination of the presiding officer's creditability determinations; and

3. A review of the agency's explanation as to why the evidence supports the agency's findings. [8]

Third, when presented with a challenge to agency action under K.S.A. 77-621(c)(8) (whether the agency acted unreasonably, arbitrarily, or capriciously), the court reviews the action to determine it was unreasonable or arbitrary and capricious. An action is unreasonable when it is taken without regard to the benefit or harm to all interested parties and is without foundation of fact. An action is arbitrary and capricious when it is unreasonable or lacks any factual basis. Useful factors that the Court may consider include whether: 1) the agency relied on factors the legislature had not intended it to consider; 2) the agency entirely failed to consider an important aspect of the problem; 3) the agency's explanation of its action runs counter to the evidence before it; and 4) whether the agency's explanation is so implausible that it could be ascribed to a difference in the view or the product of agency expertise. But, Court's must be careful in reviewing an agency's decision, but the legislature gave the agency, not the court, discretion to make the decision.[9]

3.2. Statutory Construction

The most fundamental rule of statutory interpretation and construction is that the intent of the legislature governs if that intent can be ascertained.[10] Legislative intent is ascertained through the statutory language enacted by giving common words their ordinary meanings.[11] When interpreting the plain language of a statute, the Court must also refrain from reading language into the statute or adding language that is not there.

Although Petitioners list a litany of statutory interpretation rules, they fail to remind the court that those interpretation rules only apply when a statute is not plain and not unambiguous. When a statute is plain and unambiguous, then there is no speculation as to the legislative intent behind it. As such, statutory interpretation is not necessary and the parties need not read into the statute something that can readily be found within it. [12] Only if the statute's language or text is unclear or ambiguous do parties

[8] *Williams v. Petromark Drilling, LLC*, 299 Kan. 792, 795 (2014).
[9] *Wheatland Elec. Co-op., Inc. v. Polansky*, 46 Kan.App.2d 746, 757-58, (2011).
[10] *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010).
[11] *Matter of Guardian and Conservatorship of Fogle*, 17 Kan.App.2d 357, 361 (1992).
[12] *Schneider v. City of Lawrence*, 2019 WL 494486, 3.

use canons of construction, legislative history, or other background considerations to construe the legislature's intent.[13]

The Petitioners also fail to remind the court that every statute comes before the court with a presumption of constitutionality—that presumption continues until it is clear the statute violates the constitution. Any doubts about the validity of the statue (regardless of the wisdom, economic policy, social desirability or lack thereof the court finds), must resolved in favor of finding the statute constitutional.[14]

3.3. The LEMA Statute is Plain and Unambiguous.

In this case, the Petitioners fail to show that the LEMA statute is ambiguous—because the LEMA statute is clear and unambiguous. The LEMA statute sets certain criteria, the conditions found in K.S.A. 82a-1036(a), that when met give rise to the GMDs' and KDA-DWR's authority to manage the causes leading to those conditions. If those conditions do not exist *or* if those conditions exist but later subside, then no LEMA can come into being or continue.[15]

The LEMA statute provides a menu of options the GMDs and KDA-DWR can use to address the conditions. The Legislature described that menu as corrective controls. Those corrective controls can include:

> "(1) Closing the local enhanced management area to any further appropriation of groundwater. In which event, the CE shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area;
>
> (2) determining the permissible total withdrawal of groundwater in the local enhanced management area each day, month or year, and, insofar as may be reasonably done, the CE shall apportion such permissible

[13] *State v. Trautloff*, 289 Kan. 793, 796, 217 P.3d 15 (2009).
[14] *F. Arthur Stone & Sons v. Gibson*, 203 Kan. 224, 226 (1981) (*Stone*).
[15] The LEMA statute requires an initial review of the plan at least seven years after implementation and then every 10 years. K.S.A. 82a-1041(j). Arguably, if during one of those reviews, it is found that the conditions ceased to exist, then members of the public could initiate a formal review leading to the LEMA being extinguished because the reasons for the LEMA cease to exist under K.S.A. 82a-1041(j). In this case, the LEMA ends after five years, in 2022, so the Chief Engineer must have subsequent public hearings on the matter for the LEMA to continue.

> total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights;
>
> (3) reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the local enhanced management area;
>
> (4) requiring and specifying a system of rotation of groundwater use in the local enhanced management area; *or* (emphasis added)
>
> (5) any other provisions making such additional requirements as are necessary to protect the public interest."[16]

In providing this menu, the Legislature specifically used the word "or" as a conjunction between the last two options. "Or" means the use of one or more of the options[17]—it does not require the use of all of the options. In utilizing "or," the Legislature does not require the specific use of any one option. This utilization of "or" mirrors K.S.A. 82a-1041(b)(2), when K.S.A. 82a-1041 describes the nature of the second hearing—a hearing on whether "one or more" corrective control provisions be adopted. Clearly, the Legislature did not intend to limit the GMDs, KDA-DWR, or the CE to only one option—that of first in time, first in right—but authorized the GMDS and CE to address local issues in a creative, local manner.

Turning to those options: options 3, 4, and 5 do not mention, much less require, applying the prior appropriation doctrine.[18] Rather, those options discuss *management* methods such as reducing total permissible water allowed to be withdrawn and rotating water between irrigators. Specifically, option three describes reducing the permissible withdrawal of groundwater by any one or more appropriators, or by wells in the LEMA. Option 3 does not require the prior appropriation doctrine be a part of the management plan but authorizes the GMDs and the CE reduce permissible withdrawal throughout the LEMA.

Similarly, option four authorizes a specific system of rotation of groundwater use in the LEMA. Hypothetically, a GMD could propose and the CE could accept that irrigators in Thomas County have an opportunity to use a quantity of water in year one; irrigators in Sherman County have the opportunity to use a quantity of water in year two; irrigators in Wallace have the opportunity to use a quantity of water in year

[16] K.S.A. 82a-1041(f)(1)-(5).
[17] "Or" Used as a function word to indicate an alternative. Merriam-Webster.com. 2019. https://www.merriam-webster.com (21 March 2019).
[18] K.S.A. 82a-1041 (f)(3), (4), & (5).

three; and so on and so forth. While this type of plan would have its benefits and burdens, it would be a plan that meets option four.

The Legislature clearly did not intend to hamstring the GMDs, the KDA-DWR, or the CE in creating LEMAs. In passing the LEMA statute, the Legislature intended to add tools for GMDs to address the depletion of the aquifer. If the Legislature intended for the LEMA statute to only allow prior appropriation, then the Legislature need not have gone to the trouble of passing the LEMA statute—the CE already has that power. Therefore, rather than being a restrictive statute, the LEMA is an expansive statute giving power back to the local GMDs to propose and participate in the implementation and enforcement of conservation plans. Whether this is a wise move by the Legislature it is not within the court's purview. The court need not weigh the benefits and burdens that follow the adoption of any particular legislative policy.[19] Rather the Legislature weighed the benefits and burdens that follow allowing LEMAs and the Legislature determined they are an appropriate tool to address groundwater depletion.

The GMD is also a legislative body—it is elected, issues taxes, and makes policy decisions.[20] But, under the GMD Act and LEMA statute, the GMDs, on their own, do not have the enforcement power to require individuals adhere to a LEMA management plan. And, the KDA-DWR does not have authority under the LEMA statute, on its own, to create a LEMA. Administrative agencies only have the authority conferred to them by the authorizing statutes either expressly or by clear implication from the express powers granted.[21] This is why the KDA-DWR looks to the GMDs to legislate or propose their plans and the KDA-DWR lends its enforcement power to the GMDs' plans under the LEMA statute. The CE may to delegate the enforcement of any corrective control measure to the GMD, upon written request from the GMD.[22] Hence the hearing process, which gives the KDA-DWR the ability to determine: 1) if a management plan is needed because the K.S.A. 82a-1036 criteria exist; 2) if the corrective control mechanisms will meet the goals of the plan; and 3) if KDA-DWR has the authority to enforce the management plan.

Therefore, the LEMA statute is plain and unambiguous such that no statutory construction or interpretation rules need be applied. It is the clear legislative intent for GMDs to have control of their destiny and a LEMA is a tool in the GMDs' toolboxes

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[19] *Williams v. City of Wichita*, 190 Kan. 317, 338-39 (1962).
[20] *See Landau v. City Council of Overland Park*, 244 Kan. 257, 274 (1989) – a legislative body, or political and taxing subdivision of the State is an entity that determines its own affairs, has taxing authority, and whose members are elected by the public.
[21] *Clawson v. State*, 49 Kan.App.2d 789, Syl. 10 (2013).
[22] K.S.A. 82a-1041(f)(5)

to address large-scale depletion. Here, the GMD4, as a political subdivision of the state, used its legislative or police power authorized by the Legislature to propose a LEMA and the CE reviewed the LEMA and authorized it with modifications. The CE followed procedure, as set out by the unambiguous terms of K.S.A. 82a-1041, the CE adopted the LEMA, and the Court should uphold the LEMA currently in effect.

3.4. The LEMA Statute is Constitutional

Water rights in existence before 1945 are called vested rights, because they pre-date the KWAA where the Legislature declared all of the water in the state of Kansas to the use of the people of the state, subject to the control and regulation of the state.[23] It has long been a tenant of Kansas water law that vested rights are not subject to the control and regulation of the State of Kansas because they pre-date the KWAA; by the same token, all appropriation rights (those rights created under the appropriation process and after 1945) remain subject to the regulation and control of the state of Kansas. The State of Kansas has delegated its authority to oversee the regulation and control of the water of the State of Kansas to the CE, the Kansas Department of Agriculture, and the GMDs. Ultimately, the State of Kansas retains the authority to regulate and control the use of the waters for the benefit of the people of Kansas, even in relying on its agents to exercise that authority.

As the Kansas Supreme Court held in *Williams v. City of Wichita,* the Legislature has the authority to change the principles of common law, abrogate decisions, and change public policy when, in the legislature's opinion, it is in the public's interest to do so.[24] Here, the Legislature moves away from, but does not abandon, the prior appropriation doctrine in limited circumstances. Those limited circumstances being the criteria found in K.S.A. 82a-1036.

A water right is the right of a landowner to *use* the water—it is not a right to the water itself. Legislation regulating, or creating a management plan, is not more objectionable than legislation forbidding or regulating the use of property.[25] Like zoning legislation, legislation or management plans that limit or regulate the right to use a water right in a specific manner for a specific period of time are permissible.[26]

And, while planned depletion may have been the public policy for almost 80 years, the Legislature and the GMDs, both legislative bodies, can move away or change that public policy if it is in the public's best interest. The Legislature has found what when

[23] K.S.A. 82a-702.
[24] *Williams* 190 Kan. at 331.
[25] *Stone,* 230 Kan. at 232.
[26] *Id.* at 235.

specific criteria is met, then for a period of time, the prior appropriation doctrine can be minimized and corrective control measures implemented. The CE must review the LEMA within seven years (five under this case) and then any LEMA must come up for review at least every 10 years. This LEMA ends on December 31, 2022.[27] The CE must conduct a new set of hearings in 2022 for a new LEMA that may replace the current LEMA. If, during the next five years, the corrective controls are inadequate, then alternate corrective controls can be applied; or, if the corrective controls address the criteria and those criteria cease to exist, then the LEMA may end.

As the Kansas Supreme Court in *F. Arthur Stone & Sons* realized:

> Water has become more scarce. Its use has multiplied dramatically with the growth of intensified agriculture in Western Kansas. The rate of diversion is approximately ten times the rate of recharge. Irrigation is mining the water from the Ogallala aquifer. The consequences of increased irrigation are drastic. The legislature recognized the threat by the passage of the KWAA, the State Water Plan, and *the authorization of the Groundwater Management Districts*. (emphasis added).[28]

The LEMA statute allows the GMDs and their members to control the destiny of their water use.[29] Kansas has five GMDs—three primarily west of highway 183 (west of Oakley, Kansas) and two primarily west of highway 81 and east of highway 183. The hydrological and meteorological conditions of each GMD are unique such that different management plans may work better in different GMDs. Additionally, the flexibility within the LEMA statute allows each GMD to propose and try different management plans. The GMDs are not limited in to their individual responses to the physical conditions found within each GMD. This allows each GMD to control its destiny by providing its own plan to address the criteria found in K.S.A. 82a-1036.

A LEMA is only one management plan approved by the Legislature. LEMAs are similar, yet distinct from, other management plans (e.g. Water Conservation Areas (WCAs), Intensive Groundwater Control Use Areas (IGUCAs), Multi-year flex accounts (MYFAs), etc.) allowed under the KWAA. LEMAs, while borrowing parts of the IGUCA statutes,[30] are distinct from IGUCAs because LEMAs must be proposed by a GMD Board of Directors to allow for local autonomy of the management plan. IGUCAs are imposed by the CE after the CE makes specific findings of fact. LEMAs

[27] Agency Record (AR) at 2498.
[28] *Stone*, 230 Kan. At 236.
[29] K.S.A. 82a-1020.
[30] K.S.A. 82a-1036 through 1039.

are also separate from Water Conservation Areas (WCA),[31] in that WCAs can be created by a single owner of a water right or a group of water right owners in a designated area and need not be proposed by a GMD Board of Directors or the CE. Under the LEMA statute, the GMDs have a similar opportunity as the CE and water users to create a management plan for a specific period.

Last, prior appropriation remains part of the KWAA, Kansas water law, and by extension the LEMA in question. Under K.S.A. 82a-707(c), a senior water right can still request the KDA-DWR or a Court to reduce or eliminate a junior water user's right to use water until the senior water right has the ability to pump the senior water rights full quantity. The senior water right holder must prove the junior water right holder is impairing the senior's ability to use the senior's full quantity and that enjoining the junior water right holders pumping will allow the senior water right additional water to use.[32] This remains a remedy the Petitioners, and other senior water right users that may be impaired by junior water right users, can use. The LEMA at hand does not change that method of addressing water shortage between two individuals—one a senior water right holder and one a junior. The LEMA merely adds regulatory oversight to decrease the aquifer depletion on a large scale.

3.4.1. The Management and Regulation of Water Rights is not a Collateral Attack on any Specific Water Right.

Although Petitioners do not cite, nor define, what a collateral attack on a water right is, the GMD4 infers that a collateral attack of a water right would mirror a collateral attack on a real property right. In essence, the Petitioners argue that the Certificate of Appropriation was a final agency action that established a real property right that is now inviolate. Petitioners continue their argument stating that the LEMA reduces their water right such that it is a collateral attack on the water right itself. However, after the KWAA enacted in 1945, the waters of the State of Kansas were placed under the regulation and control of the State of Kansas such that, like other real property rights, a water right may be regulated.

Therefore, the collateral attack argument is akin to the argument that a reasonable regulation of private property can become a taking that requires just compensation, but the argument of collateral attack or a regulatory taking of a water right falls short of the mark in this case. In *Frick v. City of Salina,* the Kansas Supreme Court outlined when a regulation of private property crosses the line and becomes a taking that

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31 K.S.A. 82a-745.

32 *See Garetson Brothers v. American Warrior, Inc.*, 51 Kan.App.2d 370 (2015) (rev. denied 2016); *Garetson Brothers v. American Warrior, Inc.*, ___ P.3d ___ (Kan. Ct. App., Jan. 11, 2019).

requires just compensation.[33]

Initially, a reasonable regulation of private property under the police power is not a taking and does not require just compensation.[34] Only under three scenarios does a regulation become a taking:

1) When the government requires an owner to suffer a permanent physical invasion of his property, however minor;[35]

2) When the regulation *completely* deprives the owner of *all* economically beneficial use of the property;[36] or

3) A catchall standard described in *Penn Central Transp. Co. v. New York City*, which requires a weighing of three factors: 1) the economic impact of the regulation on the claimant; 2) the extent the regulation interfered with the distinct, investment-backed expectations, and 3) the character of the governmental action. In assessing the third factor, a taking is more readily found when the interference with the property can be characterized by a physical invasion by the government as opposed to some public program adjusting the benefits and burdens of economic life to promote the common good.[37] This *Penn Central* analysis must focus on the "parcel as a whole," and not on discrete segments.[38] And, the landowner showing that his ability to exploit a property interest to the fullest extent of the belief of that property owner believed was available for development does not rise to the level of a taking.[39]

Petitioners cannot argue that the LEMA before the court is a permanent physical invasion of their property because the LEMA expires in 2022 without further GMD and KDA-DWR action. Therefore, it is not permanent.

Similarly, the Petitioners cannot argue that the regulation *completely* deprives them

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[33] *Frick v. City of Salina*, 290 Kan. 869, 885 (2010).
[34] *Id.* at 884.
[35] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.CT. 3164, 73 L.Ed.2d 868 (1982).
[36] *Frick* 290 Kan. at 885.
[37] *Id.* at 886 *citing Penn Central* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).
[38] *Penn Central* at 130-31.
[39] *Frick* at 887 *citing Penn Central* at 130.

of *all* economically beneficial use of their water rights, because the Petitioners retain a five-year allocation. They can chose how to use their five-year allocation over the course of those five years to their greatest economic benefit. This may require additional management of their pumping and water usage, but it does not completely deprive them of all economic use of their water rights. Therefore, the only "collateral attack" or regulatory taking of the Petitioners water rights to be established under the *Penn Central* test.

The Petitioners cannot show that the current management plan or regulation violates the *Penn Central* test. First, the economic impact of the regulation on the claimants is unknown; but the testimony presented at the hearings did not indicate the Petitioners would sustain economic loss. In fact, the Bill Golden study concluded that enforcing prior appropriation and "drying-up acres" would lead to the worst economic outcome. Additionally, in the short time Bill Golden studied the Sheridan-6 LEMA, he discovered that although gross incomes may decrease, net incomes of the irrigators remained steady or improved. Golden concluded that the loss of revenue from loss of production of bushels of corn was offset by decreased costs associated with pumping water (e.g. fuel and maintenance costs to maintain irrigation works). Golden also determined that there was not a large decrease in land values of irrigated ground within the Sheridan-6 LEMA as compared to land values outside of the Sheridan-6 LEMA. Therefore, Petitioners cannot show a sustained economic loss from being allocated a certain amount of water to use over a five-year period.[40]

Second, Petitioners cannot show that the five-year LEMA interferes with their distinct, investment-backed expectations. Like the first factor, the second factor is based on return on investment.[41] According to the Bill Golden study, the irrigators will still receive a return on their investment—and that that return can be equal or greater than current returns because of the decrease in input and operational costs.[42] In *Frick*, the Kansas Supreme Court found that property that was used as agricultural property and continued to be used as agricultural property throughout the term of the regulation such that the Fricks, the Petitioners in that case, were able to reap an economic benefit.[43] Here, Petitioners use the property as agricultural ground and will continue to use the property as agricultural ground through the life of the LEMA. If

[40]Golden, Monitoring Impacts of Sheridan County 6 Local Enhanced Management Area, Interim Report 2013-2015, Nov. 8, 2016 (SD-6 Interim Report), AR 996-1018; Golden, Peterson, & O'Brien, Potential Economic Impact of Water Use Changes in Northwest Kansas (2008) (The Golden Report), AR 1019-1094.
[41]*See Frick* 290 Kan. at 888.
[42]Golden, AR 996-1018.
[43]*Frick* 290 Kan. at 888-89.

for some reason a Petitioner wants to change the type of use of his water right during the LEMA, then there are provisions to allow him to do so.[44] The Supreme Court in Frick examined multiple cases where a moratorium was imposed on action while city planners developed a plan;[45] but in this case, the irrigators can continue using their water rights, albeit with a smaller allocation over a five-year period.

The third *Penn Central* factor, the character of the governmental action, flows towards finding a LEMA is not a collateral attack or regulatory taking of a water right. The third factor examines if the governmental action is a physical invasion or a potential adjustment of the benefits and burdens of economic life to promote the public good. All parties agree that the aquifer is declining and if steps are not taken to slow that decline then a point will come where the only water to pump is water that fell as precipitation. All parties agree that conserving water is in the best interest of the public to sustain the life of the aquifer (and the lives of those that live in Northwest Kansas).[46] In fact, Ms. Owens found that the LEMA was in the public interest,[47] a spirited discussion of the public interest happened at the Final Hearing;[48] and the KDA-DWR, through the CE, found that the LEMA was in the public interest.[49] Last,

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[44] AR, 2541.

[45] *Frick* 890-91 reviewing 6-month to 30-month moratoriums or delays of public agencies to issue various permits. See, *e.g., Santa Fe Village Venture v. City of Albuquerque,* 914 F.Supp. 478, 483 (D.N.M.1995) (30–month moratorium on development of lands within the Petroglyph National Monument was not a taking); *Zilber v. Town of Moraga,* 692 F.Supp. 1195, 1206–07 (N.D.Cal.1988) (18–month development moratorium during completion of a comprehensive scheme for open space did not require compensation); *Williams v. City of Central* 907 P.2d 701, 703–05 (Colo.App.1995) (10–month moratorium on development in gaming district while studying city's ability to absorb growth was not a compensable taking); *Woodbury Place Partners v. Woodbury,* 492 N.W.2d 258, 262 (Minn.App.1992), *cert. denied* 508 U.S. 960, 113 S.Ct. 2929, 124 L.Ed.2d 679 (1993) (moratorium pending review of plan for land adjacent to interstate highway was not a taking even though it deprived property owner of all economically viable use of its property for 2 years); *Nolen v. Newtown Tp.,* 854 A.2d 705, 707–10 (Pa.Commw.2004) (2–year moratorium on development was not a taking because there were other uses available, including farming, that were not affected by the moratorium); see also *Riviera Drilling and Exploration Co.,1Inc. v. United States,* 61 Fed.Cl. 395, 404–05 (2004) (6–month delay in issuing permit not a taking).

[46] AR, 445.

[47] AR, 217-75.

[48] AR, 456-458.

[49] AR, 2524-47.

the LEMA is not specifically directed at the Petitioners but creates a plan that applies to all those irrigators in townships experiencing greater than .5% per year decline.[50] Again, without the regulation proposed by the GMD and adopted by the KDA-DWR through the CE, available water would continue being pumped to where it would become unavailable. Therefore, the public safety, general welfare, and economic concerns of the potential for drying up acres is a reasonable regulation by the GMD4 as allowed by the Legislature and approved by the CE.

Last, Petitioners argue that the CE is attempting to retain jurisdiction or extend his authority over a water right in violation of *Clawson.* However, *Clawson* stands for the proposition that the CE, *of his own accord*, cannot retain jurisdiction to reduce the approved rate of diversion of quantity of water rights authorized once a final order granting a water appropriation permit is issued.[51] And in *Clawson*, the Legislature did not specifically grant the power of the CE to retain jurisdiction of a water right. However, under the LEMA statute, the Legislature specifically granted the power to the local GMDs, as enforced by the CE to *manage* the use of water for a limited duration in time when specific hydrological conditions exist. Because the Legislature specifically granted the local GMDs and the C.E. the authority to develop conservation plans, which include enforcement provisions, the ruling in Clawson does not apply because the Legislature specifically granted authority to the GMD and CE to create LEMAs.

Additionally, the Court in *Clawson* specifically found that "the CE cannot alter a water right permanently."[52] However, the LEMA does not alter a water right permanently. Rather, after the finding of specific criteria,[53] which Petitioners agree exist,[54] the LEMA limits the amount of water that can be used over a five-year period. After the five-year period ends, then the LEMA ends and the water right holder can resume using his full water right. During the LEMA, a water holder can use her full water right during a single year but then would need to limit her use during the other four LEMA years. In fact, under *Clawson*, a management plan is within the C.E.'s statutory authority because the Legislature specifically authorizes the CE and GMDs to create management plans. Therefore, creating a LEMA does not act as a collateral attack or regulatory taking under any known common law doctrine. Rather, the LEMA is a management tool duly authorized by the Legislature, proposed by GMD4

[50] AR, 2551-54
[51] *Clawson v. St., Dept. of Agric., Div. of Water Res.,* 49 Kan.App.2d 789, 800-01 (2013).
[52] *Id.* at 807.
[53] *See* K.S.A. 82a-1041 *cross-referencing* K.S.A. 82a-1036; AR, 2521-23.
[54] AR, 445.

in this case, and adopted by the CE.

3.4.2. A LEMA Plan can treat different water rights differently.

The Petitioners claim that the LEMA does not treat all water rights equally such that the current LEMA is unconstitutional. When considering if a plan offends the equal protection clause, the court must determine if there a reasonable basis for the differing treatment.[55]

In GMD4, the major driver for water declines is groundwater pumping or irrigating.[56] Water used for irrigation makes up between 97% and 98% of the water used in GMD4.[57] The other types of uses, municipal, domestic, industrial, and stock watering rights, comprise less than 3% of the water used within GMD4. The LEMA reduces the pumping of about 65% of the water rights within the LEMA while adding monitoring requirements.[58]

In holding that domestic water right holders need not file an application for a permit to pump water *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224 (1981), the Kansas Supreme Court noted that:

> A thousand steers would drink no more than 10,000 gallons of water per day. An irrigation well pumps that volume in 10 minutes. Domestic users divert less than 1% of the water used in the state, making relatively no impact on the acquirer.

In this case, domestic, municipal, industrial, and stock-watering uses account for less than 3% of the water used within GMD4. The incontrovertible testimony being that watering corn or other crops less would produce less yield; but failing to water livestock could lead to death of the animal.[59] Hence, the focus on reducing the use of irrigation water rights over a five-year period while encouraging other types of use to conserve.

Again, this is only for five years. In five years, the amount of water the municipalities use, the irrigators use, the livestock operations use, or the industrial entities use could have changed and a different or modified plan may be more appropriate.

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[55]*Stone*, 230 Kan. at 226-27.
[56]AR, 163. Testimony by Brownie Wilson.
[57]AR, 553. Testimony of Aaron Popelka.
[58]AR, 2427.
[59]AR. 553. Testimony of Aaron Popelka.

Although the LEMA treats different types of uses and different places of use differently, it has a rational basis for doing so. It treated different types of uses differently because different types of uses draw from the aquifer for different reasons. It treats the place of use differently because those areas of greater decline must mean less conservation is happening and areas of lesser decline means there is some ongoing conservation. This provides a rational basis for the differing treatment such that the differing treatment is constitutional.

3.4.3. The LEMA's appeal process is not vague.

The LEMA appeal process is straightforward. If an individual issued an allocation believes that he should have a greater allocation because he irrigated more acres from 2009 to 2015, then he brings the evidence of that to the GMD4 staff. The GMD4 staff can agree with the individual and adjust the allocation. If the GMD4 staff disagree with the individual, then he can take his request to the GMD4 Board. Because the LEMA allocation is based on irrigated acres, there are no other issues that would be appealable to the GMD4 Board.

Arguably, an individual may try to appeal the creation of the LEMA through the appeal process found in the LEMA, but that is prohibited and would fall under KJRA review required by K.S.A. 82a-1041. An individual may try to appeal the enforcement of the monitoring requirements and assessment of penalties; but all the monitoring requirement violations are handled by the KDA-DWR—both monitoring requirement violations within the LEMA and violations outside the LEMA. Those are reviewable through the KJRA. Therefore, the appeal process is not vague.

3.4.4. The District Court has the authority to review the GMD4's BOD decisions within the appeals process under K.S.A. 60-2101.

The Petitioners, like challengers of other decisions various political subdivisions of the State make, have an avenue of review with the district court under K.S.A. 60-2101 et. seq. if they are denied their request by the GMD4 Staff and GMD4 Board. K.S.A. 60-2101(d) provides that a Court may review political subdivision decisions as long as a petition for review is filed within 30 days of the decision. Similar to other civil cases, K.S.A. 60-2101(d) allows the Court to create a procedure for discovery in relation to the action filed. This gives political subdivisions the opportunity to operate independently of the judicial system, and in response to their constituents, while also allowing those with a grievance a chance to be heard in court.[60]

[60]*Landau*, 244 Kan. at 257.

Unlike an agency decision that provides why an agency made a decision, a board of directors has from three to 11 people voting on a decision and each person could have his or her own rationale for his or her vote. Those rationales can range from pressure from constituents, personal code or creed, economic rationales, or rationales in between. As such, the Kansas Supreme Court in *Landau* commented that no court should substitute its judgment for the judgment of the elected governing body merely based on a differing opinion as to what is a better policy in a specific situation. Here, the CE authorized the GMD4 to hear appeals in the Order of Designation to the GMD4 Board because he did not want to substitute his judgment for the judgment of the elected governing body on a specific situation. All of which are reviewable by a court. This created a system of checks and balances favored by our legislative and legal process while allowing affected irrigators an opportunity to have their individual allocations reviewed by a Court.

3.4.5. The LEMA's record keeping requirements are not unconstitutionally vague.

Remembering that when reviewing the constitutionality of an ordinance or LEMA, a court must:

1) Presume the LEMA ordinance is constitutional;

2) Resolve all doubts in favor of validating the LEMA ordinance;

3) Uphold the ordinance if there is a reasonable way to do so; and

4) Strike down the ordinance only if it clearly appears to be unconstitutional.

The party asserting the unconstitutionality of an ordinance has a weighty burden, because the Court has a duty to preserve the validity of the ordinance and search for ways to uphold its constitutionality. In determining if an ordinance is unconstitutionally vague, the court conducts a two-prong analysis. First—does the ordinance give adequate notice to those tasked with following it? Adequate notice is characterized as sufficient definite warning and fair notice as to the prohibited conduct in light of common understanding and practice. Second—the ordinance's terms must be precise enough to adequately protect against arbitrary and discriminatory action by those tasked with enforcing it. In essence, laws must give individuals of ordinary intelligence a reasonable opportunity to know what is prohibited and what is allowed.[61]

[61]*City of Lincoln Ctr. V. Farmway Co-Op., Inc.*, 298 Kan. 540, 546 (2013).

The LEMA requires each water owner to "inspect, read, and record the flowmeter reading at lease every two weeks while the well is operating." Again, in determining whether a statute is vague, the Court gives ordinary words their ordinary meaning. The LEMA imposes three requirements: 1) inspect, which means to view closely in critical appraisal;[62] 2) read, which means to per for the act of reading words or numbers;[63] and record the flowmeter reading, which means to set down in writing the flowmeter reading.[64] This must be completed every two weeks while the well is operating. Operating means the well is performing practical work.[65] Put another way, while the well is turned on, then the irrigator must inspect, read, and record the flowmeter reading every two weeks. The irrigator must then maintain those records and is required to provide those records to GMD4 upon request. If two conditions are met, then the well is presumed (which presumption can be overcome) to have pumped its full, annual authorized quantity for the year in question. Those two conditions are: 1) the flow meter readings are questioned for accuracy and 2) the bi-weekly records are not available or provided upon the request of the district. As long as the irrigator has a bi-weekly record of his flow meter reading, then the presumption is not imposed.

However, in inspecting, reading, and recording the flowmeter reading, an irrigator that finds a flow meter is inoperable or inaccurate has the duty to contact the GMD4 office within 48 hours of determining the meter is inoperable and providing the GMD4 with specific information. This is to ensure that operators are inspecting, reading, and reviewing their flowmeters on a bi-weekly basis. There are multiple ways to comply with the statute. An irrigator could write the flowmeter reading in a log book at least every two weeks; take a picture of the flowmeter reading at least every two weeks; email or text the flowmeter reading to someone each week; and there are probably more ways to inspect, read, and record the flowmeter reading to ensure that the flowmeter works. Again, the LMEA provides flexibility to irrigators to determine how to read the meter, record the meter reading, and keep records.

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[62]"Inspect." Merriam-Webster.com. 2019. https://www.meriam-webster.com (21 March 2019.

[63]"Read." Merriam-Webster.com. 2019. https://www.meriam-webster.com (21 March 2019.

[64]"Record." Merriam-Webster.com. 2019. https://www.meriam-webster.com (21 March 2019.

[65]"Operate." Merriam-Webster.com. 2019. https://www.meriam-webster.com (21 March 2019.

3.5. The Legislature provided timeframes and notice requirements giving the Petitioners, and others, sufficient opportunity to weigh-in during the LEMA process such that their due process rights were protected.

Under the Local Enhanced Management Area (LEMA) statute, the Legislature required notice to be given to the public before the Initial Hearing and the Final Hearing within certain periods.[66] The Legislature required written notice be given 30 days before the Initial Hearing and written notice be given 30 days before the Final Hearing stating the time, place, and issues to be heard and determined at those hearings.[67] That is clear and unambiguous. If the Legislature believed that more was required to protect the public's due process rights, then the Legislature had the ability to enact provisions addressing that concern.

In this case, the KDA-DWR gave notice of the Initial Hearing on about July 12, 2017. Constance C. Owen, the Hearing Officer appointed by the CE, held the Initial Hearing on August 23, 2017. From that hearing, Ms. Owen found that notice of the Initial Hearing was given as required by K.S.A. 82a-1041(b)(3).

Similarly, notice of the Final Hearing was given on about October 2, 2017, more than 30 days (about 43 days) before the Final Hearing. This met the 30-day notice requirement found in K.S.A. 82a-1041(b)(3). Petitioners' counsel also entered his appearance on October 10, 2017, which is also more than 30 days before the Final Hearing. Therefore, the requirements of K.S.A. 82a-1041(b)(3), unambiguously set by the Legislature, were followed.

3.5.1. The Petitioners had, and took advantage of, opportunities to receive information (or conduct discovery) and voice their concerns.

The Petitioners challenge that the written notice given 30 days before the Initial Hearing and the Final Hearing violated their with due process rights by not giving them an opportunity to conduct discovery. However, two of the Intervenors, Mr. Stramel and Mr. Friesen spoke at the Initial Hearing.[68]

Mr. Stramel testified at the initial hearing that, "I've followed this LEMA process pretty intensively for the last year or so."[69] Mr. Friesen specifically testified that he was on the Northwest Kansas Groundwater Management District No. 4's Board of

[66]K.S.A. 82a-1041(b)(3).
[67]K.S.A. 82a-1041(b)(3).
[68]AR, 178 & 763.
[69]AR, 178.

Directors for 12 years. Some of those years during the formation, proposal, and creation of the SD-6 LEMA. Mr. Friesen further submitted written comments on about September 11, 2017 detailing his concerns with the current proposal.[70]

After Mr. Friesen served on the GMD4 BOD, Mr. Justin Sloan served on the GMD4 BOD from February 2012 until April 2017. This LEMA process began in January of 2015 and continued until a formal proposal was submitted on June 9, 2017. The Proposal was discussed at the open, public GMD4 BOD meetings on a monthly basis during that period.

Mr. Friesen, or a person purporting to be Mr. Friesen; Mr. Bert Stramel, or a person purporting to be Mr. Stramel; and Mr. Saddler, or a person purporting to be Mr. Saddler, all signed in as present at the Colby public meeting. Proposal, 11-15.

Additionally, Mr. Saddler has already made written comments and submitted those written comments to add to the record for the Initial Hearing. *See* Unsigned and Undated Letter from Doyle E. Saddler (on file with the Kansas Dept. of Agric., Div. Water Res.). To argue that the intervenors did not have sufficient time or ability to collect information about the Proposal and prepare for the two hearings is disingenuous at best.

The Petitioners further challenge their ability to receive additional discovery between the Initial and Final Hearing. By allowing a continuance and further discovery, outside of the time frame contemplated by K.S.A. 82a-1041(B)(3), which could have potentially allow water users to increase the acreage they irrigated during 2018 and could have been factored into their LEMA allocation. The GMD4 Board, when it made its Proposal, recognized that it had water use data through about December 31, 2015. In considering increasing a LEMA allocation, the GMD4 BOD has requested staff to consider additional data from 2016 and 2017 when determining LEMA allocations. Adding an additional year, 2018, would have given water users an opportunity to irrigate additional acres and thereby increase their LEMA allocation. Therefore, a delay for a year could have been detrimental to implementing the LEMA.

The Petitioners requested, and received, the right to cross-examine the GMD4 witnesses and the State's witnesses.[71] The LEMA statute does not require the cross-examination of witnesses and the Legislature does not appear to contemplate LEMA hearing to be adversarial in nature—LEMA hearings are legislative in nature, which allows the CE to ask questions of the witnesses. (In fact, the SD-6 LEMA proceedings were information only and the CE did not allow cross-examination. In this case, no

[70]AR, 256-57.
[71]AR, 383.

parties requested cross-examination at the Initial Hearing and no cross-examination of witnesses occurred.) Nevertheless, the CE, at the request of the Petitioners, allowed the Petitioners to cross-examine witnesses. In turn, the CE allowed the GMD4 and State to cross-examine the Petitioners witnesses. This added additional protection to the Petitioners' rights.

The Petitioners availed themselves of the procedure. Two of the Petitioners testified they had been following the LEMA proceedings at the GMD level and then testified at the Initial and Final Hearing.[72] The Petitioners, Bert Stramel testified at the final hearing, too.[73] Other Petitioners provided written testimony under the guidelines provided by the CE. During the hearing, Petitioners counsel cross-examined the witnesses. After reviewing the testimony, the CE requested a modification of the plan, which the GMD4 adopted, removing some of GMD4 from the LEMA.

In listening to witnesses, allowing cross-examination, and extending the deadlines for parties to submit written testimony, the CE concluded a modified plan would better address the declines in GMD4. The Petitioners argue that an even better plan may have been devised had they been given more time to prepare. Admirable as that may be, the Petitioners could easily be accused of sacrificing a good plan for the sake of a perfect plan, which is not required by the statute. The Statute only requires a reasonable plan that provides corrective controls to address the conditions described in K.S.A. 82a-1036. As initially proposed, the plan was a district-wide plan. After hearing the testimony, the CE determined that the LEMA should only apply to those townships where there is a decline of water in excess of .05% per year. As described above, if all of the townships within GMD4 reduce declines to less than .05%, then the current LEMA would cease.

In enacting the LEMA statute, the Legislature unambiguously set for specific notice requirements. The Legislature also authorized the CE to determine the character of the proceedings, whether informational, adversarial, or a combination of both. Here, KDA-DWR complied with the notice requirements of K.S.A. 82a-1041(b). And under his authority, the CE allowed cross-examination of the witnesses for the Petitioners and the witnesses for the Defendants. Therefore, the Petitioners', and all interested parties', due process rights were protected.

[72]AR, 180-84.
[73]AR, 674.

3.6. The CE found that the LEMA plan is reasonable and there is no substantial evidence that the LEMA plan is unreasonable, arbitrary, or capricious.

In 2015, the GMD4, at its board meetings and with the public, began discussing a LEMA that would regulate groundwater use throughout the GMD4. This culminated in the GMD4 requesting the CE review and approve a Proposed LEMA. But before requesting the CE review the plan and initiate the LEMA process, the GMD4 held eight public meetings and multiple board of director meetings (by at least 28 board meetings) where the LEMA was discussed.

On August 23, 2017, Ms. Constance Owen conducted the Initial Hearing. After reviewing the testimony (discussed below), Ms. Owens found that all three requirements of K.S.A. 82a-1041(a) were met and that the Proposal should move to the next stage of the LEMA process. Based on the testimony of Ray Luhman, Manager of GMD4, and Brownie Wilson of the Kansas Geological Survey (KGS), Ms. Owen found that annual pumping from 307,015 acre-feet per year to 539,567 acre-feet per year exceeded the rate of recharge of between 126,910 acre-feet per year to 160,320 acre-feet per year. Brownie Wilson of KGS collaborated that testimony stating that the average saturated thickness for GMD4 declined from 76 feet in 2004 to 70 feet in 2015 (a six foot decline) and that parts of Sherman County had an average decline of over 20 feet. There was no testimony that the water table has not declined.

Ms. Owens defined the public interest based on two prongs: 1) proper management of groundwater through corrective controls; and 2) having the public be involved in the process. Again, no one testified that the aquifer was not declining thereby meeting the first prong. The second prong was met, because the public was significantly involved in the process of developing the LEMA Proposal.

Last, Ms. Owens found using the boundaries of the GMD4 was reasonable, although those boundaries were compacted to most effectively utilize State resources. First, the LEMA will encourage conservation of water because it will reward users who conserve while reducing usage in areas of greater decline. About 82% of water rights within the GMD will have a reduced water allocation under the LEMA. Initial Order, 16. Second, the increased monitoring will inform water users and encourage more judicious water use. Third, having the GMD boundaries be the same as the LEMA boundaries creates an incentive for water users located in the townships currently below the .5% annual decline rate to judiciously use water to prevent their townships from experiencing more decline and becoming eligible for possible reductions in allocations. Fourth, including all the townships within the LEMA will allow for adjustments in corrective controls as areas experience greater or lesser declines rather

than revisiting the boundaries at a later date.

Ms. Owens also found that using townships as sub-units were reasonable boundaries, because there were differences in the annual water level decline throughout GMD4. Those townships with at least 0.5% annual decline, the townships shown in red, yellow, and purple, contain about 82% of the water rights in the GMD4 boundaries. There was little objection to the creation of a LEMA in these areas of excessive decline. For these reasons, Ms. Owen found the sub-unit boundaries based on townships were reasonable.

At the Final Hearing the GMD4 and the KGS further explained the reasoning behind using township boundaries as opposed to section boundaries. GMD4 used the township political boundaries because the surface area equivalent to the area of a township level contains the appropriate number of data points within the KGS monitoring system to provide a correlation between the surface area political boundaries and the hydrological conditions below ground. As Ms. Owen recognized when she accepted the township boundaries as being reasonable that there is an inherent problem when surface or political boundaries are used to try to regulate the varying and complicated areas with multiple underground hydrological conditions.[74] It is this reasonable balance that the GMD4 Board of Directors struck when they determined to set the boundaries at the township level.

Mr. Brownie Wilson supported that determination in his testimony at the Final Hearing.[75] With the current data available, based on his training and experience, Mr. Wilson would base sub-units on a township level.[76]

The first corrective controls allowed under K.S.A. 82a-1041(f)(3) are the LEMA allocations. GMD4 determined the LEMA allocation for each water right using the procedures described below. The first step in determining a LEMA allocation is to determine the acreage a water user recently irrigated; second, determine the annual decline percent for the township the water rights is located in; third, apply the Net Irrigation Requirements (NIR) as determined by the United State Geological Survey (USGS) as to the zone of a county where the water right is located; and fourth, set the water right's LEMA allocation.

To determine a water right's LEMA allocation, GMD4 first determined what land

[74]AR, 275-80.
[75]AR, 751. Testimony of Brownie Wilson. ("Township scale in terms of making comparisons of what the water levels are doing directly in that township, I am more comfortable with that scale than I would be at the individual section level scale.").
[76]AR, 752.

acreage water users recently irrigated (irrigated acres or eligible acres). To determine irrigated acres, GMD4 examined annual water use reports from 2009–2015. GMD4 used the 2009-2015 range because 2009 was the first year that all wells in GMD4 were metered and 2015 was the last year that water use data was available when the GMD4 conducted the first public meetings about the Proposal. The maximum reported irrigated acreage during that period was used to set the irrigated acre amount (or eligible acre amount) for each right. GMD4 checked any discrepancies or inconsistencies against the United States Department of Agriculture aerial photos, the actual water rights, and the water use reports to finally determine irrigated acres (or eligible acres).

Second, the GMD4 derived the LEMA township annual decline percentage for each township in the GMD4 for the period from 2004 to 2015 from the KGS section level data. A section is an area about one square mile containing 640 acres with 36 sections making up one survey-township on a rectangular grid. The KGS compiled data on a section-by-section basis to determine the section-by-section declines. The KGS section level data was averaged for each township in GMD4. The KGS section level data was used because it assigns a value for bedrock and water level elevations for each specific section. Then, the GMD4 removed all wells with any alluvial connection from the data set. Additionally, the GMD4 removed any sections that exhibited less than 15 feet of saturated thickness from the analysis; because, removing those sections minimized the depletion status of areas on the fringe of the GMD4. Very small declines in areas of little saturated thickness result in unacceptably high percentage figures, which is why they were removed from the analysis. This is the section level data the GMD4 relied on to determine the township declines and the LEMA allocations.

Third, the GMD examined the Net Irrigation Requirements (NIR) set by the United State Natural Resource Conservation Services (NCRS) for the township where the water right is located.[77] The State of Kansas has used the NIR amounts since at least 1994 and referenced the NIR amounts in K.A.R. 5-5-9, K.A.R. 5-5-10, K.A.R. 5-5-11 and other regulations. The GMD4 Board used the NRCS NIR 50% and 80% values for corn by county. 50% NIR represents the net irrigation requirement for corn that would be sufficient in 5 out of 10 years (which is considered to normal precipitation) based on the precipitation that would be expected in 5 out of those 10 years. 80% NIR represents the net irrigation requirement for corn that would be sufficient in 8 out of 10 years (which is considered to be dry or less precipitation than normal) based on

[77] *See* U.S. Dept. of Agric., Nat. Res. Cons. Serv., Nat'l Eng'r Handbook, Irrigation Guide, KS 210-652-H, Amend. KS 31, KS 652-4.1 thru 4.25 (2014), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_030990.pdf.

the precipitation that would be expected in 8 out of those 10 years.

These figures were then interpolated to derive a value at the western edge of each zone. Each township was then assigned a color based on the zone in which it was located, red, yellow, purple, blue and green. Townships exhibiting greater than a 2% annual decline rate were assigned the 50% NIR for corn by zone (red). Townships exhibiting from 1% to 2% annual decline rate were assigned the 80% NIR for corn by zone (yellow). Townships exhibiting 0.5% to 1% were assigned an 18 inch allocation district-wide (purple). Those townships that are below the 0.5% decline rate will not have restrictions (blue and green). The tiered system gives due consideration to water users who have already implemented reductions in water use resulting in voluntary conservation measures as evidenced by a slower rate of decline. No township has an allocation less than the 50% NIR (less than normal precipitation) for its respective zone.

Fourth, and finally, the GMD4 multiplied the irrigated acre (or eligible acre) values by the allocation amount on the map attached to the Proposal based on the decline percentage for the township where the point of diversion was located and the corresponding NIR. That NIR number was then divided by 12 (to convert to acre-feet) and then multiplied times the acres times five to determine the five-year LEMA allocation. For example, in township 8-42W in Sherman County, the NIR for corn is 16.1 inches per acre. If a water right user irrigated 124 acres in that township, then the LEMA allocation would be 832 acre-feet over five years.[78]

Under K.S.A. 82a-1041(f)(3) and (5), GMD4 added additional requirements to set a LEMA allocation. For example, The LEMA allocation will also not reduce water users by greater than 25% except for those being reduced to an 18 inches per acre per year ca No LEMA allocations within areas of decline greater than 0.5% will be receive an allocation in excess of 18 inches per acre per year. These amounts apply to those water rights in red, yellow, and purple townships.

The Proposal contains other provisions addressing specific situations. Those provisions include:

> Wells pumping to a common system or systems shall be provided a single allocation for the total system acres, subject to the review process in Sections 5 and 6. The total amount pumped by all of the wells involved must remain within the system allocation.

[78] AR, 713-715. GMD4 Final Hr'g Written Testimony; Luhman Testimony, Final Hr'g Tr.

> No water right shall receive more than the currently authorized quantity for that right, times five (5).
>
> No water right within a K.A.R. 5-5-11, 5-year allocation status shall receive an allocation that exceeds its current 5-year allocation limit.
>
> No water right shall be allowed to pump more than its authorized annual quantity in any single year.
>
> In all cases the allocation shall be assigned to the point of diversion and shall apply to all water rights and acres involving that point of diversion. Moreover, in all cases the original water right shall be retained.
>
> For water rights enrolled in EQIP and/or AWEP that will be coming out of either program on or before September 30, 2022, the allocation quantity shall be set at the annual allocation for only the remaining years of the 2018-2022 LEMA period.
>
> If a water right is or has been suspended, or limited for any year of this LEMA, due to penalty issued by the Kansas Department of Agriculture, Division of Water Resources (DWR), then the GMD4 and DWR will reduce the allocated quantity for such water right accordingly for the 2018-2022 LEMA period.
>
> For water rights enrolled in a KAR 5-5-11 change, MYFA, WCA, or other flexible water plan, the most water restrictive plan will apply.

These special circumstances address contingencies related to specific situations that may happen during the LEMA period. For example, water rights going into and out of an Agricultural Water Enhancement Program (AWEP) or Environmental Quality Incentive Program (EQIP); the creation of WCAs or MYFAs; allowing the CE to impose penalties for over pumping or meter tampering; and capping a given year LEMA allocation to an amount not greater than the yearly amount currently allowed under the base water right. These provisions are necessary to allow water users the ability to create WCAs or MYFAs; enter the LEMA with water rights coming out of AWEP or EQIP programs; give the CE enforcement authority; and yet not allow water users to use more water in any given year than they are currently allowed.[79]

[79] *See* AR, 433 Luhman Testimony (the LEMA would allow WCAs or MYFAs if agreed to by DWR and a water user).

After applying the above rules, about 65% of water rights will have a LEMA allocation that is less than their combined diversions from 2009-2015. For five years, these water rights will be regulated and yet the base water right will not change. Any water conservation that happens will benefit those water users that conserve. And if the GMD4 Board of Directors examines reinitiating this LEMA, then it must consider including a 10% carryover.

The testimony presented by the GMD4 shows that the Proposal is a good start. Lynn Goossen testified about watching the water table declines and that the LEMA is a good start to slowing the decline rate. He believes that it is better to solve the problem together by cutting back a little rather than senior water right holders attempting to cut off junior water right holders. He will have a LEMA allocation and he is willing to work with his neighbors to save water for the next generation.[80]

The Water Commissioner, Kelly Stewart, testified that the Proposal came from the GMD4 Board of Directors and was not implemented by DWR staff. But, that DWR staff was ready, willing, and able to assist in managing the LEMA. Mr. Stewart also testified that, based on DWR calculations, the LEMA will reach the goal of only pumping 1.7 million acre feet over a five-year period.[81]

Last, Mr. Schultz of Brewster, Kansas testified that he has been there when he had to turn off the spigot and could not get water. He testified that water in Brewster was becoming unpotable. He testified that he believed the reductions should be stricter. He said that if the public, or the municipalities, begin running out of water, then they could out vote the farmers and propose greater reductions. He urged for adopting the LEMA because it allows the farmers to control their destiny.[82]

In this way, the Proposal will regulate water use for the next five years. It will assign LEMA allocations, treat water rights showing similar decline in the aquifer the same, regulate water rights that use the most of the aquifer, encourage conservation, allow the benefits of conservation to flow to those conserving, and retain "first in time, first in right" through impairment complaints. As Mr. Schultz stated, it is time to begin reducing through the GMD4 Board of Director's Proposal before being forced to conserve by municipalities or the CE.

[80] AR, 757. Goossen Testimony.
[81] AR, 757-58 Stewart Testimony.
[82] AR, 766-67.

4. Conclusion

No person or entity testified that water users and the GMD4 should continue depleting the aquifer at current rates and should not conserve water. No one testified that the water table in the aquifer was not declining—and some testified that it was excessively declining in areas. The consensus was that conservation needed to begin taking place to preserve the long-term economic viability of the GMD4. No one testified that the GMD4 was not a hydrologically connected region and that the conservation measures that occur in the GMD4 will benefit the water users of the GMD4. No one testified that nothing should be done and that draining the aquifer is appropriate.

The Legislature adopted the LEMA statute specifically to allow local communities to combat aquifer depletion. The LEMA statute is part of the public policy of the State of Kansas—that public policy being that the waters of the state are dedicated to the state for the beneficial use of those water subject to the regulation and control of the State. The Legislature determined that when certain hydrological conditions are met, then corrective controls can be proposed by a group of local leaders (GMD Boards) and the CE can authorize and enforce those corrective controls.

Therefore, the GMD4 requests the Court find that the LEMA Statute is constitutional; that the LEMA before the Court is constitutional; that a LEMA is not required to include the prior appropriation doctrine; that the proper procedure to create a LEMA was followed; and that the current LEMA is reasonable and not arbitrary and capricious.

SUBMITTED BY:

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Certificate of Service

I certify that on the date and time above, the above *Northwest Kansas Groundwater Management District Number Four's Answer* was electronically filed with the Clerk of the District Court using the Court's electronic filing system, which will send a notice of electronic filing to the following registered participants:

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