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,	)Case No. 002-DWR-LEMA-2017
Logan, Sheridan, Sherman, Thomas, and	)
Wallace Counties in Kansas.	)
	)

REPLY MEMORANDUM IN SUPPORT OF
THE INTERVENORS' MOTION TO PROVIDE DUE PROCESS
PROTECTIONS FOR IRRIGATORS

I. The LEMA Statute must be read to include Due Process protections to avoid constitutional problems.

The original Memorandum points out that the U.S. and Kansas Constitutions require that state agencies provide the regulated parties with Due Process of Law. The Constitution is the "supreme Law of the Land" and controls acts of the Legislature, the Courts, and the Executive Branch of government. United States Constitution, Article VI, Clause 2.

Statutes, regulations, and orders that do not provide Due Process are unenforceable as written. However, in *City of Lincoln Center v. Farmway Co–Op, Inc.*, 298 Kan. 540, 544, 316 P.3d 707, (2013), the court said that it upholds city ordinances against constitutional challenges if there is "a reasonable way to do so." This is accomplished by reading Due Process requirements into a provision if it can be done within the apparent legislative intent.

> A statute must clearly violate the constitution before it may be struck down and an appellate court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute.

State v. Gaona, 293 Kan. 930, 958, 270 P.3d 1165 (2012) (internal quotations omitted).

> Even if a statute appears unconstitutional on its face, it may nevertheless be constitutional when limited and construed as in *Skov* [*v. Wicker*, 272 Kan. 240, 32 P.3d 1122 (2001)], by reading into the statute any necessary judicial requirements or constraints, provided such an interpretation is consistent with the intent of the legislature."

In re Marriage of Riggs & Hem, 35 Kan. App. 2d 61, 67, 129 P.3d 601 (2006).

> In an action to test the constitutionality of a statute this court will assume that trial courts will construe the statute in conformity with the constitution.

State ex rel. McDowell v. Holcomb, 154 Kan. 222, Syl. 2, 117 P.2d 591 (1941).

> In addition to K.S.A. 2010 Supp. 22-2512, Kansas courts have construed other statutes governing disposition and forfeiture of seized property to require due process in the form of an evidentiary hearing.

State v. Markovich, 258 P.3d 388, 2011 WL 3795544, at *5 (Kan. Ct. App. Aug. 26, 2011) (collecting cases) (unpublished). *See also, State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 71, 547 P.2d 760 (1976) (stating that it "fe[lt] justified in construing and limiting [an obscenity] statute to meet constitutional standards").

II. Basic and well known rules of statutory interpretation make it clear that the Legislature intended that LEMA public hearings include basic Due Process protections.

GMD4's statement of the principles of statutory interpretation is correct but incomplete. GMD4 argues that legislative intent is determined from the language in the statute, giving common words their ordinary meanings.

In addition to interpreting the statute to be constitutional, determining legislative intent requires more, including among other things, that one read the entire statute—as a whole and in conjunction with other provisions.

In *Miller v. Board of County Commissioners, Wabaunsee County*, 305 Kan. 1056, 1064-65, 390 P.3d 504 (2017) citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) and *State v. Deffebaugh*, 277 Kan. 720, 728, 89 P.3d 582 (2004), the Court said that construing the words used by the legislature requires consideration of "the language and design of the entire statute . . . the statute as a whole."

In *Milano's, Inc. v. Kansas Dept. of Labor*, 296 Kan. 497, 500, 293 P.3d 707 (2013), the Court quoted from *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 754-55, 189 P.3d 494 (2008), stating:

> We ascertain 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. 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. [Citation omitted.]' *In re Marriage of Ross*, 245 Kan. 591, 594, 783 P.2d 331

> (1989); *see also State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, Syl. ¶ 2, 69 P.3d 1087 (2003). Thus, in cases that require 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*.' *Kansas Commission on Civil Rights v. Howard*, 218 Kan. 248, Syl. ¶ 2, 544 P.2d 791 (1975).

Miller, supra, also provides that statutes dealing with the same subject—those that are in *pari materia*—should be interpreted harmoniously when possible. 305 Kan. at 1066, citing *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1123, 307 P.3d 1255 (2013).

But even limiting the review to giving "common words their ordinary meanings," and ignoring the balance of the statute does not advance GMD4's argument that the requirement to provide notice "***at least 30 days***" prior to each public hearing should be read to mean the Chief Engineer is required to provide notice "only 30 days" prior to the hearing; or the Chief Engineer is permitted to provide notice "just 30 days" prior to the hearing.

It is not necessary to consult a dictionary to know that the ordinary meaning of the common phrase "at least" establishes a minimum time limit. According to the McMillan Dictionary, the phrase "at least" means "not less than a particular amount or number, and possibly more."[1] Thus, the Chief Engineer must provide a minimum of 30 days, but he can provide more.

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[1] https://www.macmillandictionary.com/us/dictionary/american/at-least, consulted on November 1, 2017.

But that can't be the end of the inquiry because, as discussed above, the statute must be read in its entirety. Reading the statute as a whole makes it clear that more is required.

First, the statute requires that the Chief Engineer publish rules and regulations. K.S.A. 82a-1401(k). The Chief Engineer has failed to comply with this Legislative mandate, which is likely to be fatal to the current LEMA plan.

The requirement that the Chief Engineer provide "at least 30 days" notice must be read together with subsection (k): "The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section."

> [W]hile administrative agencies have no inherent legislative power, they have all the powers expressly delegated to them by the legislature and are ***authorized to fill in the interstices in the legislation by promulgating rules and regulations consistent with their enabling legislation.*** In other words, while an agency does not have the power to promulgate rules that amend or change legislative enactments, ***it may fill in the gaps in legislation where necessary to effectuate a general statutory scheme.***

2 Am. Jur. 2d *Administrative Law* § 127 (emphasis added).

It is clear that the Legislature intended that the Chief Engineer give a minimum of 30-days advance notice but that he also publish regulations to "effectuate and administer" the procedural steps to implement the LEMA statute. In other words, the Legislature intended that the Chief Engineer add procedural safeguards in rules and regulations.

Second, the plain language used by the Legislative demonstrates its intent that the Chief Engineer conduct an adjudication style "proceeding" similar to a hearing under the Kansas Administrative Procedures Act, K.S.A. 77-501, *et seq.* ("KAPA").

The formal hearing provisions of KAPA apply only to the extent that other statutes expressly say so and there is no other statute that unequivocally says that KAPA applies to the portion of the LEMA proceeding conducted by the Chief Engineer. K.S.A. 77-503(a). *But see* K.S.A. 82a-1041(i) specifically referencing the KAPA stay provisions.[2]

And K.S.A. 2016 Supp. 82a-1901(a)[3] "expressly provides" that the Secretary's review of the Chief Engineer's initial LEMA order "shall be subject to review in accordance with the provisions of the Kansas administrative procedure act." Thereafter, the order is subject to judicial review. *Id.*, at (b).

The Secretary's review of the Chief Engineer's initial order requires that she "consider the agency record or such portions of it as have been designated by the

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[2] It is possible that KAPA applies because it is expressly referenced in both K.S.A. 2016 Supp. 82a-1901 and K.S.A. 82a-1041(i). The Intervenors do not make that assertion here but do not waive the right to assert it in the future.

[3] K.S.A. 2016 Supp. 82a-1901 was amended in 2017, effective on July 1, 2017. Subsection (e) states that the previous version controls "any administrative proceeding pending before the chief engineer" on July 1, 2017. The Chief Engineer's review of the plan occurred sometime before June 27, 2017, the date of his letter stating "I am initiating proceedings to consider the designation of the proposed local enhanced management area." For this and other reasons, it appears that the pre-amendment version of K.S.A. 2016 Supp. 82a-1901 is to be applied in this proceeding.

parties." K.S.A. 77-527(b). If the Secretary makes changes to the Chief Engineer's initial order, she must "state the facts of record" that justify the differences. *Id.* at (h). Likewise, judicial review is limited to the agency record. K.S.A. 77-618.

The KAPA standards for initial and final orders, K.S.A. 77-526 and 77-527, are clearly and expressly applicable to the review of a LEMA initial order. K.S.A. 2016 Supp. 82a-1901(a) and 82a-1041(i).

To be reviewable by the Secretary and by the Courts, the LEMA statute requires that the Chief Engineer's initial order be entered after a "proceeding" that resolves "issues of fact" based on "findings of fact" that are supported by "documentary and oral evidence" that is entered into a "complete record" during "public hearings" for which there must be "at least 30 days" of prior "notice." K.S.A. 82a-1041(a) and (b).

Likewise, a KAPA initial order can only be entered after:

- a "proceeding" (*See, e.g.*, K.S.A. 77-502(e), 77-503(a), 77-503a, 77-506, 77-511, and 77-514.);
- that resolves "issues of fact" (*See, e.g.*, K.S.A. 77-523(b) and 77-526(c).);
- based on "findings of fact" (*See, e.g.*, K.S.A. 77-519(b), 77-526(c) and (d), 77-527(d), and 77-529(h).);
- that that are supported by "documentary and oral evidence" (*See, e.g.*, K.S.A. 77-524(b) and (e).);
- that is entered into a "complete record"(*See, e.g.*, K.S.A. 77-523(c).);
- during "public hearings" (K.S.A. 77-523(f)); and
- for which there must be reasonable prior "notice." (*See, e.g.*, K.S.A. 77-519(b).).

The plain language of the LEMA statute includes terms that mirror the formal hearing requirements in KAPA. And reading those terms together, and especially in

light of the constitutional requirements cited in Section I, *supra*, indicates that the Legislature intended that LEMA hearings provide Due Process protections.

Moreover, administrative review by the Secretary and judicial review can only take place with a clear, complete, and well-developed record of the proceedings. That is especially the case where the facts and legal issues are in dispute. That cannot occur in the summary proceeding contemplated thus far. So while KAPA may not apply at this stage of this administrative proceeding, the structure of the LEMA act contemplates an adjudication of fact issues.

The GMD asserts, without citation to any provision in the LEMA statute, or to any other authority, that "The Kansas Legislature also gave the Chief Engineer control to set forth the character of the proceedings, whether informational, adversarial, or a combination of both." GMD4 Resp. at 2. On that shaky foundation, the GMD argues that the Legislature could have imposed additional procedural requirements if it believed that more were required to protect the public's Due Process rights.

The argument misses the mark.

First, as discussed above, the Legislature used terms and imposed requirements that contemplate an adjudicatory hearing that includes adequate Due Process protections.

Second, the argument ignores the overriding Due Process requirements imposed on the State by the U.S. Constitution. Thus, even if the Legislature did not intend to

provide Due Process protections, as the GMD asserts, the U.S. and Kansas Constitutions impose the requirements anyway. Even in the absence of specific Due Process requirements, a court will read the constitutional requirements into the statute.

Third, the legislature is presumed to know the law when it enacts a new provision. *Cochran v. Kansas Dept. of Agriculture*, 291 Kan. 898, 906, 249 P.3d 434 (2011). And when the Legislature enacted K.S.A. 82a-1041, it was well aware of the "obligations imposed by the fifth and the 14th amendments of the constitution of the United States and section 18 of the bill of rights of the constitution of the state of Kansas." K.S.A. 77-702. In fact, the Legislature specifically directed all state agencies "to be sensitive to and account for the obligations imposed" by those constitutional provisions, stating: "It is the express purpose of this act to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain lawful governmental actions." *Id.*

Thus the LEMA statute's requirement that the "proceeding" resolve "issues of fact" based on "findings of fact" that are supported by "documentary and oral evidence" that is entered into a "complete record" during "public hearings" for which there must be "at least 30 days" of prior "notice" must be read together with the Private Property Protection Act directive to err on the side of providing Due Process protections. K.S.A. 82a-1041(a) and (b).

For these reasons, it is reasonable to conclude that the Legislature left the procedural details to the Chief Engineer assuming that he would comply with their

mandate to adopt reasonable rules and regulations that comply with basic Due Process standards.

III. The Intervenors are entitled to a reasonable chance to review and understand the LEMA plan, conduct discovery, and otherwise prepare for a hearing.

At the prehearing conference on October 31, counsel for the GMD noted that DWR and the GMD4 have been working on the details of the plan since early 2015. During that time, the Intervenors have been operating their farms. In spite of attendance and testimony at public meetings and the initial hearing and other occasional interactions with the agencies, DWR and the GMD are far ahead of the Intervenors and other water right holders in GMD4 who will be affected by the plan if it is implemented.

So the Intervenors have made a reasonable request that they be allowed adequate time to gather the information needed to understand the fact issues that are the subject of the upcoming proceeding and to prepare to address those issues. The GMD and DWR have a three-year head start and it will take time for the Intervenors to catch up.

IV. The GMD's concerns about additional pumping in 2018 are mere speculation and not a basis for denying the Intervenor's Due Process rights.

The GMD argues that providing basic Due Process protection should be trumped by its speculation that irrigators might use 2018 to increase their irrigated acreage which would, in turn, increase their allocation. The argument is based on a request by the

GMD4 Board that staff "consider additional data from 2016 and 2017 when determining LEMA allocations."

The specific request is unclear, it is not attached to the GMD4 Memorandum, and there is no citation to the record so the Intervenors can adequately respond. Did the Board ask staff to provide information so that the Board could decide whether to amend the plan? Or did the Board ask staff's permission to amend the plan?

Either way, the only plan that has been provided to the Intervenors and the public uses verified acres for years 2009-2015 and the record does not include a request to amend the plan to add 2016 and 2017, much less 2018. The GMD's concern about adding 2018 is speculative.

The GMD points out that parties to other LEMAs did not request cross-examination and no cross-examination took place at the initial hearing in this case. Irrigators in a completely different situation who did not insist on their Due Process rights did not and cannot waive Due Process rights for everyone else, or anyone else in the District. Nor did the Intervenors waive their Due Process rights by not asserting them in the initial hearing.

Whether the Chief Engineer's delegation of authority to Ms. Owen was proper and the validity of her findings are not the subjects of the present motion. Nor does this motion directly concern the evidence presented at the initial hearing. To be sure, the Intervenors have questions and concerns about those issues, but it seems clear that the

Chief Engineer intends to proceed as if the procedure to date is either valid or can be validated going forward.

And it is clear that there is nothing "legislative" about the LEMA proceeding. In fact, the Chief Engineer has failed to exercise any quasi-legislative power he may have when he failed to adopt rules and regulations as directed. Instead, the plan proposes a reduction in the quantity of specific individual water rights and affects individuals directly. It would alter the terms, conditions, and limitation of preexisting water appropriation rights that are real property rights.

Conclusion

The Intervenors are entitled to Due Process protections. The Intervenors, the GMD, DWR, and the public are all best served by providing these protections now. And even if the Intervenors were not entitled to Due Process, giving them time to prepare is just the right thing to do.

Let's do it right the first time so we don't have to do it over again.

Respectfully submitted,
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CERTIFICATE OF SERVICE

On this 2nd day of November 2017, I hereby certify that foregoing was sent by electronic mail to:

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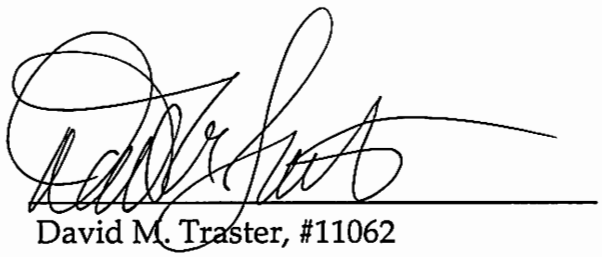

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