BEFORE THE DIVISION OF WATER RESOURCES
KANSAS DEPARTMENT OF AGRICULTURE

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, Thomas, and Wallace Counties, Kansas.	)	**002 – DWR-LEMA – 2017**
Pursuant to K.S.A. 82a-1041.	)	

DECISION TO EXPAND DUE PROCESS PROCEDURES AT THE SECOND LOCAL ENHANCED MANAGEMENT AREA PUBLIC HEARING

COMES NOW, David W. Barfield, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture ("Chief Engineer"), having considered the Intervenors' motion and the written and oral arguments submitted, hereby agrees to modify the procedures, as stated herein, to be followed at the second LEMA public hearing ("second hearing") which will further consider the Northwest Kansas Groundwater Management District No. 4 ("GMD4") District Wide Local Enhanced Management Area ("LEMA") Management Plan.

BACKGROUND

On October 27, 2017, Intervenors filed a *Motion to Provide Due Process Protections* regarding the upcoming second hearing. Along with this motion, a memorandum in support of the motion was also submitted to the Chief Engineer. The memorandum argued that expanded due process procedures should be implemented at the second hearing because real property interests are at stake, and that lacking the opportunity to cross-examine witnesses, conduct discovery, or have time beyond that required by statute to prepare would constitute a violation of the United States Constitution, the Kansas Constitution, and other Kansas law. Further, such failings would lead to a record unsuitable for additional review. The remedy proposed by Intervenors would be to allow full cross-examination of witnesses and to delay the second hearing, scheduled for November 14, 2017, to allow more time to prepare and to conduct some

form of discovery. *Memorandum in Support of the Intervenors' Motion for Due Process Procedures* ("*Memorandum for Due Process*").

At a scheduled pre-hearing telephone conference held on October 31, 2017, attorney for Intervenors and attorney for GMD4 presented oral arguments regarding the need for expanded due process procedures at the second hearing.

GMD4 responded to Intervenors' *Memorandum for Due Process* and oral arguments with a written response on November 1, 2017, arguing that the Chief Engineer correctly followed the timelines set forth by the Kansas Legislature, that ample opportunity to gain information about the LEMA plan and process has already been afforded to all parties, and that lacking any specific statutory requirements, the Chief Engineer has the discretion to implement the hearing procedures that he deems most appropriate. *Written Response to Intervenors' Motion to Provide Due Process Protections* ("*Response to Motion*"). The Intervenors responded to GMD4 in a reply submitted on November 2, 2017. *Reply Memorandum in Support of the Intervenors' Motion* ("*Reply Memorandum*").

DECISION

I. Due Process in LEMA Proceedings

The Intervenors have gone to great lengths in both their initial memorandum and in their response to GMD4 to establish that the United States Constitution, the Kansas Constitution, and Kansas law require that due process procedures be applied to LEMA proceedings. The Chief Engineer agrees with this assertion and believes that the procedures contained in K.S.A. 82a-1041, as set by the Legislature, provide for acceptable due process protections. Due process protections are provided in numerous ways. First, K.S.A. 82a-1041 provides for formal action by the applicable groundwater management district board of directors when they recommend a proposed LEMA to the Chief Engineer. Second, this is followed with both public and individual notice to all water right owners within a proposed LEMA. Third, two public hearings must be held, with proper notice, and an opportunity to provide statements under oath with a complete record made of all oral and written statements. The information in the record is then used as the basis for approving, rejecting, or recommending modifications to a LEMA management plan. The Legislature has outlined a procedure for a LEMA to be initiated and that process encompasses the need for due process procedures.

Since the Legislature has already provided for due process, we must turn to Intervenors' arguments to see what constitutes the basis of their concerns. Based on the arguments made by Intervenors, their primary concern appears not to be whether due process is applied, but to what extent due process procedures are expanded on those contained in K.S.A. 82a-1041.

Intervenors raise a speculative argument in their *Reply Memorandum*, that the requirement by the Legislature that rules and regulations be promulgated in order to "effectuate and administer the provisions of this section" require the enactment of specific due process protections. K.S.A. 82a-1041(k). Intervenors present their view of what exactly these rules and regulations should contain, but such interpretation is just that, the Intervenors' speculation, which, absent something explicit in statute or in the legislative history, is not convincing evidence of legislative intent.

There is a stronger argument based on similar water statutes that the Legislature did not intend to guarantee greater due process procedures than those they outlined in K.S.A. 82a-1041. A useful comparison can be made to the provisions related to the creation of Intensive Groundwater Use Control Areas ("IGUCAs"), which is similar to but not equal to a LEMA. K.S.A. 82a-1036 *et seq.* The development of a LEMA management plan is done by the groundwater management district, while the management plan in an IGUCA is developed by the Chief Engineer, based solely on the evidence presented on the record in public hearings. K.S.A. 82a-1037 and 82a-1038. Unlike a LEMA, where the Chief Engineer cannot amend a management plan created by a groundwater management district without the district's approval, the corrective controls in an IGUCA are set exclusively by the Chief Engineer. The IGUCA process is a more restrictive and has less public involvement because no management plan is created by a local entity prior to holding the required hearings. Overall, an IGUCA places fewer constraints on the Chief Engineer in deciding what corrective controls will be put in place.

The Legislature adopted K.S.A. 82a-1036 in 1978 and required that "documentary and oral evidence shall be taken, and a full and complete record of the same shall be kept." Since enactment, eight IGUCAs were created using this procedure without any other due process requirements being added. A corresponding regulation that further outlined how IGUCA public hearings were to be conducted was adopted in 2009, but even that leaves the conduct of the procedure at the required public hearings to the discretion of the Chief Engineer and such procedures were never applied to any of the already existing IGUCAs. K.A.R. 5-20-1. Any

additional due process procedures implemented were provided at the discretion of the Chief Engineer, not because of an inferred Legislative mandate. The IGUCA statutes are the most similar enactment to the LEMA statute passed by the Legislature. It does not seem logical that the Legislature intended to create more extensive due process procedures upon the LEMA proceedings than the IGUCA proceedings based on the nature of each. A LEMA is ultimately generated by a local unit of government and cannot be modified without the local unit's consent. This requirement alone already provides greater protections in the LEMA process than those available in an IGUCA proceeding. It is difficult to understand why the Legislature would require a higher level of due process in the case of LEMAs.

Intervenors also cite the due process procedures the Legislature set forth in the Water Transfer Act. K.S.A. 82a-1501 *et seq.*; *Memorandum for Due Process*, 12-13. Specifically, that the Kansas Administrative Procedure Act shall apply to all proceedings, that there shall be a formal hearing phase, and that specific intervention is allowed. K.S.A. 82a-1503. This example only shows that the Legislature is aware of the necessity of due process when dealing with water rights, and when the Legislature deems it necessary they will specifically require greater due process procedures in statute, rather than rely on the Chief Engineer's ability to infer such intent without any explicit instructions.

In summary, all parties and the Chief Engineer agree that water rights are real property and deserve due process protections. However, based on the text of K.S.A. 82a-1041 and the due process requirements of other water statutes, it is clear that the Legislature has set what they believe is the appropriate level of due process. This still does not preclude the Chief Engineer from setting forth other procedures that are helpful in the LEMA process, and what level of due process is helpful and necessary in the present preceding should be examined.

II. Level of Due Process Required by the LEMA Process

In order to determine the level of due process required in the LEMA proceedings, Intervenors cite *Winston v. State Dep't of Soc. & Rehab. Servs.,* 274 Kans. 396, 409 49 P.3d 1274(2002)(citing *Kennedy v. Board of Shawnee County Comm'rs*, 264 Kan. 776, 797–98, 958 P.2d 637 (1998)) , stating that the "basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." Further, the notice and opportunity to be heard must be meaningful, as "process which is a mere gesture is not due

process." *Bd. of Cty. Comm'rs v. Akins*, 271 Kan. 192, 196, 21 P.3d 535, 539 (2001) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950)). The Legislature provided for both of these things in K.S.A. 82a-1041. That is, formal action by the applicable groundwater management district to recommend the proposed management plan, followed by published notice, individual notice, and two public hearings with both oral and written evidence on the record, and multiple opportunities for review following issuance of an Order of Designation. Further, Intervenors rely on *Kennedy* (as cited in *Winston*) out of context. The facts in *Kennedy* revolve around whether publication alone was sufficient due process for a tax foreclosure. 271 Kan. 192, 193. There is no such shortcoming in the present proceeding. Again, K.S.A. 82a-1041(b)(3) requires individual notice be sent to every person holding a water right of record, in addition to notice by publication. Intervenors cite no further Kansas case law that defines what a meaningful opportunity to be heard may look like in the case of a public hearing required by statute, although intervenors propose that a meaningful opportunity to be heard must consist of cross-examination, discovery, and additional time to prepare. *Memorandum for Due Process* at 7.

Intervenors suggest that the three additional or expanded due process procedures are justified based on the balancing test set forth in *Winston*, which requires an examination of:

> (1) the individual interest at stake, (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 274 Kan. 396, 409-10.

"The question of what process is due in a given case is a question of law," (*Id.*) thus it is appropriate to consider a water right involved in the LEMA management plan under the criteria set forth in *Winston*.

A. Interest at Stake

First, the individual interest at stake is undeniably a real property right as established by K.S.A. 82a-701. As stated above, due process procedures are important when dealing with real

property rights and are necessary here. While agreeing that due process rights should be used during LEMA proceedings, Intervenors present a partially implied argument that the Legislature passed K.S.A. 82a-1041 with the intent that the Chief Engineer never be allowed to exercise the powers granted in that statute, except perhaps as a solution to an impairment complaint. *Memorandum for Due Process* at 8-9. Intervenors appear to rely on this assertion to request greater due process procedures as means of wholly invalidating all actions taken under K.S.A. 82a-1041, however, in accord with proper statutory interpretation, the Chief Engineer will not assume the Legislature passed useless or meaningless legislation. *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870. That being said, all parties agree that due process rights are owed to water rights, it is simply a matter of to what extent they are required by LEMA proceedings.

Intervenors also fail to address the actual nature of the restrictions that could potentially be put in place within the proposed LEMA. The management plan is only valid for five years and creates a five-year allocation for each water right. This allocation does not affect the base water right, which continues to exist unmodified. Water rights within some areas of the proposed LEMA boundaries are not required to reduce their water use. The most restrictive of the proposed control provisions in the plan, applicable in only two townships with the greatest rate of decline, still allow for a five-year allocation of five times the annual average net irrigation requirement for corn in the applicable area. Therefore, it is important to consider that the base water right remains unchanged and that the LEMA would only be authorized for five-years, with a built in a review process. *Request for a District-Wide LEMA*, dated June 8, 2017.

B. Erroneous Deprivation without Additional Safeguards

The second element concerns the risk of erroneous deprivation without additional safeguards. In this instance, Intervenors mischaracterize the proceedings and availability of information to date. The proceedings have met and exceeded all statutory requirements set forth in K.S.A. 82a-1041 for notice. For example, the initial hearing was held on August 23, 2017 and notice was published in the Kansas Register on July 20, 2017, the Goodland Star-News on July 21, 2017, and in the Colby Free Press on July 21, 2017. Individual notices were mailed out on July 14, 2017. For the second hearing, to be held on November 14, 2017, notice was published in the Kansas Register on October 12, 2017, in the Goodland Star-News on October 13, 2017, and

in the Colby Free Press on October 13, 2017. Individual notices were mailed out on October 6, 2017. However, to only consider this narrow window of time would be to ignore much of the process that was used to develop the proposed management plan. The LEMA process did not begin with the Chief Engineer's initiation of proceedings in June 2017. LEMA management plans are developed by groundwater management districts and must be formally approved by action of the groundwater management district board. The LEMA process began in GMD4 in January 2015 *Response to Motion* at 3. There has been ample opportunity for input over this time and at least some of the individuals that make up the Intervenors appear to have been involved in the process from the earliest stages. This includes serving as a board member during this period. *Response to Motion* at 3. GMD4 also held numerous board meetings open to the public, as well as additional informational public meetings. The final version of the management plan has been available to the public and has been posted on GMD4's website and the Division of Water Resources' ("DWR") website since June 8, 2017, including a listing of water rights affected and allocations proposed.

The information appears to be widely available and the development process was open to the public. Intervenors have brought forward no proof that shows any difficulty in obtaining information about the LEMA from any source. Further, since both GMD4 and DWR are public entities, both are subject to the Kansas Open Records Act. There was no evidence brought forth that either entity has denied any appropriate request. Any such requests could also have been made at any point since the plan was finalized in June 2017. (The information was arguably available prior to this date because the management plan had been referenced at numerous open meetings.) Further protections were provided by the Chief Engineer when he designated a hearing officer to make the initial LEMA determinations so that more than one person would consider the record in this matter. All parties have the opportunity to present oral and written evidence at the hearings, including the ability to ask clarifying questions and submit rebuttal written testimony after the hearing. All determinations are made based on the evidence in the record. The combination of all these factors make the likelihood of error low, although Intervenors do not say what type of error they are concerned about. The requirements that must be met in order to implement a LEMA are plainly set forth in K.S.A. 82a-1041 and the Chief Engineer must rely solely on the record in determining if a LEMA should be implemented. Should an error be made, adequate review is provided based on the record.

Intervenors also raise the issue that more time than the 30 days required by K.S.A. 82a-1041 should be provided prior to the second hearing. The timeline set forth by the legislature has been followed and considering the length of time that Intervenors have been involved in and aware of the LEMA process, the argument that "at least 30 days" must mean more than 30 days is unconvincing. *Response to Motion* at 4. During the initial implementation of the LEMA, GMD4 has also provided for an individual appeal process to make sure that the number eligible acres included in each water right allocation is accurate. *Request for a District-Wide LEMA*.

C. State's Interest in the Procedures Used

Regarding the third element, significant time and money has been spent to send out notice, organize, and prepare for the second hearing. That being said, it would not create an unmanageable burden on the state to postpone the second hearing if it were to be a benefit to the entire process or to even a small minority of the applicants. However, Intervenors' argument, and the timing of such request for additional time to prepare, appears to be focused on an exceedingly small group of water right owners within the proposed LEMA boundaries that are simply unhappy that a LEMA has been proposed. The Chief Engineer has not received any other complaints about the date of the second hearing. Further, the Intervenors did not raise any concerns about the potential schedule of the LEMA proceedings when the initial hearing was proposed. In fact, some of them participated in the initial hearing. Considering that only five water right owners have requested a delay, and making that request, only after waiting until the eleventh hour to hire an attorney, there is not enough justification to delay a hearing that the other 1,781 owners have prepared for without request for delay.

Another unique element of the scheduling of this hearing that must be considered is that the LEMA process is not determined solely by the Chief Engineer. A LEMA plan is developed locally and brought forward by a groundwater management district. In this case, GMD4 desires the plan to be implemented in 2018 and the board specifically rejected a request by the Intervenors to delay the hearing. A groundwater management district board of directors is elected by all the parties that are subject to a LEMA proceeding, and it would not make sense to overturn the board's decision to appease only five owners when, absent evidence to the contrary, the board is authorized to speak for owners within the district.

III. Conclusion

Based on all of these considerations and the *Winston* balancing test, providing additional time and allowing formal discovery regulated by the Chief Engineer would not serve to improve the record or increase the level of protection provided. Further, the types of restrictions proposed by the management plan do not create the need for an increased level of due process. However, the right to cross examine witnesses would add benefit to the overall record to be considered by the Chief Engineer. It would also be beneficial to hold formal and informal hearing phases as suggested by the Intervenors. In addition, due to some unforeseen delays in the fall harvest, it is appropriate to extend the November 28, 2017 deadline to submit written testimony, including rebuttal material, for an additional two weeks to December 12, 2017. The details for including such additional procedures shall be included in the Pre-Hearing Order.

THEREFORE, based on all the arguments presented, the Chief Engineer hereby agrees to expand the due process procedures provided by K.S.A. 82a-1041 to include cross-examination of witnesses and additional time to submit written comments following the second public hearing. Such additional procedures shall be included in a subsequent pre-hearing order.

THIS DECISION SHALL BE ENTERED INTO THE RECORD ON THIS __6th__ DAY OF NOVEMBER 2017.

David W. Barfield, P.E.
Chief Engineer, Division of Water Resources
Kansas Department of Agriculture

Prepared by:

Kenneth B. Titus #26401
Chief Legal Counsel
Kansas Department of Agriculture
kenneth.titus@ks.gov

CERTIFICATE OF SERVICE

On this 6th Day of November 2017, I hereby certify that the original of the foregoing Decision was sent by U.S. Mail and a true and correct copy by electronic mail to:

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

Ray Luhman, District Manager
Northwest Kansas Groundwater Management District No. 4
P.O. Box 905
1175 S. Range
Colby, Kansas 67701
rluhman@gmd4.org

Adam C. Dees, Attorney for GMD4
Clinkscales Elder Law Practice, PA
718 Main Street, Suite 205
P.O. Box 722
Hays, Kansas 67601
adam@clinkscaleslaw.com

David M. Traster, Attorney for Intervenors
Foulston Siefkin LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, Kansas 67206-4466
dtraster@foulston.com
apollardmeek@foulston.com

KDA Staff Person