KANSAS LIVESTOCK ASSOCIATION

*Since 1894*

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

From: Aaron M. Popelka, V.P. of Legal and Governmental Affairs, Kansas Livestock Association

Re: **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.**

Date: November 14, 2017

*The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,300 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf, and stocker cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.*

The Kansas Livestock Association (KLA), on behalf of its members in Groundwater Management District (GMD) #4, would like to express three distinct concerns with the proposed GMD #4 Local Enhanced Management Area (LEMA). The first two issues directly affect KLA members' ability to provide water to livestock, while the third issue concerns the ability to water feed crops.

KLA appreciates and supports the goal of water conservation, but such decisions must be made carefully with full knowledge of the facts and the law. It should also be done in such a way as to avoid doing harm to the underlying property right and the economic viability of the activity for which the water is used. While the livestock industry is always striving for efficiency and ways to better use our natural resources, it is also important to note that stockwater use represents only 0.71 percent of total annual water use in GMD #4. In addition, livestock feeding has a larger economic multiplier effect compared to crop production which uses approximately 97.6 percent of all water consumed in GMD #4. Any water use reductions should be targeted to those uses that generate the most water savings, while ensuring economically important, small quantity water use categories are not negatively impacted.

**Stockwater Allocation**

KLA believes the livestock allocation proposed in the LEMA unfairly penalizes stockwater users compared to other non-irrigation uses and could lead to significant loss of investment for feedyards that have expanded since December 31, 2015. KLA believes that rather than fixing an allocation to an arbitrary past date and permit capacity, the LEMA should instead focus on encouraging greater efficiencies from such a high value use of water that will allow future growth in the animal agriculture sector. Not stifling this growth is critical as the local cropland farm economy relies on livestock as a primary consumer of its product.

The LEMA proposes a livestock allocation of either 76 percent or 85 percent of the maximum reasonable quantity of water for livestock as set forth in K.A.R. 5-3-22 multiplied by the "maximum head supported by the feedlot permit in effect on December 31, 2015." For beef cattle the K.A.R. 5-3-22 quantity is 15 gallons per head per day and represents the maximum amount of water per animal that meets the beneficial use requirement of K.S.A. 82a-703. The percent reduction in the beneficial use standard proposed by the LEMA is based on the level of annual aquifer decline per township. It does not appear that any stockwater rights exist in the 76 percent allocation areas.

The primary problem with the LEMA stockwater allocation formula is that it picks an arbitrary point in time that will have occurred nearly two years in the past before this LEMA proposal is expected to become law. Significant changes may, and in some cases have already occurred, in regard to feedlot operating capabilities since that time. In one example, KLA member Timmerman Feeding Corporation began an expansion after the December 31, 2015 date, and is nearing the completion of construction at this time. The expansion is based on available water under the feedyard's existing authorized quantity of water. Therefore, if the LEMA proposal for stockwater is finalized as proposed, this KLA member will be allocated less water than needed to operate the feedyard. This would result in a significant financial loss directly attributable to the LEMA.

Unlike an irrigated corn field, a feedyard cannot simply reduce the amount of water per head. A steer in a feedlot drinks a given amount of water based on size, diet, and climatic conditions. If the steer's requirements are not met, the steer dies. Therefore, a feedlot's only choice to comply with the LEMA allocation, as proposed, is to leave pens empty. An irrigated corn field, however, can still use every acre of a field to raise a crop. Although less water may be available, different technologies like soil moisture probes, improved irrigation systems, and no-till farming practices can promote better water utilization resulting in a profitable yield on every acre.

Another issue with using permit capacity based on an arbitrary date in the past is the actual LEMA allocation could reduce available water more than the percent reduction in beneficial use. For instance, in the case of water right 23448 00 owned by Timmerman Feeding Corporation, the total authorized quantity is 336 acre feet per year, but the proposed LEMA allocation is 257 acre feet per year. This results in a 23

percent reduction in available water, despite the water right being in the 85 percent allocation per head zone. This change could be due to a number of issues like a forced capacity reduction after the perfection period due to environmental rules, or installation of better water infrastructure after the perfection period. A feedlot should not be penalized for either of those events occurring.

The second problem with the stockwater allocation is not just the date when permit capacity is set, but the lack of clarity as to which permit the LEMA is referencing. Feedlots have two operating permits, one is a water pollution control permit issued by Kansas Department of Health and Environment, and the other is an animal health permit issued by the Kansas Department of Agriculture. Each permit can vary in capacity because of different permitting criteria and cost of the permit.

The third concern with the LEMA stockwater allocation is it penalizes stockwater users more than other non-irrigation uses. It should be noted that all non-irrigation water rights combined represent only 2.2 percent of groundwater use in GMD #4, and of that number, stockwater represents only 0.71 percent of total water use. Given the small amount of total water use by these use types and the high-value nature of most of the uses, it does not seem prudent to give any of the non-irrigation uses a set allocation that reduces the uses' total authorized quantity of the water right. Instead, it would be prudent to simply ensure the non-irrigation uses are using water as efficiently as possible. For all uses other than stockwater that was the approach taken by the LEMA proposal.

Municipal water uses are simply "encouraged to reduce the amount of unaccounted for water reported annually on the water use report and reduce the gallons per capita per day." This is a common sense efficiency initiative without a set allocation. All other non-irrigation water users, other than stockwater and municipal users, are asked to "utilize best management practices." Again, this is another common sense efficiency measure that does not lock a high-value water use into a lower fixed allocation.

Unfortunately, stockwater is singled out among the non-irrigation water uses and given a fixed allocation. ***KLA suggests that GMD #4 modify its non-irrigation allocation section to require stockwater rights to "utilize best management practices." This can easily be accomplished by deleting section (2), paragraph (a) and redesignating the remaining paragraphs accordingly.*** This is consistent with KLA suggestions to GMD #1 in 2013 where KLA suggested stockwater right owners devise a conservation plan to more efficiently use available water without taking a reduction in gallons per head per day, while also accounting for any past improvements taken by the water right owner prior to the LEMA.

KLA is aware the GMD #4 Board of Directors voted to support a change to its original proposal to replace section (2), paragraph (a) with the following: "(a) Livestock and poultry use will be encouraged to maintain their use at 90% of the said amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the number

of animals authorized by a current facility permit. At no time will a stockwater right be authorized to pump more than its authorized quantity." KLA acknowledges this is an improvement over the original proposal, and although it is a complicated means of implementing best management practices, it is not a binding conservation factor as in the original proposal. For consistency, KLA would prefer that stockwater simply be asked to "utilize best management practices" as suggested above, but would be willing to accept the GMD #4 proposal as a viable alternative.

**The LEMA Law Allows Different Conservation Factors Among Types of Use**

LEMA's were created to allow local GMD boards maximum flexibility in enacting water conservation measures. Legislation that enacted the LEMA laws contemplated the ability to apply different conservation factors across different water uses. While some may suggest such differentiation among types of water uses is impermissible under the Kansas Water Appropriations Act (KWAA), such an interpretation ignores the fact that the legislature integrated the authorized corrective controls of a LEMA into the KWAA. *See* K.S.A. 82a-1041(l).

Under K.S.A. 1041(f), a GMD may propose the following corrective actions in its LEMA plan:

(1) Closing the local enhanced management area to any further appropriation of groundwater. In which event, the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area;

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

Kansas courts have recognized basic rules of interpretation concerning statutory construction and the ability of an agency to adopt regulations to carry out those statutes. When possible, Kansas courts must follow legislative intent in interpreting Kansas statutes. *Cochran v. State Dept. of Agr. Div. of Water Resources*, 291 Kan. 898, 903, 249 P.3d 434, 440 (2011). Legislative intent should be determined by looking at the statutory scheme as a whole. *Id*.

When the language of a statute is plain and unambiguous, the court is bound to follow legislative intent. *Id*. When a potential conflict occurs courts "should construe statutes to avoid unreasonable results and should presume that the legislature does not intend to enact useless or meaningless legislation. . . . To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible." *Cochran* at 903-904, 291 Kan at 440. Furthermore, courts must presume that the legislature acted with knowledge of existing statutory and case law when it enacts legislation. *Cochran* at 906, 291 Kan at 442.

When an agency is authorized to adopt regulations pursuant to a statute, the regulations are presumed valid if there is a rational basis for the regulation. *See Hawley v. Kansas Dept. of Agr.*, 281 Kan. 603, 611, 132 P.3d 870, 878 (2006). The party challenging the regulation has the burden to prove that the regulations are arbitrary and capricious. *See id.; see also Pork Motel, Corp. v. Kansas Dept. of Health and Env.*, 234 Kan. 374, 381, 673 P.2d 1126, 1133 (1983).

A GMD LEMA plan that includes a different conservation factor for stockwater rights and irrigation water rights is allowed under K.S.A. 82a-1041. Paragraph (f)(3) of K.S.A. 82a-1041 expressly states that among other options for corrective action, the plan may include restrictions for "reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells . . . ." This provision authorizes the Chief Engineer to adopt LEMA regulations that distinguish pumping restrictions on individual appropriations or differentiate restrictions on various wells, whether or not under the same appropriated right. Although this provision of the statute does not mention water uses, by its specific reference to individual wells, which is a more narrow method of allocating pumping restrictions than a pumping regulation applied to a broad category of appropriations, the statute allows applying a different conservation factor according to water use by type.

K.S.A. 82a-1041(f)(2) states that if a LEMA chooses to limit the total groundwater withdrawal within the geographic boundaries of a LEMA, then such an action should be according to the principles of prior appropriation. The legislature chose to specifically limit this corrective option by the traditional concept of prior appropriation. The legislature did not include this limitation in conjunction with the other corrective actions proposed in paragraphs (1), (3), (4), or (5) of K.S.A. 82a-1041(f). The use of the conjunction "or" in describing the options evidences an intent that the corrective actions contained in these paragraphs are separate from the limitation found in paragraph (2).

The conjunction "or" in describing permissive corrective controls, allows the Chief Engineer to approve any combination of the corrective controls described in subsection (f) that may be contained in a LEMA plan. The provisions of the corrective controls are not cumulative and the specific limitations of one control are not applicable to others.

As noted above, statutory schemes should be interpreted to further legislative intent and should assume the legislature was aware of existing law. Therefore, we should assume that when the legislature approved the ability of a LEMA to differentiate pumping reductions among individual appropriations and wells in SB 310, it did so with the knowledge of the existing components of the KWAA. Therefore, a LEMA can stay consistent with the existing principles of the KWAA if it requires a different method of conservation from an irrigation use compared to a stockwater use.

Use of the LEMA law in this manner would be reasonable and consistent with the legislative intent to allow additional water conservation controls. If the Chief Engineer was not allowed to vary water use among different appropriators or wells within LEMA boundaries except to shut off the most junior water rights, it would make the LEMA law superfluous. With the passage of the LEMA statute, the legislature decided in certain geographic areas of excessive decline, additional regulation beyond mere administration of water rights should be available to GMDs and the Chief Engineer to better serve the public interest.

**Conversion Formula from Irrigation to Non-Irrigation Use**

KLA believes the LEMA conversion formula to convert irrigation to non-irrigation water uses in section (2), paragraph (d) is confusing and violates the KWAA. Section (2), paragraph (d) of the GMD #4 LEMA states: "When converting irrigation to non-irrigation, then the most restrictive of the LEMA allocation, GMD regulations, or conversion outlined in K.A.R. 5-5-9 will be used to determine the converted allocation amount."

Although unclear from this paragraph, it appears the LEMA is trying to apply a temporary procedure to a permanent change in a water right. Not only does this create internal conflict within the LEMA, it also violates the KWAA process for change in use applications.

The KWAA establishes the framework under which water is appropriated and regulated. An agency may not restrict water rights beyond the authority granted by the KWAA. K.S.A. 82a-708b sets forth the standard for approving an application to change the use made of water. In subsection (a), K.S.A. 82a-708b states, "Any owner of a water right may change the place of use, the point of diversion or the use made of the water, without losing priority of right . . . ." It goes on to limit the authority of the Chief Engineer in evaluating the change application to those authorities "in accordance with the provisions and procedures prescribed for processing original applications for permission to appropriate water." As a result of this language, a change application

must be permanent and must reflect statutory authority and regulations promulgated by the Chief Engineer to carry out this requirement.

The LEMA is not a permanent restriction to a water right. The LEMA proposal states in paragraph (2)(e): "The base water right will not be altered by an Order issued under this request," and states in the Overview section, "This LEMA shall exist only for the five-year period beginning January 1, 2018 and ending December 31, 2022." As a result, an application to change the use made of water from an irrigation use to a non-irrigation use cannot apply the "LEMA allocation" to a conversion. By statute, any regulatory formula must effectuate the terms of K.S.A. 82a-708b and be a permanent change to the water right. K.S.A. 82a-1041, which requires LEMAs to be "consistent with state law," requires the Chief Engineer to reject section (2), paragraph (d).

It is also unclear what is meant by the terms "LEMA allocation" and "GMD 4 regulations". GMD #4 does not have use conversion regulations. All applications for change in the use made of water in GMD #4 are governed by K.A.R. 5-5-9. It is uncertain why such language would be included in the LEMA.

Second, the term "LEMA allocation" is ambiguous because it does not say whether the LEMA irrigation allocation, stockwater allocation, or both are to be used in determining the water available in a conversion. For instance, the term could mean a stockwater user is allowed to simply use the same quantity of water for stockwatering as the LEMA irrigation quantity, unless converting the base water right, using the K.A.R. 5-5-9, would result in less available water. It could also mean the LEMA irrigation allocation is to be further reduced by the LEMA stockwater allocation upon a conversion. It could also mean the K.A.R. 5-5-9 conversion is to be applied to the LEMA irrigation allocation, unless the K.A.R. 5-5-9 conversion formula, when applied to the base water right, results in less available water. Without further definition of the term "LEMA allocation" there are numerous additional combinations of how the "LEMA allocation" could apply in a conversion.

***KLA proposes that the most lawful and clear way to conduct a conversion from an irrigation use to a non-irrigation use, is to strike paragraph (2)(d) and replace it with the following: "When converting irrigation to non-irrigation, the base water right will be converted under the procedures in K.A.R. 5-5-9 and K.A.R. 5-5-10, and then the appropriate non-irrigation LEMA allocation in paragraph 2 will apply for the remainder of the LEMA period."***

**<u>Irrigation Allocations</u>**

KLA believes that conservation of irrigation water rights is appropriate, but allocating water in a LEMA according to "the maximum reported and/or verified acres for years 2009-2015" will unfairly penalize some producers who chose to conserve water, and without amendment, violates K.S.A. 82a-744 and K.S.A. 82a-1041(a)(4). These statutes require that any LEMA "give due consideration to water management or conservation

measures previously implemented." By setting the irrigation allocation to a verified acres allocation, the LEMA disregards water right owners who may have chosen to irrigate less acres.

KLA is aware of one situation where the water right owner was authorized to irrigate three quarter sections of ground. One of the quarter sections has a pivot irrigation system, while the other two quarter sections utilize flood irrigation. Due to the age of the owner, he chose not to irrigate the flood irrigation parcels despite the well testing 900 gallons per minute. Whatever the motivation of the owner, the non-irrigation of the two quarter sections represents past conservation that must be given due consideration. As it stands now, the GMD #4 LEMA is replete with any language to address such situations, and risks being rejected by the Chief Engineer or challenged in court, should it become final.

In addition, using the verified irrigated acres approach may, in some situations, violate the prior appropriation doctrine required under K.S.A. 82a-707 of the KWAA and paragraphs K.S.A. 82a-1041(a)(6) and (f)(2) of the LEMA statute. K.S.A. 82a-1041(a)(6) requires all LEMAs to be consistent with state law and paragraph (f)(2) requires total groundwater withdrawal restrictions be "in accordance with the relative dates of priority of such rights . . . ." By using the verified irrigated acres approach a more senior water right with available water could be significantly reduced compared to a more junior water right in the same local source of supply, simply because the senior chose not to fully irrigate all its authorized acres during the LEMA verification period. This significant reduction puts the senior right in a lesser position than the junior right resulting in a violation of priority, and damaging the property right. A better approach is to simply reduce all authorized irrigation quantities by the same amount in a local source of supply. This approach puts junior and senior water rights on equal footing should the need arise to administer priority rights as a result of an impairment.

***KLA believes the LEMA irrigation allocation should be modified to apply a percent reduction to the authorized quantity of the irrigated water right. Similar to the current proposal, the percent reduction in the authorized quantity can be varied by level of annual decline in the aquifer with areas of more significant decline receiving a greater reduction. This approach would more closely track the actual property right that is based on the quantity of water perfected during the perfection period. It also avoids conflicts with past conservation practices, as is the case with using the verified irrigated acres approach. Using the verified irrigated acres approach risks future legal action because it ignores the basis of the property right.***

***An additional option, should the Board choose to stay with the irrigated acres approach, is to build an alternate formula that allows irrigated water right owners to increase the verified acres to the total authorized acres, subject to a well pump test to ensure the acres were not taken out of production due to a failing well. This could meet the due consideration for past conservation requirement. The verified acreage***

***approach, even if reformed, is not advisable as it disregards the true property right and could violate the prior appropriation doctrine, as discussed above.***

**Modifications by the Chief Engineer are Necessary**

For the foregoing reasons, KLA requests the Chief Engineer either return the local enhanced management plan to GMD #4 giving the above cited reasons for the return, and provide the district with the opportunity to resubmit a revised plan for public hearing within 90 days of the return of the deficient plan pursuant to K.S.A. 82a-1041(d)(3), or return the local enhanced management plan to GMD #4 and propose the foregoing modifications to the plan pursuant to K.S.A. 82a-1041(d)(4).

Sincerely,

Aaron M. Popelka