BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE
DIVISION OF WATER RESOURCES

In The Matter of the Designation of the Groundwater Management District No. 4 District-Wide Local Enhanced Management Area in Cheyenne, Decatur, Rawlins, Gove, Graham, Logan, Sheridan, Sherman, Thomas, and Wallace Counties in Kansas.	) Case No. 002-DWR-LEMA-2017

INTERVENORS' SUBMITTAL IN OPPOSITION TO THE PROPOSED DISTRICT-WIDE LEMA

> In a well-ordered society it is important that people know what their legal rights are, not only under constitutions and legislative enactments, but also as defined by judicial precedent, and having conducted their affairs in reliance thereon, ought not to have their rights swept away by judicial [or administrative agency] decree. And this is especially so where rights of property are involved . . .. And it should be left to the legislature to make any change in the law, except perhaps in a most unusual exigency.[1]

[1] *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 233, 630 P.2d 1164 (1981) and *Clawson v. State, Dept. of Agriculture, Div. of Water Resources*, 49 Kan.App.2d 789, 799, 315 P.3d 896 (2013) both cases quoting *Freeman v. Stewart*, 2 Utah 2d 319, 273 P.2d 174 (1954).

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STATEMENT OF FACTS

I. Summary of Proceedings to Date

1. The Northwest Kansas Groundwater Management District No. 4 ("GMD" or the "District") has proposed a district-wide Local Enhanced Management Area ("LEMA") pursuant to K.S.A. 82a-1041 (the "LEMA statute").

2. Highly summarized, the plan proposes that the Chief Engineer enter an order reducing all irrigation water rights within many of the townships in the GMD based on the estimated annual decline in the High Plains Aquifer in that township during 2004 to 2015.

3. The plan calls for across-the-board cuts in the quantity of water that can be diverted for irrigation use in some, but not all townships in the District with no consideration of their relative priorities in violation of the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, and the Kansas Groundwater Management District Act, K.S.A. 82a-1021, *et seq.*

4. In addition, the proposed plan treats irrigation, stockwatering, and other users differently in violation of the Water Appropriation Act, which specifically states that the "date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights."[2]

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

5. The GMD plan, dated June 8, 2017, was submitted to the Chief Engineer and on June 27, 2017, he entered a finding that the plan meets the threshold requirements set out in K.S.A. 82a-1041(a) and is "acceptable for consideration."[3]

6. The Chief Engineer appointed Connie Owen to serve as hearing officer for the first hearing required by the LEMA statute.

7. Ms. Owen held a hearing on August 23, 2017, and issued an Order on September 23, 2017, in which she made the findings required by K.S.A. 82a-1041(b).

8. On October 10, 2017, several irrigators intervened in the proceeding and filed a Motion to continue the hearing scheduled for November 14, 2017.

9. On October 27, 2017, the Intervenors filed Motions seeking due process protections and for reconsideration of the Chief Engineer's June 27, 2017, findings.

10. The Motion for reconsideration was denied and the Motion to provide due process was granted in part and denied in part.

11. While the Chief Engineer denied the parties an opportunity to conduct discovery, DWR staff has worked diligently to provide a great deal of the requested information.

12. Some documents were produced immediately before the November 14, 2017, hearing and some after. The last of the documents were produced on December 18, 2017, just days before the December 22, 2017 deadline.

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[3] Letter dated June 27, 2017.

13. The Chief Engineer refused to provide staff and the Intervenors with adequate time to produce the requested documents, review them, and follow up.

II. It is no surprise that groundwater levels have declined and continue to decline in the District because DWR and the GMD implemented a formally recognized "planned depletion" policy between at least February 20, 1980 and August 19, 1991.

14. The 1957 Kansas Legislature amended K.S.A. 82a-711 and enacted K.S.A. 82a-711a, both effective on June 29, 1957.[4] K.S.A. 82a-711 sets out standards for the approval, modification, or denial of applications to appropriate water. The relevant portions of those statutes read as follows:

> With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable . . . lowering of the static water level . . . beyond a reasonable economic limit.[5]

> It shall be an express condition of each appropriation of . . . ground water that the right of the appropriator shall relate to a specific quantity of water and that such right must allow for a reasonable . . . lowering of the static water level . . .: PROVIDED, That in determining such reasonable raising or lowering of the static water level in a particular area, the chief engineer shall consider the economics of diverting or pumping water for the water uses involved; and nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be . . . lowered at the point of diversion of a prior appropriator, so long as the rights of holders of existing water rights can be satisfied under such express conditions.[6]

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[4] L. 1957, Ch. 539.

[5] K.S.A. 82a-711(c).

[6] K.S.A. 82a-711a.

15. On December 19, 1971, a Steering Committee filed a declaration of intent and a map of the proposed boundaries seeking approval to form the Northwest Kansas Groundwater Management District No. 4.[7]

16. The Secretary of State approved the Petition to form the District on November 20, 1976.[8]

17. The 1972 Kansas Legislature enacted the current Groundwater Management District Act.[9] The Act permitted the formation of GMD's and required that they adopt management plans that must be approved by the Chief Engineer before they could be implemented.[10]

18. On February 18, 1977, former Chief Engineer, Guy Gibson, approved the GMD's Management Program.[11]

19. The 1977 Management Program indicated that groundwater in portions of the GMD was already declining by virtue of the numerous irrigation wells that had already been approved by the Kansas Board of Agriculture, Division of Water Resources ("DWR").[12]

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[7] GMD4's Management Program approved on February 18, 1977.

[8] *Id.*

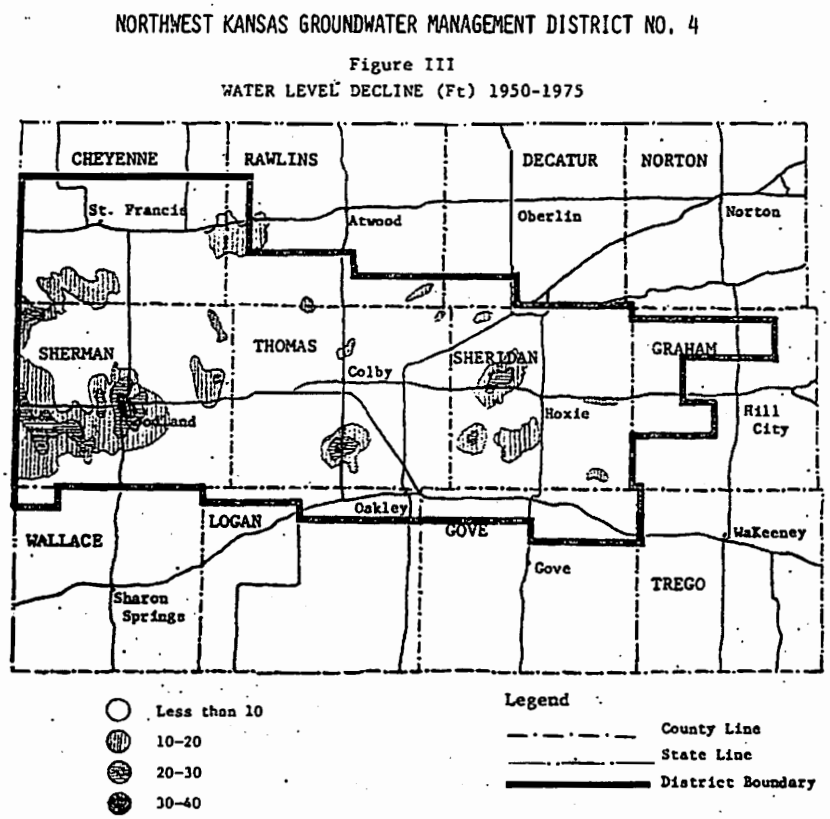
[9] K.S.A. 82a-1020, *et seq.*

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

[11] *Id.*

[12] *Id.* at 13. The "Board of Agriculture" was renamed the "Department of Agriculture" in 1994.

20. A map of the District showing areas of decline was included in the 1977 Management Plan:[13]



21. The 1977 Management Program listed a number of strategies to address declining water levels.[14]

22. The Management Program, approved by the Chief Engineer on July 17, 1978, included more robust provisions designed to address groundwater depletion concerns.[15]

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[13] *Id.*

[14] *Id.* at 14-15.

[15] GMD4's Management Program approved on July 17, 1978.

23. The Management Program, approved by the Chief Engineer on December 29, 1978, continued to address declining ground water levels.[16]

24. Management Programs approved by Chief Engineer Guy Gibson on January 9, 1980, and December 31, 1980, included GMD Policy No. V-2-a entitled *Planned Depletion*.[17]

25. DWR regulations effective as of May 1, 1983, included K.A.R. 5-24-2, also entitled "*Planned depletion.*[18]" That regulation implemented the District's 1980 planned depletion policy which allowed DWR to approve new permits in the District so long as a new well would limit the reduction in saturated thickness to 2% or less each year.[19] That regulation read, in part:

> The sum of the proposed appropriation, the vested rights, prior appropriation rights and earlier priority applications shall not exceed a calculated rate of depletion of more than two percent of the saturated thickness underlying the area included within a two mile radius (approximately 8,042 acres) whose center is the location of the proposed well.[20]

26. Under the 1980 GMD policy and the 1983 DWR regulation, new permits were approved even though they would cause further depletion so long as depletion of the aquifer did not exceed 2% as determined by the following formula:

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[16] GMD4's Management Program approved on December 29, 1978.

[17] GMD4's Management Programs approved on January 9, 1980 and December 31, 1980.

[18] Kansas Register, Vol. 2, No.12, March 24, 1983, at 262.

[19] *Id.*

[20] *Id.*

$$\underline{Q = 0.02\,(AMS) + AR}$$
12

Where Q = allowable annual appropriation, acre-feet per/year
A = area of consideration, acres
M = average saturated thickness, feet
S = storage coefficient (specific yield)
R = average annual recharge, inches per/year)[21]

27. The Management Program approved on January 7, 1985, by then Chief Engineer, David Pope, included the text of then-current K.A.R. 5-24-2 entitled *Planned Depletion*.[22]

28. On August 19, 1991, K.A.R. 5-24-2 was amended to close the entire District to most new appropriations.[23]

29. There are 3,300 individual water rights in the District. In many cases the permits allow more than one well.[24]

30. There are 33 vested water rights.[25]

31. There are 209 water appropriation rights with priority dates prior to June 29, 1957, the effective date of the amendment to K.S.A. 82a-711 and enactment of 82a-711a.[26]

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[21] *Id.*

[22] GMD4's Management Program approved on January 7, 1985.

[23] K.A.R. 5-24-2.

[24] Based on the water rights in the WIMAS database downloaded from DASC on December 18, 2017.

[25] *Id.*

[26] *Id.*

32. There are 2,643 water appropriation rights with priority dates after June 29, 1957, and before February 20, 1980.[27] DWR permitted each of these water rights before the GMD policy limiting depletion to 2% per year.

33. There are 201 water appropriation rights with priority dates between February 20, 1980, and August 19, 1991.[28] DWR permitted each of these water rights while the planned-depletion policy was in effect.

34. There are 156 water appropriation rights in the District with priority dates after August 19, 1991.[29]

III. The record contains no support for the proposition that a 0.5% annual decline is "excessive."

35. The proposed plan calls for reductions in the quantity of water that can be diverted in areas with average annual reductions in saturated thickness of 0.5% or more.

36. In order to establish a LEMA it must be shown that groundwater within clearly defined boundaries is declining or has declined excessively.[30]

37. The Legislature provided the Chief Engineer with no guidance to determine whether declines are "excessive."[31]

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[27] *Id.*

[28] *Id.*

[29] *Id.*

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

38. As shown in the following table, reducing the permissible percent of annual decline from 2.0% to 0.5% is dramatic. The table uses the formula in the pre-1991 version of K.A.R. 5-24-2 to illustrate the differences between a 2.0% and a 0.5% rate of decline in the total quantity of water that could be diverted from a two-mile radius circle with average saturated thicknesses ranging from 0 to 300 feet.

Area in Acres	Saturated Thickness in Feet	Storage Coefficient	2.0% Annual Percent Decline	0.5% Annual Percent Decline	Difference
8,042	0	0.2	-	-	-
8,042	25	0.2	804	201	-603.15
8,042	50	0.2	1,608	402	-1,206.30
8,042	75	0.2	2,413	603	-1,809.45
8,042	100	0.2	3,217	804	-2,412.60
8,042	125	0.2	4,021	1,005	-3,015.75
8,042	150	0.2	4,825	1,206	-3,618.90
8,042	175	0.2	5,629	1,407	-4,222.05
8,042	200	0.2	6,434	1,608	-4,825.20
8,042	225	0.2	7,238	1,809	-5,428.35
8,042	250	0.2	8,042	2,011	-6,031.50
8,042	275	0.2	8,846	2,212	-6,634.65
8,042	300	0.2	9,650	2,413	-7,237.80

39. Begging the question, the GMD asserts that groundwater has declined in some townships by 0.5% or more and, therefore, the declines are "excessive." The GMD provided no explanation for its definition of 0.5% annual decline as "excessive."

40. At the August 23, 2017, LEMA hearing, Mr. Luhman testified that groundwater levels have declined excessively but offered no explanation for this assertion. He testified as follows:

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[31] This raises questions about the whether the statute unlawfully delegates legislative power to the Chief Engineer.

> Groundwater levels in GMD4 are declining or have declined excessively. Townships used in those calculations which were based on the KGS section level data have at least 15 foot of saturated thickness in the GMD areas marked as red, yellow or purple. And that would be in the testimony that I had given which is part of the actual proposal. Those are -- there's at least .5 percent annual decline in the aquifer over an eleven year period. Therefore, groundwater levels are declining excessively in those areas. Townships exhibiting less than .5 percent decline rate have no restrictions proposed, only additional monitoring criteria.[32]

41. The GMD's written testimony is no more instructive. The portion of the written testimony addressing "excessive" declines reads as follows:

> Groundwater levels in GMD 4 are declining or have declined excessively. Townships used in the calculations, which were based on KGS section level data, have at least 15 feet of saturated thickness. In the GMD 4 areas marked as red, yellow, and purple (see attached map in district request exhibit 1) there is at least a 0.5 % annual decline in the water table over an eleven year period. Therefore, groundwater levels are declining excessively in those areas. Townships exhibiting less than 0.5 % decline rate have no restrictions proposed, only additional monitoring enforcement criteria.

42. The GMD has provided no evidence, explanation, or basis for the assertion that declines of 0.5%, as opposed to 2.0% or even 0.4% or 0.6%, or any other value, are "excessive."

43. Moreover, there is no explanation in the record to support a reduction in the permissible average annual percent of decline from 2% established in GMD policies

[32] August 23, 2017, Trans. at 7:20 – 8:9.

from at least February 20, 1980[33] until August 19, 1991, the date that K.A.R. 5-24-2 was amended.[34]

44. In fact, the words "excess," "excessive," and "excessively" appear in the transcript only eight times.[35]

45. Moreover, the testimony about whether the declines were excessive was conflicting. Mr. Luhman's cursory testimony, quoted above, appears on pages 7 and 8.[36] And on pages 30-32, Pat Haffner testified as follows:

> In my research and some other research, I feel it's incomplete. Not -- there's just not been enough work done to get the boundaries right. I -- I don't know that we meet the criteria for -- for some of these statutes, because of the -- there's -- there's a – this 10 -- let me look at it here. 1036, "Groundwater 25 levels" -- "(a) groundwater levels in the area in question are declining and have declined excessively."
>
> Well I don't believe that's, when referring to the District unit, there are areas of decline. But there are some large areas that haven't.
>
> HEARING OFFICER OWEN: I'm sorry, sir, I couldn't quite understand what you said regarding that.
>
> PAT HAFFNER: Well, I'm reading 1036 -- 82a-1036, and it's supposed to meet these criteria that "groundwater levels in the area in question are declining or have declined excessively."
>
> I agree there are excessive decline in areas, but there's a lot of areas where there isn't. And we're throwing the whole District into, you know, we just put the boundaries around the whole thing. And I believe it needs to be studied quite a lot more to find out where the boundaries really need to be

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[33] GMD4's Management Programs approved on January 9, 1980.

[34] Kansas Register, Vol. 10, No. 27, July 4, 1991, at 976-77.

[35] August 23, 2017, Trans. at 7:12, 7:21, 8:6, 8:22, 10:12, 31:2, 31:13, and 31:14. References at 8:22 and 10:12 do not deal with water level declines.

[36] August 23, 2017, Trans. at 31:2, 31:13, and 31:14.

> and then we're taking townships instead of -- if we're going to do this right, I think we ought to go a lot more intensive measurements and things like that. I do believe if you go to the eastern part of the District, there's only maybe 16 wells that have ever been monitored in that area. And some of there are alluvial.[37]

46. Even if one accepts that declines of 0.5% are excessive, there are entire townships in the proposed district-wide LEMA in which declines do not meet the statutory standard.

47. The map attached to the GMD plan indicates that there are 121 full and 34 partial townships in the District. There are 25 full and 16 partial townships shaded in blue and 7 full and 11 partial townships shaded green. Thus, 32 full and 27 partial townships, over one-fourth of the District, do not meet the statutory standard.

IV. The GMD affirmatively decided not to comply with the statutory requirement to give due consideration to water users who have implemented voluntary conservation measures.

48. In order to approve the GMD's plan, the Chief Engineer must enter a finding that a proposed LEMA gives "due consideration to water users who already have implemented reductions in water use resulting in voluntary conservation measures."[38]

49. In his June 27, 2017, letter to the GMD, the Chief Engineer states that the proposed plan meets this criterion and he entered a finding to that effect.[39]

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[37] August 23, 2017 Trans. at 30:18 – 32:2.

[38] K.S.A. 82a-1041(a)(4).

[39] June 27, 2017, letter to the GMD.

50. The Chief Engineer did not provide a factual basis for this finding, did not cite provisions in the proposed plan that address this statutory requirement, and provided no analysis of the issue.[40]

51. At the November 14, 2017, hearing, DWR staff called two witnesses to testify in support of the plan. Neither witness addressed this requirement.

52. In fact, at the November hearing, Mr. Luhman testified that the GMD made no attempt to comply with the statutory mandate that its plan gives due consideration to water users who have already have implemented reductions in water use with voluntary conservation measures. Mr. Luhman testified as follows:

> I don't remember the year, but the Kansas Legislature has put language in several places in state law that says if you are looking at doing some sort of conservation cutbacks, that you have to take into account previous conservation requirements.
>
> So from that standpoint, we could see early on that each individual that might have a allocation given to them was probably going to claim that they were conserving, whether they were or not. But, you know, you could see with 3,600 wells, that was going to be quite an extensive process.
>
> So we did go back and we just decided to go across the board with an allocation based on their irrigated acres and we did not take into account cropping type or anything like that. It was just based on acres.[41]

53. Mr. Luhman went on to explain that irrigators with wells that have reduced capacities will not be further reduced suggesting that a lower water table is a "voluntary conservation measure."[42]

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[40] *Id. See* Section VI.A., *infra.*

[41] November 14, 2017 Trans. at 33:10-25.

V. The Plan reduces the quantities of water available in many townships below quantities that are needed for full irrigation.

54. The NRCS defines "Net Irrigation Requirement" as follows:

NIR is the water need of the specified crop over and above effective rainfall and carryover soil moisture. Table KS4-1 gives the values for seasonal NIR, based on 80% chance rainfall, for each county for each crop named. Likewise, Table KS4-2 gives the values for seasonal NIR based on 50% chance rainfall. The 80% chance rainfall (that which can be expected to be equaled or exceeded in 8 years out of 10) is, of course, a lesser amount of rainfall than the 50% chance rainfall that can be expected to be equaled or exceeded 5 years out of 10. Therefore, irrigation requirements based on the 80% chance rainfall are higher as shown by comparison of values in Table KS4-1 against those in Table KS4-2. Irrigation based on 80% chance rainfall is safer, and there is less risk of drought for the crop than if based on average years. The 80% chance rainfall is normally used to determine crop irrigation requirements.[43]

55. The NIR for each of the counties in the District are as follows[44]:

County	Seasonal NIR (inches) 80% chance rainfall	Seasonal NIR (inches) 50% chance rainfall
Cheyenne	15.4	13.7
Decatur	14.8	12.7
Gove	15.3	13.1
Graham	14.7	12.4
Logan	15.8	13.9

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[42] *Id.* at 34, lines 6-14.

[43] National Engineering Handbook Irrigation Guide, Part 652, KS652.0408 State Supplement–Water Requirements, Chapter 4 at KS652-4.1

[44] *Id.* at Tables KS4-1 and KS4-2.

Rawlins	15.1	13.2
Sheridan	15.7	12.9
Sherman	15.7	14.1
Thomas	15.4	13.5
Wallace	16.1	14.3

56. K.A.R. 5-3-19 states that for applications filed before September 22, 2000,[45] the maximum reasonable annual quantity of water for irrigation use west of the eastern border of Range 21 West shall not exceed two acre-feet of water per acre irrigated.

57. K.A.R. 5-3-20 reduces the quantity that would be permitted pursuant to a new application to between 1.5 and 1.6 acre-feet per acre in the District.

58. The quantities set out in the GMD plan are lower in every county in the District than the quantity that is considered "reasonable" for irrigation use under both K.A.R. 5-3-19 and 5-3-20.

VI. The percent declines are based on very sparse data.

59. Brownie Wilson with the Kansas Geological Survey submitted written testimony at both hearings. He testified that the GMD requested that he look at changes in the saturated thickness of the Ogallala/High Plains aquifer within the GMD from 2004 to 2015.[46]

[45] Kansas Register, Vol. 19, No.36, September 7, 2000, at 1490.

[46] August 23, 2017, KGS Testimony.

60. The KGS and DWR measure the depth-to-water in a network of approximately 1,400 water wells, across the entire Ogallala/High Plains aquifer in western Kansas each year.[47]

61. Based on the map attached to Mr. Wilson's written testimony, there appear to be about 268 monitoring wells in the GMD.[48] The map shows an additional 53 wells outside the GMD.

62. The water-level measurements were used to calculate the 3-year average winter depth to water for each monitoring well site for calendar years 2004, 2009, and 2015.[49]

63. To estimate the water table elevations for each of the 4,981 sections in the GMD, the elevations at the monitoring well sites were "interpolated into continuous water table surfaces" using a computer program designed to create digital elevation models.[50]

64. The interpolated surfaces were composed of uniform grid cells 250 x 250 meters (820.21 x 820.21 feet) in size, each containing estimates of the water table elevations for 2004, 2009, and 2015.[51]

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id. See* the spreadsheet used to calculate water elevations.

[51] *Id.*

65. The mean interpolated water table elevations, based on the cells occurring within each PLSS section, were computed for 2004, 2009, and 2015.[52]

66. Bedrock elevations were assigned from interpolated surfaces used in published KGS reports and surface elevations were obtained from the USGS National Elevation Dataset.[53]

67. An average section of land covers 27,878,400 square feet. 250 x 250 meter cells cover 672,744 square feet so there are approximately 41 cells in each section. The GMD plan relies on estimated reductions in elevations in 4,981 sections of land in the GMD based elevations in over 206,000 cells interpolated from actual elevations in 268 wells in the District.

VII. The public was given little advance indication of the terms and conditions of the plan.

68. While there were public meetings at the end of November and the beginning of December of 2016, the draft plan was not provided to the public for review. Instead, Mr. Luhman "just described it."[54]

69. The plan was not made available to the public until late May or early June of 2017.[55]

70. Bert Stramel testified as follows:

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[52] *Id.*

[53] *Id.*

[54] November 14, 2017 Trans. at 46:19-47:15.

[55] *Id.* at 48:12-25.

> It is like today, this was the first time the 25 -- no more than 25 percent reduction was actually explained to an extent that it could be understood. We have never had a full explanation of how this appeals process is going to work. I have several of my personal water rights that I know are going to need to go through this appeal, and I am not sure how well I am going be served by it without knowing the process, without knowing who is going to be in charge of it, if it is going to be this current board, if it is going to be the current staff. I mean, who knows what future staff or future boards are going to look like. And to just walk into this without having some of these questions answered is reckless. We wouldn't go into our fields and plant something without having some idea of what to expect.[56]

71. Mr. Stramel went on to testify that the plan was explained in "pretty big generalities" with no discussion of the requirement to keep an accurate log of all flowmeter readings every two weeks or that if the log was not accurate, there was a risk of losing an entire year's allocation.[57]

72. Ex. Q is the document handed out at the public meeting in Colby.[58]

73. The GMD has asserted that the plan was discussed during its annual meetings and at monthly board meetings. The Intervenors do not contend that the plan was developed in complete secrecy but the District was less than proactive in its efforts to involve the public.

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[56] November 14, 2017, Trans. at 269:1-18.

[57] *Id.* at 272:9-19.

[58] *Id.* at 270:25-271:15.

VIII. Dr. Bill Golden's conclusions about the Sheridan 6 LEMA are preliminary, based on economic data that is not statistically valid, and relies on data collected during years in which there was greater than normal rainfall.

74. Testimony at the November 14, 2017, hearing indicated that Dr. Bill Golden's research has shown that during the first four years of the Sheridan 6 LEMA, cash flow and profitability have "remained pretty much the same as their peer group around the outside of that." The four years studied so far were 2013-2016.[59]

75. Mr. Luhman testified that precipitation has exceeded normal amounts during at least two of those years.[60]

76. The data Dr. Golden relied on was voluntarily reported to the GMD by producers, and the GMD passed the data on to Dr. Golden. His report indicates that the preliminary results are "informative" but "[d]ue to the limited number of participants reporting economic data, the results cannot be considered statistically valid."[61]

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[59] Golden Report attached to Ex. A.

[60] November 14, 2017, Trans. at 176:20-24

[61] Golden Report attached to Ex. A.

Argument and Authorities

I. The Chief Engineer lacks statutory authority to reduce the quantity of water that can lawfully be diverted pursuant to a valid water appropriation right other than to protect a senior water right from impairment under the prior appropriation doctrine.

Since 1957, Kansas law has included definitions of "water right" and "appropriation right."[62] A water right "is a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other disposal, or by inheritance."[63]

An appropriation right is a water right that allows the holder to "divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date."

A. Approval of applications to divert water.

To approve an application for a water appropriation right, the Chief Engineer must make several findings of fact.[64] And, in fact, DWR makes the required findings

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[62] K.S.A. 82a-701.

[63] K.S.A. 82a-701(g). *See also,* K.S.A. 82a-708a.

[64] K.S.A. 82a-701(f) defining "appropriation right," and K.S.A. 82a-711(a).

each time it issues a permit to appropriate water.[65] A permit establishes the "specific quantity of water at a specific rate of diversion" that can be diverted and thus perfected.[66]

DWR's approval of an application authorizes the applicant to proceed with the construction of the diversion works and the other steps necessary "perfect" the proposed appropriation of water.[67] DWR's regulations define the term "perfect" to mean the

> [A]ctions taken by a water user to develop an approval of application into a water right. These actions shall consist of the completion of the diversion works and the actual application of water to the authorized beneficial use in accordance with the terms, conditions, and limitations of the approval of application.[68]

Water appropriation rights are created by the diversion of water which requires investment and effort. Perfection of each of the irrigation water rights in the District required prior ownership or the purchase of land suitable for irrigation; drilling and equipping a well with a pump, motor, flowmeter, and other equipment; laying pipes; and in most cases, purchase of a center pivot irrigation system.[69] All of this equipment

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[65] November 14, 2017 Transcript at 258:6 – 260:1 and Ex. R consisting of examples of cover letters transmitting approved permits and judgment sheets used by DWR to determine whether the appropriate findings of fact can be made.

[66] *Id.*

[67] K.S.A. 82a-712 (emphasis added).

[68] K.A.R. 5-1-1(zz).

[69] Many older water rights were perfected with flood irrigation which is extremely labor intensive.

must be purchased, installed, maintained, repaired, and replaced at considerable expense. Thus, each water right is the result of a considerable investment made because the expected return is both higher and more consistent. Generally speaking, irrigation produces higher yields and substantially reduces the risks associated with drought.

Because water rights are real property rights that require significant investment and hard work, changes to their characteristics, including temporary changes, trigger the requirement that owners be compensated.

B. DWR does not have the power to reduce the authorized quantity of water after a permit is issued other than pursuant to the prior appropriation doctrine.

DWR has always believed that it had the power to reduce the quantity of a water right after a permit was issued even after making the findings required by K.S.A. 82a-711. In undated Administrative Policy No. 83-33, former Chief Engineer, Guy Gibson, directed DWR staff preparing Certificates of Appropriation to limit irrigation rights to 1.15, 1.7, and 2.25 acre-feet per acre irrigated, depending on the location in the state.[70] The policy was updated on September 26, 1993, by former Chief Engineer, David Pope, reducing the quantities to 1.0, 1.5, and 2.0 acre-feet per acre.[71]

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[70] Ex. N.

[71] Ex. O. Administrative policy 83-33 was replaced with policy no. 86-8, which established reasonable quantities of water for irrigation use when an application was being considered as opposed to during preparation of a certificate of appropriation.

Under these policies, permitted and perfected quantities in excess of those set out in the policies were reduced in Certificates of Appropriation that, pursuant to K.S.A. 82a-714, were supposed to set forth the full extent to which a water right was perfected.

Similarly, and as discussed in *Clawson v. State, Dept. of Agriculture, Div. of Water Resources*,[72] when issuing permits, the Chief Engineer began including provisions attempting to retain jurisdiction to reduce quantities authorized to be perfected.[73]

In *Clawson*, the Court of Appeals explained that DWR does not have that authority.

> The chief engineer does not have the statutory power to retain jurisdiction to reduce the approved rate of diversion or quantity of the water rights authorized to be perfected once the Kansas Department of Agriculture issues a final order granting a water appropriation permit. ***The Kansas Water Appropriation Act does not authorize the chief engineer to reevaluate and reconsider an approval once a permit has been issued.***
>
> The Court said:
>
> The significance of the perfection period is that any modification of the water right is dependent upon the actions of the applicant, not the chief engineer. The ***chief engineer's only role is to monitor and inspect*** to ensure that the appropriation has been perfected in conformity with the approved application. This is akin to enforcement, and, like in *Guss*, the ***chief engineer's supervisory role strikes us as ministerial in nature. The chief engineer is no longer engaging in active consideration of the water appropriation request but is merely enforcing the conditions of the water***

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[72] 49 Kan.App.2d 789, syl. 15, 315 P.3d 896 (2013).

[73] See Ex. R, examples of permits issued by DWR that include provisions attempting to retain jurisdiction to reduce the rates of diversion and quantities of water.

permit consistent with the KWAA's provisions on perfection of a water right.[74]

As set out in the statement of facts, there are 3,300 water rights in the District. All of the water rights with priority dates after June 29, 1957, were permitted after K.S.A. 82a-711 was amended and 82a-711a was enacted. Thus, each of those property rights was permitted with the specific understanding that they may lower the water table without impairing senior rights so long as there was no direct well-to-well impairment.

Until the 1983 version of K.A.R. 5-24-2 became effective, there was no specific standard or guidance limiting the number of water rights that could be permitted or the extent to which the static water level could be lowered. Instead, the limitation was whatever the Chief Engineer decided would "conform to the public interest to the end that the highest public benefit and ***maximum economic development*** may result from the use of such water."[75]

The 201 permits issued between 1980 and 1991 allowed the diversion and perfection of specific quantities of water limited by the 2.0% depletion formula in the regulation.[76]

All of the water rights in the District were permitted and perfected pursuant to these statutory and regulatory authorities that are binding on the owners, the GMD,

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[74] 4 Kan.App.2d at 804 (emphasis added).

[75] K.S.A. 82a-711(a) (emphasis added).

[76] K.A.R. 5-24-2(1983).

and DWR. DWR is not permitted to sweep away or reduce a water right by decree because in order to maintain a well-ordered society people must be able to rely on the stability of their legal rights and because they are real property rights that require investment of significant resources to develop and maintain.[77] Farmers have to pay their mortgages just like everyone else.

Thus, in the absence of specific statutory authority, the Chief Engineer has no power to reduce the quantity of water that can lawfully be diverted pursuant to a valid water appropriation right. In order to approve the proposed LEMA order over the objection of the Intervenors, he must find authority in the LEMA statute. No such authority exists.

II. The LEMA statute does not permit the Chief Engineer to approve a plan that imposes across-the-board reductions in the permitted quantities of water in violation of the prior appropriation doctrine.

The LEMA statute permits a Groundwater Management District to develop a plan to address any of the following conditions:

> (a) Groundwater levels in the area in question are declining or have declined excessively;
>
> (b) the rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area;
>
> (c) preventable waste of water is occurring or may occur within the area in question;

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[77] *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 233, 630 P.2d 1164 (1981) and *Clawson v. State, Dept. of Agriculture, Div. of Water Resources*, 49 Kan.App.2d 789, 799, 315 P.3d 896 (2013) both cases quoting *Freeman v. Stewart*, 2 Utah 2d 319, 273 P.2d 174 (1954).

(d) unreasonable deterioration of the quality of water is occurring or may occur within the area in question.[78]

When a GMD submits a proposed LEMA plan, the Chief Engineer is obligated to review it to determine whether it meets certain basic requirements, including whether it is "consistent with state law."[79] In this case, the GMD submitted a proposed LEMA plan to the Chief Engineer on or about June 8, 2017.

Extensive email correspondence between the Chief Engineer, the GMD, and others demonstrates that the plan had been extensively reviewed by the Chief Engineer and other DWR personnel prior to its formal submittal.

On June 27, 2017, the Chief Engineer entered a finding that the plan met the initial requirements, including a finding that the plan is "consistent with state law." On that basis, the Chief Engineer initiated the LEMA hearing process set out in subsection (b) of the LEMA statute.

The Chief Engineer's finding was clearly erroneous for a number of reasons, including those set out in the *Memorandum in Support of Intervenors' Motion to Provide Due Process Protections for Irrigators* filed on October 27, 2017, and in the *Memorandum in Support of Intervenors' Motion for Reconsideration* filed on October 27, 2017. Both memos are incorporated by reference.

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[78] K.S.A. 82a-1041(a) citing 82a-1036.

[79] K.S.A. 82a-1041(a)(6). *See* Section VI.A.

A. The GMD's LEMA plan is fundamentally flawed because it fails to allocate available water using the Prior Appropriation doctrine.

DWR and the GMD are creatures of statute with no inherent authority or power; they are limited to the authority specifically granted by the Legislature and must operate within the confines of those specific powers.[80] Orders that go beyond an agency's specifically delegated power are void.[81]

Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available to meet the needs of all appropriators.[82] The prior appropriation doctrine permeates the Kansas Water Appropriation Act and is fundamental Kansas public policy that is binding on all water users and government agencies, including DWR and the District.[83] The application and enforcement of the prior appropriation doctrine is arguably the most important "duty or power of the chief engineer granted pursuant to the Kansas water appropriation act," quoting from K.S.A. 82a-1039.[84]

Moreover, Kansas public policy specifically permits groundwater mining in areas where there is little or no recharge even though it reduces the quantity of water

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[80] See authorities cited in the *Memorandum in Support of Intervenors' Motion for Reconsideration.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

available to senior users, the public, and future users.[85] Changing that policy is the exclusive right of the Kansas Legislature.

Critical to the present matter is the fact that the Groundwater Management District Act is subject to, controlled by, and does not amend the Kansas Water Appropriation Act making all of the GMD Act's provisions subject to the prior appropriation doctrine.[86]

The Legislature mandated that IGUCAs follow the prior appropriation doctrine by specifically stating that the duties and powers granted to the Chief Engineer in the Water Appropriation Act trump the IGUCA provisions.[87]

DWR and the GMD have implemented the Kansas public policy that permits groundwater mining in Northwest Kansas.[88] Moreover, DWR has entered a finding of fact for every Kansas water appropriation right holding that the permitted quantity is reasonable and that finding cannot be collaterally attacked by a permitee, other water users, or governmental agencies, including the DWR or the District.[89]

There was testimony at the hearing to the effect that even though K.S.A. 82a-1041(f)(2) requires that available water be apportioned "in accordance with the relative

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[85] *Id.*

[86] *Id.*

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

[88] *Id.*

[89] *Id. See also* the 1956 Report by Professor Shurtz cited in the *Memorandum in Support of the Intervenors' Motion for Reconsideration.*

dates of priority," subsection (f)(3) does not make that requirement. The contention is that the Chief Engineer is permitted to reduce the quantity of water that can be diverted by an appropriator, by a well, by more than one appropriator, or by more than one well using subsection (f)(3).

Mr. Letourneau testified that the proposed LEMA "does not touch the first in time, first in right for priority if impairment would occur. If there was interaction between two water rights, then the junior water right will still be curtailed to meet the senior water right's needs."[90] The fallacious implication of his testimony is that while subsection (b)(2) requires the Chief Engineer to follow the prior appropriation doctrine, subsection (b)(3) allows him to ignore priority and make across-the-board reductions in quantity.

In essence, Mr. Letourneau asserts that the prior appropriation doctrine is not applicable to the proposed LEMA because there is no claim or assertion of impairment of a senior water right by junior appropriators. He goes on to state that the prior appropriation doctrine remains applicable and available if an impairment claim is asserted and substantiated. He alleges that it is not applicable for reasons that he does not and cannot explain.

Because K.S.A. 82a-711 relates very specifically to issues that are to be considered before issuing new permits, it is clear that "impairment" in that context refers to a

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[90] Transcript at 250, lines 1-6.

general reduction in the water table and so is not limited to direct well-to-well interference as Mr. Letourneau has inaccurately suggested.[91]

The prior appropriation doctrine is one method of allocating water from a common source among multiple users. The Legislature could have selected other allocation methods such as absolute ownership, correlative rights, or equitable apportionment. It did not.

The prior appropriation doctrine is the sole method for allocating scarce water resources and there is nothing in Kansas law that recognizes or permits an alternative approach. Nor is there any basis for the notion that the prior appropriation doctrine applies in some instances and not others.

B. Because the GMD's proposed plan determines the total quantity of water that is available for diversion within the boundaries of the proposed LEMA, pursuant to subsection (f)(2) of the statute, water must be allocated "in accordance with the relative dates of priority."

The LEMA corrective action provisions mirror the IGUCA corrective actions permitted by K.S.A. 82a-1038. The Chief Engineer can close the area to new appropriations, which has already been accomplished using other authorities.[92] In addition, a LEMA order can include any of the following provisions:

> (2) determining the permissible total withdrawal of groundwater in the local enhanced management area each day, month or year, and, insofar as

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[91] K.S.A. 82a-711(c) and K.S.A. 82a-711a. *See also* the 1956 Report by Professor Shurtz cited in the *Memorandum in Support of the Intervenors' Motion for Reconsideration.*

[92] K.S.A. 82a-1041(f)(1).

> may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights;
>
> (3) 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
>
> (5) any other provisions making such additional requirements as are necessary to protect the public interest.[93]

Under subsection (f)(2), the Chief Engineer can determine the total quantity of water that is available for diversion within the boundaries of a LEMA. The former Chief Engineer did exactly that in the Walnut Creek IGUGA.[94] In that proceeding, the former Chief Engineer concluded that "no more than approximately 22,700 acre-feet per year" could be diverted from the control area.[95]

The GMD's plan asks the Chief Engineer to do the same thing. It requests that the Chief Engineer enter an order limiting the total quantity that can be withdrawn for irrigation use in portions of the LEMA to 1.7 million acre-feet over five years.

> To promote improved management of water used district-wide with a goal not to exceed 1.7 million acre-feet (AF) for irrigation over five years within townships displaying an annual decline rate for the period 2004 -

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[93] K.S.A. 82a-1041(f)(2)-(4).

[94] http://www.agriculture.ks.gov/docs/default-source/igucas/wc1992.pdf?sfvrsn=2, accessed on December 9, 2017. In that case, the former Chief Engineer went on to allocate the quantity of water in three tiers in violation of the prior appropriation doctrine.

[95] *Id.* at 96,¶ 6.

2015 of 0.5% or greater annual decline and promote more efficient use by non-irrigation uses.[96]

* * *

The total program diversion amount of 1.7 million AF for irrigation use for townships with annual decline rates of 0.5% or greater shall represent five (5) times the sum of designated legally eligible acres times the amount designated for irrigation water rights;[97]

When the Chief Engineer uses the subsection (f)(2) authority, he is obligated to allocate the quantity "in accordance with the relative dates of priority of such rights."[98] Because the GMD's plan asks the Chief Engineer to limit the "permissible total withdrawal of groundwater in the local enhanced management area" subsection (f)(2) is operative and water must be allocated under the prior appropriation doctrine.

C. Approval of the GMD's proposed plan under subsection (f)(3) would require the Chief Engineer to establish that the Legislature intended to repeal the following provisions by implication: K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; and 82a-1039.

Subsection (f)(3) of the LEMA statute does not repeal or permit allocation of water other than under the prior appropriation doctrine. As discussed above and in the *Memorandum in Support of the Intervenors' Motion for Reconsideration*, the Water Appropriation Act (1) mandates that the Chief Engineer administer Kansas water

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[96] GMD4 Plan at 1.

[97] *Id.*

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

appropriation rights using the prior appropriation doctrine and (2) the Groundwater Management Act is subject to that doctrine.

Under subsection (f)(3), the Chief Engineer can reduce the permissible withdrawal of groundwater by individual appropriators or from individual wells. Unlike subsection (f)(2), this provision does not specifically include a requirement that reductions in the quantity of groundwater withdrawal by more than one appropriator or from more than one well follow the prior appropriation doctrine. More importantly, it does not repeal the prior appropriation doctrine or the provisions in the GMD Act making the entire act subject to the Kansas Water Appropriation Act.

It is well settled that repeal by implication is not favored, and acts will not be held to have been repealed by implication unless a later enactment is so repugnant to the provisions of the first act that both cannot be given force and effect.[99]

There is nothing in the GMD Act that permits the Chief Engineer to ignore the prior appropriation doctrine and the absence of a reference to priority in subsection (f)(2) cannot be read to repeal or otherwise emasculate this doctrine which is the foundation of Kansas water law.

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[99] *State v. Roderick*, 259 Kan. 107, 911 P.2d 159 (1996); *City of Salina v. Jaggers*, 228 Kan. 155, 169, 612 P.2d 618 (1980); *Jenkins v. Newman Memorial County Hospital*, 212 Kan. 92, Syl. P 1, 510 P.2d 132 (1973) disapproved on other grounds in *Stephens v. Unified School Dist. No. 500*, 218 Kan. 220, 546 P.2d 197 (1975); *City of Overland Park v. Nikias*, 209 Kan. 643, 498 P.2d 56 (1972); and *Pederson v. Russell State Bank, Executor*, 206 Kan. 718, 481 P.2d 986 (1971); *Wolff v. Rife*, 140 Kan. 584, 38 P.2d 102 (1934).

D. Subsection (f)(3) cannot be read in isolation. Instead, the entire Groundwater Management Act and the Water Appropriation Act must be read and construed together.

Courts apply rules of statutory construction that apply with even greater force to administrative agencies. Moreover, the Kansas Supreme Court has recently held that the interpretation of a statute by an administrative agency is not binding on the courts so that courts no longer defer to an agency's interpretation of a statute. Nor will the courts defer to the way an agency has applied the statute, i.e., the doctrine of operative construction. For example, in *Douglas v. Ad Astra Information Systems, L.L.C.*, the court said that "no deference is due the interpretation or construction given the statute" by an administrative agency.[100] Going on, the Court said:

> To be crystal clear, we unequivocally declare here that the doctrine of operative construction . . . has been ***abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books*** where it will never again affect the outcome of an appeal.

In *Dougan, Administratrix v. McGrew*, the Court set out a key principle of statutory construction stating:

> When this court is faced with the construction of a statute, its function is to interpret such statute and not to rewrite legislation. It is not our province to determine what the law should or should not be. It is our duty to ascertain and, if possible, to make effective the legislative will.[101]

The fundamental goal of statutory construction is to ascertain the intent of the Legislature based on the plain language of the statute, giving common words their

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[100] 296 Kan. 552, 559, 293 P.3d 723 (2013) (emphasis added; citations omitted).

[101] 187 Kan. 410, 415, 357 P.2d 319 (1960) (citations omitted).

ordinary meaning. *University of Kansas Hosp. Authority v. Board of County Comm'rs.*[102] ("If the plain language of a statute is unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.")[103]

In *In re Estate of Strader*, the Court said:

> A statute's language is our paramount consideration because the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used. And in abiding by the language the legislature has used, we assign common words their ordinary meaning.[104]

These are not ancient or archaic statements. They are fundamental rules that have been are being applied.[105] Moreover, these are rules that have been enunciated and applied in cases in which DWR was a party.[106]

It appears that DWR and the GMD wish that they could read subsection (f)(3) by itself without considering its context. But the provision cannot be read in isolation. Instead, the rules of statutory construction require that the language of the entire GMD

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[102] 301 Kan. 993, 998, 348 P.3d 602 (2015).

[103] *Id.* Citations and internal quotations omitted.

[104] 301 Kan. 50, 55, 339 P.3d 769 (2014).

[105] *See, e.g., Milano's, Inc. v. Kansas Dept. of Labor*, 296 Kan. 497, 293 P.3d 707 (2013); *Kansas One-Call System, Inc. v. State*, 274 P.3d 625, 294 Kan. 220. (2012); *In re J.M.D.*, 260 P.3d 1196, 293 Kan.153 (2011).

[106] *See e.g., Clawson v. State, Dept. of Agriculture, Div. of Water Resources*, 49 Kan.App.2d 789, 315 P.3d 896 (2013); *Cochran v. State, Dept. of Agr., Div. of Water Resources*, 291 Kan. 898, 249 P.3d 434 (2011); *Wheatland Elec. Co-op., Inc. v. Polansky*, 46 Kan.App.2d 746, 265 P.3d 1194 (2011); and *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 132 P.3d 870 (2006).

Act be read together, in context, and harmonized.[107]

The Chief Engineer's subsection (f)(2) power to reduce the "permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the local enhanced management area" must be read together with and harmonized with the entire the Groundwater Management District Act which, in turn is subject to, controlled by, and does not amend, the Kansas Water Appropriation Act. [108] The GMD Act specifically states:

> It is the policy of this act to preserve basic water use doctrine and to establish the right of local water users to determine their destiny with

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[107] *See e.g., Miller v. Board of County Commissioners, Wabaunsee County*, 305 Kan. 1056, 390 P.3d 504 (2017) ("To construe the words of a statute, court considers the language and design of the entire statute."); *In re Protest of Jones*, 52 Kan.App.2d 393, 367 P.3d 306 (2016) ("In cases involving statutory construction, courts are not permitted to consider only a certain isolated part or parts of an act, but are required to consider and construe together all parts thereof in *pari materia*."); *Milano's, Inc. v. Kansas Dept. of Labor*, 296 Kan. 497, 293 P.3d 707 (2013) ("Supreme Court ascertains the legislature's intent behind a particular statutory provision from a general consideration of the entire act; effect must be given, if possible, to the entire act and every part thereof."); *Kansas One-Call System, Inc. v. State*, 294 Kan. 220, 274 P.3d 625 (2012) ("When interpreting a statute, legislative intent is to be determined from a general consideration of the entire act."); *Herrell v. National Beef Packing Co.*, LLC, 292 Kan. 730, 259 P.3d 663 (2011) ("Courts ascertain the legislature's intent behind a particular statutory provision from a general consideration of the entire act."); *Cochran v. State, Dept. of Agr., Div. of Water Resources*, 291 Kan. 898, 249 P.3d 434 (2011) ("Courts ascertain the legislature's intent behind a particular statutory provision from a general consideration of the entire act.); *Welch v. Board of Ed. of Unified School Dist., No. 495, Pawnee County*, 212 Kan. 697, 703, 512 P.2d 358 (1973) ("Related statutory provisions are to be considered together and in their entirety in determining legislative intent.")

[108] See Section IV and V of the *Memorandum in Support of Intervenors' Motion for Reconsideration.*

respect to the use of the groundwater insofar as it does not conflict with the basic laws and policies of the state of Kansas.[109]

Likewise, GMDs are permitted to "adopt administrative standards and policies" that are "***not inconsistent*** with the provisions of . . . the Kansas water appropriation act."[110] GMDs are permitted to recommend rules and regulations to be adopted by the Chief Engineer so long as they are "***not inconsistent*** with . . . the Kansas water appropriation act."[111] The GMD Act requires that each GMD develop a management plan that is consistent with the Water Appropriation Act and must be approved by the Chief Engineer but only if it is "***compatible with article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto*** and any other state laws or policies."[112]

Moreover, the Legislature mandated that IGUCAs, after which the LEMA statute was clearly modeled, follow the prior appropriation doctrine by specifically stating that the duties and powers granted to the Chief Engineer in the Water Appropriation Act trump the IGUCA provisions.[113]

The erroneous assertion that subsection (f)(2) requires that the Chief Engineer follow the prior appropriation doctrine while subjection (f)(3) does not only because it

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

[110] K.S.A. 82a-1028(n) (emphasis added).

[111] K.S.A. 82a-1028(o) (emphasis added).

[112] K.S.A. 82a-1029 (emphasis added.)

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

does not specifically mention the doctrine violating fundamental rules of statutory conservation and basic common sense.

III. The GMD plan violates Kansas law which prohibits allocating water based on the type of use.

The GMD plan treats irrigation water rights differently than other kinds of water rights in direct violation of Kansas law. As discussed above, and in the *Memo in Support of the Intervenors' Motion for Reconsideration*, Kansas adopted the prior appropriation doctrine in 1945. First-in-time is a central feature of the doctrine and while the statute sets out preferences where the priority dates are equal, it is clear that priority trumps the list of preferences. This principle could not be clearer:

> (b) ***The date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights.*** Where lawful uses of water have the same date of priority, such uses shall have priority in the following order of preference: Domestic, municipal, irrigation, industrial, recreational and water power uses. ***The holder of a water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this state, other than through condemnation.***
>
> (c) As between persons with appropriation rights, ***the first in time is the first in right.***[114]

In spite of this clear and long-standing doctrine, the GMD proposes to allocate water among all irrigation rights stating, for example: "All irrigation water rights, excluding vested rights, shall be limited to the allocation for the water right location on

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[114] K.S.A. 82a-707(b) and (c) (emphasis added).

the accompanying map over the 5-year period beginning January 1, 2018 and ending December 31, 2022."[115]

The plan goes on to address other types of use differently.[116] Restrictions are placed on livestock and poultry use that are different than those placed on irrigation use.[117] Municipal users will be "encouraged" to reduce water use.[118] And all other non-irrigation users "will utilize best management practices."[119]

The plan does not indicate how reductions in municipal use will be "encouraged" in spite of the fact that this question was posed to the GMD at a public meeting in St. Francis in November or December of 2016.[120] Nor does the plan indicate how the GMD intends to implement and enforce the plan's requirement that all non-irrigation users "will utilize" best management practices.

The plan cannot be approved because it would allocate water based on the authorized use in direct violation of the Water Appropriation Act.

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[115] GMD Plan, at 1, ¶ (1)(b).

[116] *Id.* at 2-3, ¶ (2)(a)-(c).

[117] *Id.* at 3, ¶ (2)(a). At the November 14, 2017 hearing, Mr. Luhman testified that the GMD had not formally amended the plan but proposed amendments to the portion of the plan dealing with stockwatering use. Both the plan and the proposed amendment treat stockwatering use differently than irrigation and other types of use. November 14, 2017, Trans. at 38:11 – 40:13.

[118] *Id.* at 3, ¶ (2)(b).

[119] *Id.* at 3, ¶ (2)(c).

[120] *Id.* at 22.

IV. The boundaries of the proposed LEMA are not "reasonable" as required by the LEMA statute.

To approve the LEMA, the statute requires an initial finding that that the proposed boundaries are reasonable.[121] The map attached to the GMD plan indicates that there are 121 full and 34 partial townships in the District. There are 25 full and 16 partial townships shaded in blue and 7 full and 11 partial townships shaded green. Even accepting the dubious conclusion that annual declines of 0.5% are "excessive," 32 full and 27 partial townships, over one-fourth of the District, do not meet the statutory standard.

In order to approve a LEMA, it must be shown that one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d) exist.[122] In this case, the GMD relies on subsection (a) of that statute: "Groundwater levels in the area in question are declining or have declined excessively." As discussed above, there is no evidence in the record to support the District's assertion that 0.5% annual declines are excessive, especially in light of Kansas public policy permitting groundwater mining. But even accepting the District's definition declines in at least one fourth of the District are not "excessive." There is no reason to impose restrictions over and above those that are already in place in areas where the GMD concedes that declines are not excessive.

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[121] K.S.A. 82a-1041(b)(1) and (3).

[122] K.S.A. 82a-1041(b)(1).

At the hearing, Mr. Luhman testified that these townships should be included in the LEMA in order to impose the "additional monitoring requests" and the "meter tampering policy" even though there are no cutbacks or allotments in those areas.[123]

While the LEMA statute authorizes the inclusion of other provisions that are "necessary" to protect the public interest, there is no evidence in the record to indicate why and how these additional provisions are necessary to protect the public interest. DWR has extensive regulations that accomplish the same purpose making the additional provisions unnecessary to protect the public interest or for any other purpose.

V. Because the proposed plan is overly simplistic it is unfair and denies many irrigators Equal Protection of the laws.

The District's plan calls for restrictions in townships with average annual declines in the following ranges:

- No decline shaded green on the GMD map
- 0 to 0.5% average annual decline shaded blue on the GMD map
- 0.5% - 1% average annual decline shaded purple on the GMD map
- 1% - 2% average annual decline shaded yellow on the GMD map
- 2%+ average annual decline shaded red on the GMD map[124]

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[123] November 14, 2017 Trans. at 71:2-10.

[124] GMD Plan.

The GMD's proposed plan uses scant data to estimate the extent of groundwater declines across the entire District. As set out in the Statement of Facts, elevation data from 268 wells in the District was interpolated to estimate average groundwater elevations in over 200,000 cells that was then averaged across over 4,000 section of land in the District and then averaged again to estimate average elevations by township.

There are some townships with relatively uniform percentages of depletion.[125] But that is not uniformly true. When section-by-section data reviewed, it is apparent that declines are not uniform across many townships in the GMD.[126]

Irrigators in areas with less than the average declines in their township are punished while those with greater than average declines in the township are rewarded.

To the extent that an irrigator is in an area with less than the average annual decline in a township because of voluntary conservation efforts, it violates the legislative mandate to favor those irrigators. And as Mr. Luhman testified, the GMD decided to ignore that statutory requirement. [127]

Moreover, the proposed plan mistreats irrigators at the edge of a township that is adjacent to another township that has a lower average annual rate of depletion.

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[125] *See* Ex. D and Ex. D-1, attached. Ex. D-1 uses the percent change formula used by the District and Mr. Wilson.

[126] *Id. See also,* Exs. I, J, K, and L.

[127] November 14, 2017, Trans. at 33, lines 10-25.

The GMD's overly simplistic allocation method is unfair to many irrigators across the District and fails to provide equal protection. As H. L. Mencken has said, "Explanations exist; they have existed for all time; there is always a well-known solution to every human problem — neat, plausible, and wrong."

VI. The process implemented by the Chief Engineer failed to provide adequate procedural protections to the Intervenors and to all other irrigators in the Groundwater Management District.

DWR's process is fundamentally flawed and cannot support the proposed LEMA. In addition to the failure to allocate reductions based on priority, the GMD plan fails to provide equal protection to the Intervenors and all other irrigators since it violated clear statutory requirements.

A. The Chief Engineer's June 27, 2017, letter fails to provide findings of fact, conclusions of law, or the policy basis for his decisions.

Because the Chief Engineer failed to provide any basis for his June 27, 2017, conclusions that the proposed plan meets the six threshold requirements in K.S.A. 82a-1041(a), the Intervenors are left to guess about the basis for his conclusions. This placed the Intervenors at a significant disadvantage from the outset of this proceeding. In addition, administrative review pursuant to K.S.A. 82a-1901 of any order the Chief Engineer issues and judicial review will also be problematic. *See, e.g.* K.S.A. 77-526(c).

B. The Intervenors and other irrigators have been denied Due Process and Equal Protection because the Chief Engineer refused to permit Intervenors to conduct discovery and denied adequate time to prepare.

The Due Process Clause applies to LEMA hearings because any orders approving the proposed LEMA will be state action that will adversely affect real property interests.[128] Because water rights are real property rights, the Intervenors' interests are entitled to significant procedural protection.[129] There is a significant risk of erroneous deprivation and additional procedural safeguards would have dramatically increased the Intervenors' ability to safeguard their property interests.[130] Any additional burden caused by providing the Intervenors with their basic due process rights would have been minimal and, in fact, illumination of all of the facts would have been to the Agency's advantage.[131]

Because this administrative proceeding was conducted without allowing the Intervenors an opportunity to conduct discovery and without adequate time to prepare the Intervenors' due process rights have been and are being violated. For example, DWR has provided over 1,500 pieces of electronic correspondence with numerous attachments. Counsel has only had time to make a cursory review of the documents provided.

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[128] *See* authorities cited in the *Memorandum in Support of Intervenors' Motion to Provide Due Process Protections for Irrigators.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

C. The Intervenors and other irrigators have been denied Due Process and Equal Protection because the Chief Engineer has failed to comply with the 5.5-year old legislative mandate directing him to adopt rules and regulations "to effectuate and administer the provisions of this section."

The LEMA statute imposes a mandatory duty on the Chief Engineer to adopt rules and regulations to govern LEMA proceedings stating, "[t]he chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section."[132]

The Legislature knows the difference between "shall" and "may." Compare K.S.A. 82a-1041(k), quoted above, with K.S.A. 82a-736(e)(6), stating that the Chief Engineer "***may*** establish, by rules and regulations, criteria for . . . term permits."[133] Moreover, the Legislature has made the failure to issue a regulation reviewable by the Courts.[134]

In *Hallmark Cards, Inc. v. Kansas Department of Commerce & Housing,*[135] the Court said:

> When an agency is charged with implementing or interpreting legislation, especially when the agency is administering a licensing or certification statute, fundamental fairness and due process generally dictate that any "standard" or "statement of policy" be expressed in a rule or regulation filed and published pursuant to law. K.S.A. 77–415 *et seq.* Members of the public, and others affected thereby, should not be subjected to critical

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[132] K.S.A. 82a-1041(k).

[133] Emphasis added.

[134] *See* K.S.A. 77-602(b)92) defining "agency action" to include the "failure to issue a rule and regulation."

[135] 32 Kan.App.2d 715, 725, 88 P.3d 250 (2004) (rev. denied).

agency rules and regulations that are known only by agency personnel. *Clark v. Ivy*, 240 Kan. 195, 206, 727 P.2d 493 (1986).

The *Hallmark* Court went on to state that the failure to promulgate regulations has both Due Process and Equal Protection concerns and an agency's "internal and unwritten standards" are subject to a "higher level of scrutiny" when the Legislature has explicitly stated that the agency "shall" publish rules and regulations to implement a statute.[136]

The failure to promulgate these regulations has resulted in an *ad hoc* and *ad libitum* administrative proceeding that is entirely to the benefit of the Division of Water Resources and the GMD. The Intervenors and others are left to guess about how this important proceeding will be handled and the impact it will have on their real property rights.[137]

D. The Chief Engineer unlawfully delegated his obligation to conduct the initial LEMA hearing to a third party.

Using "shall," the LEMA statute requires the Chief Engineer to "conduct an initial public hearing on the question of designating such an area as a local enhanced management area according to the local enhanced management plan."[138] There is nothing in the statute that permits the Chief Engineer to delegate this mandatory duty to a third party.

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[136] 32 Kan.App.2d at 726.

[137] *See* Section VI.A., *supra*.

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

This is more than a technical violation. At the initial hearing, the Chief Engineer is required to take evidence several matters that require the exercise of engineering judgment. For example, what are "excessive" declines; "preventable" wastes; and "unreasonable" deterioration? More importantly, what is or is not in the "pubic interest"?[139]

For these and other reasons the Intervenors and others have been denied due process and equal protection.

VII. There are fundamental problems with the LEMA statute that have never been resolved and cannot be resolved by administrative agencies.

As discussed above, the 1957 amendments to the Water Appropriation Act specifically and unequivocally state that Kansas public policy permits groundwater mining in Western Kansas.[140] Any change in this public policy must come from the Legislature.

DWR issued thousands of water appropriation rights in Western Kansas under this authority, together with K.S.A. 82a-703, ("all waters within the state may be appropriated for beneficial use"), K.S.A. 82a-705, 82a-709, and 82a-728 (new appropriation rights require the chief engineer's prior approval), K.S.A. 82a-711(a) (". . .

---

[139] *Id.* Although the Legislature itself may have unlawfully delegated too much legislative power to the Chief Engineer.

[140] *See, e.g.*, K.S.A. 82a-711 and 82a-711a, the 1956 Shurtz report, and Sections III and VI-VIII of the *Memorandum in Support of the Intervenors' Motion for Reconsideration*, filed on October 27, 2017.

to the end that the highest public benefit and maximum economical development may result from the use of such water."), and other provisions of the Water Appropriation Act.

As discussed the *Memorandum in Support of the Intervenors' Motion for Reconsideration,* all of the water rights in the GMD with a priority date before August 19, 1991, were created under the DWR and GMD planned depletion policy specifically authorized by K.S.A. 82a-711(c), K.S.A. 82a-711a, and the regulations in effect within the GMD.[141] And in each case, DWR has made findings of fact that the proposed use does not impair existing water rights; does not prejudicially or unreasonably affect the public interest; and the rate of diversion and quantity are within reasonable limitations.[142]

A finding under the LEMA statute that reduces the quantity of water that can be diverted pursuant to a valid water right when senior water rights can still be fully satisfied is an impermissible collateral attack on DWR's own orders and a taking of private property for public use that requires compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution and K.S.A. 26-501, *et seq.*[143]

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[141] *Memorandum in Support of the Intervenors' Motion for Reconsideration,* Section VIII.

[142] *Id.,* Section VII.

[143] The IGUCA provisions, K.S.A. 82a-1036 – 82a-1040, are subject to the same fundamental problem.

Respectfully submitted,

FOULSTON SIEFKIN LLP

By: _____

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Telephone: (316) 291-9725
Facsimile: (866) 347-3138
Email: dtraster@foulston.com
ATTORNEY FOR INTERVENORS

CERTIFICATE OF SERVICE

On this 22nd day of December, 2017, I hereby certify that the original of the foregoing was sent by electronic mail to:

David W. Barfield, Chief Engineer
Division of Water Resources
Kansas Dept. of Agriculture
1320 Research Drive
Manhattan, KS 66502
David.Barfield@ks.gov

and true and correct copies were sent by the same method to:

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

Aaron Oleen, Staff Attorney
Kansas Department of Agriculture
1320 Research Drive
Manhattan, KS 66502
Aaron.Oleen@ks.gov

Ray Luhman, District Manager
Northwest Kansas Groundwater Management District No. 4
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1175 S. Range
Colby, KS 67701
rluhman@gmd4.org

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

David M. Traster, #11062

THE STATE OF KANSAS

STATE BOARD OF AGRICULTURE
Sam Brownback, *Secretary*

DIVISION OF WATER RESOURCES
David L. Pope, *Chief Engineer*

APPROVAL OF APPLICATION
and
PERMIT TO PROCEED

DUPLICATE COPY

RECEIVED

JUL 15 1992

Field Office
Division of Water Resources
Section

(This Is Not a Certificate of Appropriation)

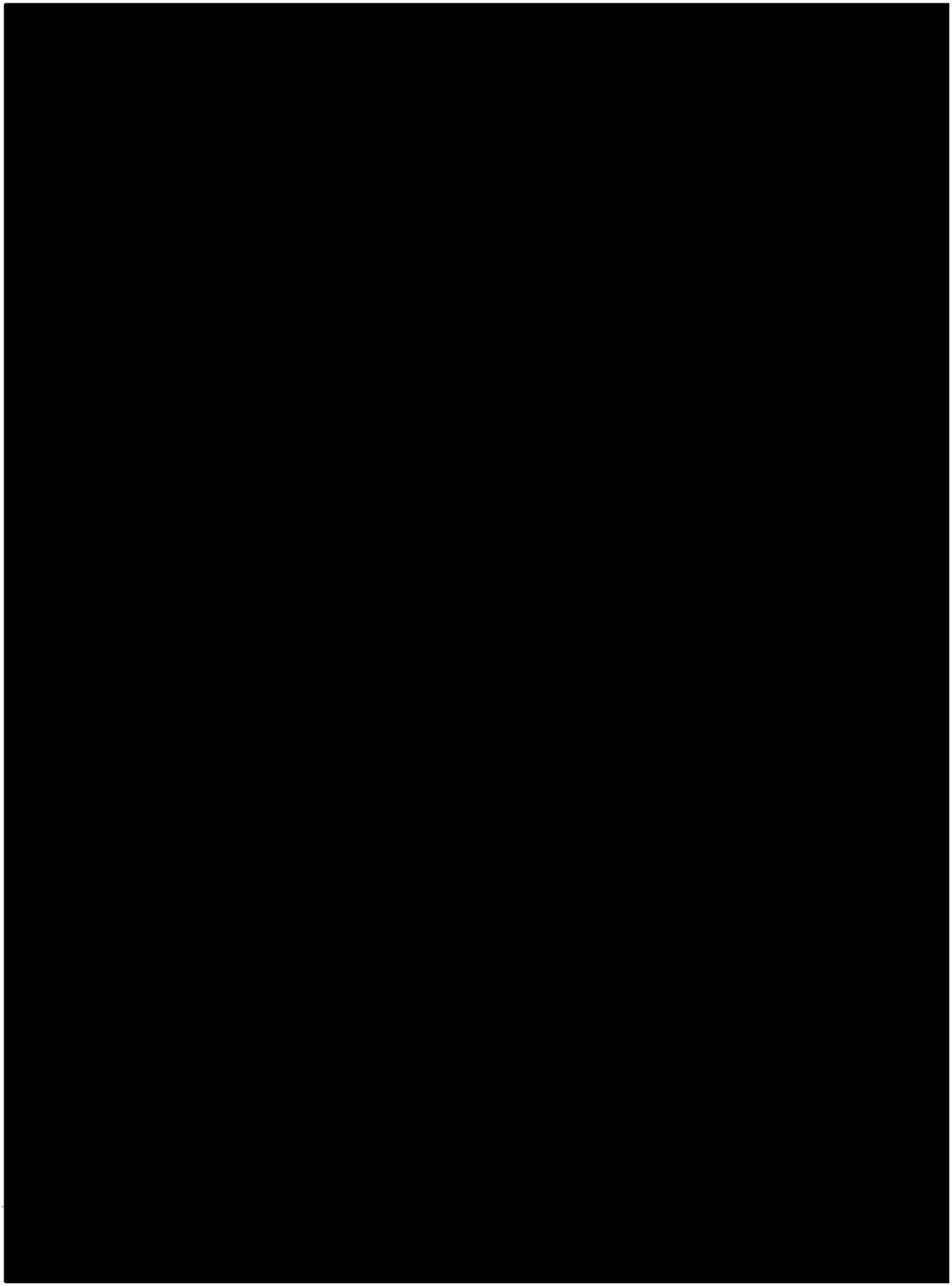
This is to certify that I have examined Application, File No. [redacted] of the applicant

[redacted]

for a permit to appropriate water for beneficial use, together with the maps, plans and other submitted data, and that the application is hereby approved and the applicant is hereby authorized, subject to vested rights and prior appropriations, to proceed with the construction of the proposed diversion works (except those dams and stream obstructions regulated by K.S.A. 82a-301 through 305a, as amended), and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect the proposed appropriation subject to the following terms, conditions and limitations:

[redacted]

MICROFILMED



[redacted]

26. That the Chief Engineer specifically retains jurisdiction in this matter with authority to make such reasonable reductions in the approved rate of diversion and quantity authorized to be perfected, and such changes in other terms, conditions, and limitations set forth in this approval and permit to proceed as may be deemed to be in the public interest.

Dated at Topeka, Kansas, this 1st day of July, 1992.

DIVISION OF WATER RESOURCES
DAVID L. POPE
CHIEF ENGINEER
DIRECTOR
KANSAS STATE BOARD of AGRICULTURE

David L. Pope

David L. Pope, P.E.
Chief Engineer
Division of Water Resources
Kansas State Board of Agriculture

THE STATE OF KANSAS

STATE BOARD OF AGRICULTURE
Sam Brownback, *Secretary*

DIVISION OF WATER RESOURCES
David L. Pope, *Chief Engineer*

RECEIVED
AUG 07 1992
State Office
Division of Water Resources
Stockton

APPROVAL OF APPLICATION
and
PERMIT TO PROCEED
(This is not a Certificate of Appropriation)

DUPLICATE COPY

RECEIVED
DEC 15
DIVISION OF WATER RESOURCES
STOCKTON

This is to certify that I have examined Application File No. [redacted] of the applicant [redacted]

for a permit to appropriate water for beneficial use, together with the maps, plans and other submitted data, and that the application is hereby approved and the applicant is hereby authorized, subject to vested rights and prior appropriations, to proceed with the construction of the proposed diversion works (except those dams and stream obstructions regulated by K.S.A. 82a-301 through 305a, as amended), and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect the proposed appropriation subject to the following terms, conditions and limitations:

[redacted]

[redacted]

19. That the Chief Engineer specifically retains jurisdiction in this matter with authority to make such reasonable reductions in the approved rate of diversion and quantity authorized to be perfected, and such changes in other terms, conditions, and limitations set forth in this approval and permit to proceed as may be deemed to be in the public interest.

[redacted]

Dated this 6th day of Dec.

DIVISION OF WATER RESOURCES
DAVID L. POPE
CHIEF ENGINEER
DIRECTOR
KANSAS STATE BOARD of AGRICULTURE

David L. Pope

David L. Pope, Chief Engineer, P.E.
Division of Water Resources
Kansas State Board of Agriculture

THE STATE OF KANSAS

DUPLICATE COPY

STATE BOARD OF AGRICULTURE
~~Phillip A. Fishburn, Acting Secretary~~
Alice Devine, Secretary

DIVISION OF WATER RESOURCES
David L. Pope, *Chief Engineer*

APPROVAL OF APPLICATION
and
PERMIT TO PROCEED

(This Is Not a Certificate of Appropriation)

This is to certify that I have examined Application, File No. [redacted] of the applicant

[redacted]

for a permit to appropriate water for beneficial use, together with the maps, plans and other submitted data, and that the application is hereby approved and the applicant is hereby authorized, subject to vested rights and prior appropriations, to proceed with the construction of the proposed diversion works (except those dams and stream obstructions regulated by K.S.A. 82a-301 through 305a, as amended), and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect the proposed appropriation subject to the following terms, conditions and limitations:

[redacted]

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MAY 11 1995

Division of Water Resources
Garden City

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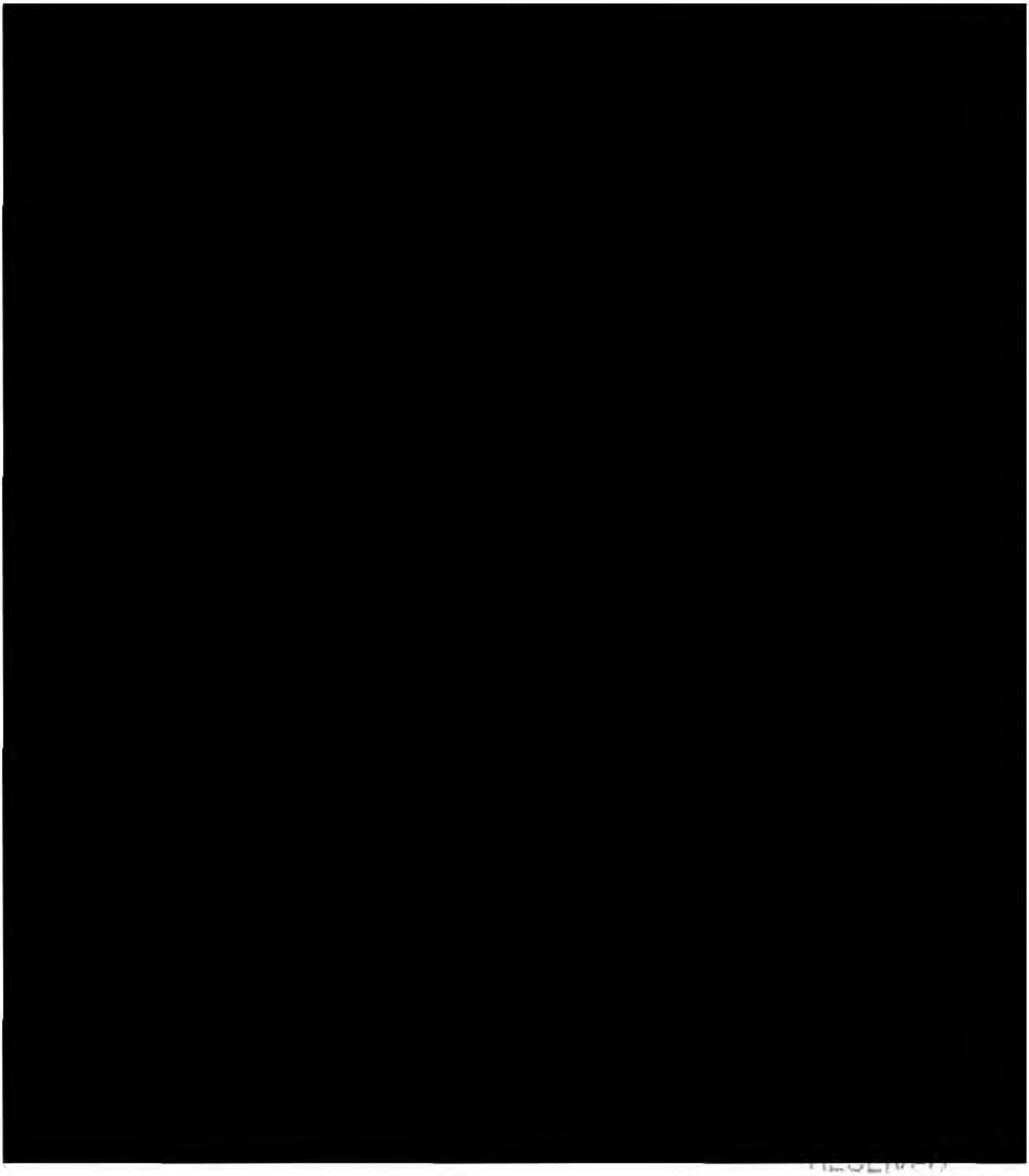

RECEIVED

MAY 1 1 1995

Division of Water Resources
Garden City

WATER METER REQUIRED

MICROFILMED

[redacted]

20. That the Chief Engineer specifically retains jurisdiction in this matter with authority to make such reasonable reductions in the approved rate of diversion and quantity authorized to be perfected, and such changes in other terms, conditions, and limitations set forth in this approval and permit to proceed as may be deemed to be in the public interest.

Dated at Topeka, Kansas, this 27th day of April, 1995.

DIVISION OF WATER RESOURCES
DAVID L. POPE
CHIEF ENGINEER
KANSAS STATE BOARD of AGRICULTURE

David L. Pope, P.E.
Chief Engineer
Division of Water Resources
Kansas State Board of Agriculture

DUPLICATE COPY

THE STATE OF KANSAS

KANSAS DEPARTMENT OF AGRICULTURE
Alice A. Devine, *Secretary of Agriculture*

DIVISION OF WATER RESOURCES
David L. Pope, *Chief Engineer*

APPROVAL OF APPLICATION
and
PERMIT TO PROCEED

(This is not a Certificate of Appropriation)

RECEIVED
JUN 0 4 1996
Field Office
Division of Water Resources
Stockton

This is to certify that I have examined Application File No. [redacted] of the applicant

[redacted]

for a permit to appropriate water for beneficial use, together with the maps, plans and other submitted data, and that the application is hereby approved and the applicant is hereby authorized, subject to vested rights and prior appropriations, to proceed with the construction of the proposed diversion works (except those dams and stream obstructions regulated by K.S.A. 82a-301 through 305a, as amended), and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect the proposed appropriation subject to the following terms, conditions and limitations:

[redacted]

DUPLICATE COPY

[redacted]

19. That the Chief Engineer specifically retains jurisdiction in this matter with authority to make such reasonable reductions in the approved rate of diversion and quantity authorized to be perfected, and such changes in other terms, conditions, and limitations set forth in this approval and permit to proceed as may be deemed to be in the public interest.

Dated this 10th day of May , 19 96

David L. Pope, Chief Engineer, P.E.
Division of Water Resources
Kansas Department of Agriculture

WATER METER REQUIRED

THE STATE OF KANSAS

KANSAS DEPARTMENT OF AGRICULTURE
Adrian J. Polansky, Secretary of Agriculture

DIVISION OF WATER RESOURCES
David L. Pope, Chief Engineer

APPROVAL OF APPLICATION
and
PERMIT TO PROCEED

(This Is Not a Certificate of Appropriation)

This is to certify that I have examined Application, **File No.** [redacted] of the applicant [redacted]

RECEIVED
JUL 0 8 2005
Stockton Field Office
Division of Water Resources

for a permit to appropriate water for beneficial use, together with the maps, plans and other submitted data, and that the application is hereby approved and the applicant is hereby authorized, subject to vested rights and prior appropriations, to proceed with the construction of the proposed diversion works (except those dams and stream obstructions regulated by K.S.A. 82a-301 through 305a, as amended), and to proceed with all steps necessary for the application of the water to the approved and proposed beneficial use and otherwise perfect the proposed appropriation subject to the following terms, conditions and limitations:

[redacted]

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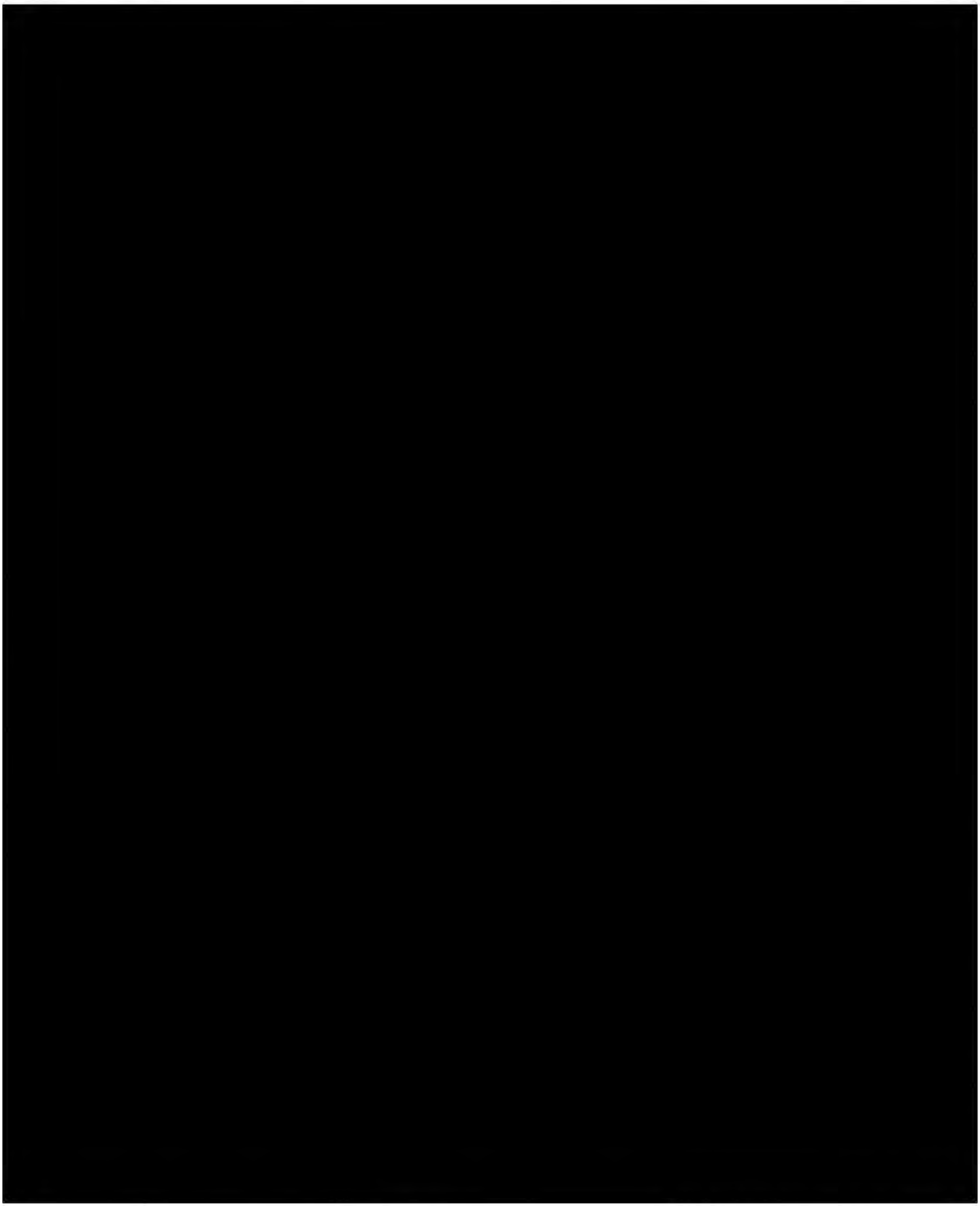

[redacted]

19. That the Chief Engineer specifically retains jurisdiction in this matter with authority to make such reasonable reductions in the approved rate of diversion and quantity authorized to be perfected, and such changes in other terms, conditions, and limitations set forth in this approval and permit to proceed as may be deemed to be in the public interest.

[redacted]

This Order shall become a final agency action, as defined by K.S.A. 77-607(b), without further notice to the parties, if a request for hearing or a petition for administrative review is not filed as set forth below.

Request for Hearing. According to K.A.R. 5-14-3(c), any party who desires a hearing must submit a request within 15 days after the date shown on the Certificate of Service attached to this Order. Filing a request for a hearing will give you the opportunity to submit additional facts for consideration, contest any findings made by the Chief Engineer or present any other information you believe should be considered in this matter. A timely-filed request for hearing will stay the deadline for requesting administrative review of this Order pending the outcome of the hearing.

Petition for Review. The applicant, if aggrieved by this Order, may petition for administrative review, pursuant to K.S.A. 82a-711(c) and K.S.A. 82a-1901(a). The petition must be filed within 30 days after the date shown on the Certificate of Service attached to this Order and must set forth the basis for the review, unless stayed by the timely filing of a request for hearing.

Any request for hearing or petition for administrative review shall be in writing and shall be submitted to the attention of: Chief Legal Counsel, Kansas Department of Agriculture, 109 SW 9th Street, 4th Floor, Topeka, Kansas 66612, Fax: (785) 368-6668.

Dated at Topeka, Kansas, this 28th day of June, 2005.

DIVISION OF WATER RESOURCES
DAVID L. POPE
CHIEF ENGINEER
KANSAS DEPARTMENT of AGRICULTURE

David L. Pope, P.E.
Chief Engineer
Division of Water Resources
Kansas Department of Agriculture

State of Kansas)
) SS
County of Shawnee)

The foregoing instrument was acknowledged before me this 28th day of June
David L. Pope, P.E., Chief Engineer, Division of Water Resources, Kansas Department of Ag

RECEIVED
JUL 0 8 2005
Stockton Field Office
Division of Water Resources

Debra L. Mendez
Notary Public
Notary Public
State of Kansas
My Appt. Expires 5/13/06

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Average Annual Percent Decline 2004-2015

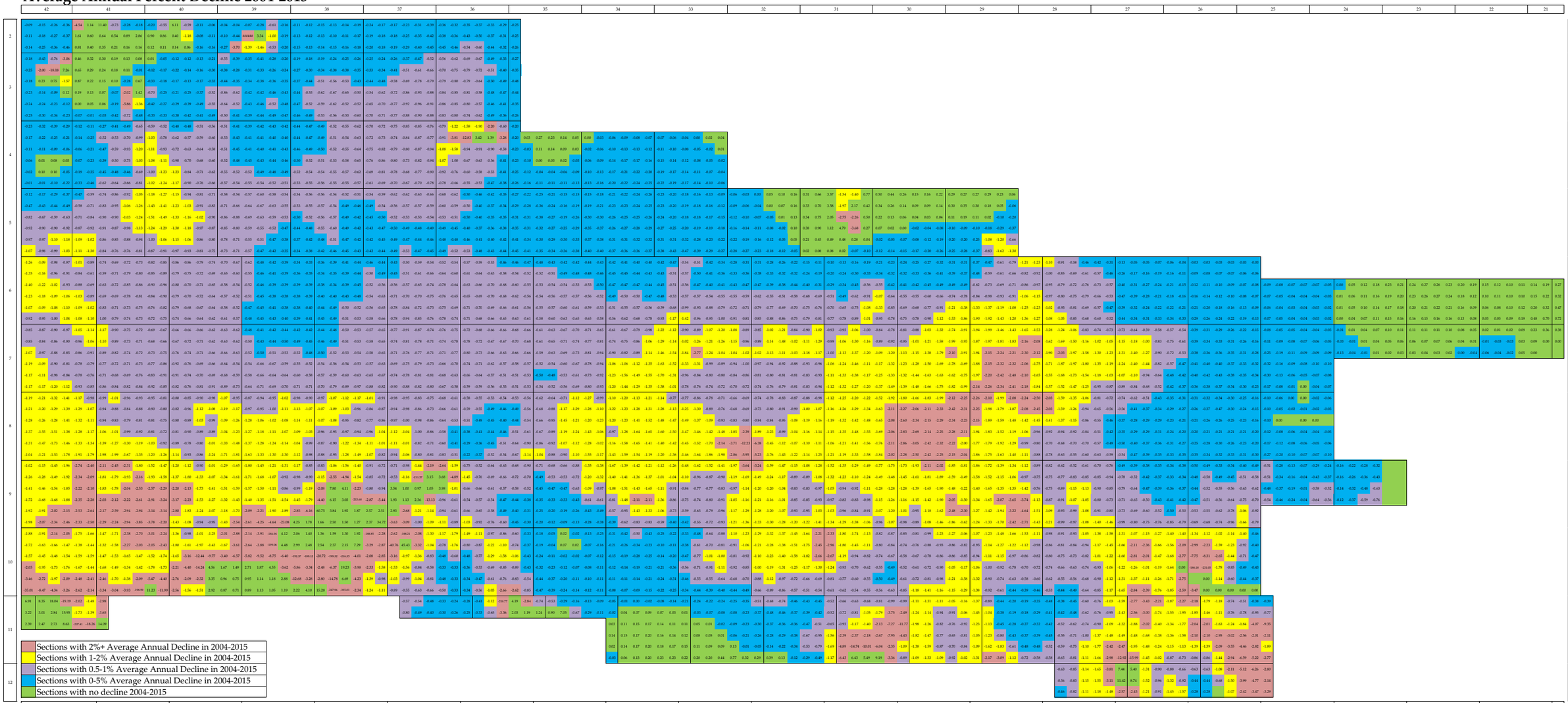

EXHIBIT
D-1