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IN THE TWENTY-THIRD JUDICIAL DISTRICT
DISTRICT COURT OF GOVE COUNTY, KANSAS

JON and ANN FRIESEN; FRIESEN FARMS, LLC, et. al., Plaintiffs, vs. DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, in his official capacity, Defendant.	Case No. 2018-CV-000010

Pursuant to K.S.A. Chapter 77

DEFENDANT CHIEF ENGINEER'S RESPONSE MEMORANDUM TO PETITIONERS' MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

COMES NOW, Defendant David Barfield, P.E., Chief Engineer, Division of Water Resources, Kansas Department of Agriculture ("Chief Engineer"), by and through counsel, Kenneth B. Titus, pursuant to the Kansas Judicial Review Act ("KJRA"), and hereby offers the Chief Engineer's memorandum regarding the establishment of the District-Wide Local Enhanced Management Area ("District-Wide LEMA") within the Northwest Kansas Groundwater Management District No. 4 ("GMD4"). As explained herein, an order upholding the Chief Engineer's *Order of Designation*, dated April 13, 2018 ("Order of Designation"), is proper because the Chief Engineer acted lawfully and did not violate the KJRA standards set forth in K.S.A. 77-621.

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I. BACKGROUND AND PROCEDURAL HISTORY

Local water users and the Kansas Legislature have made the conservation of water resources within Kansas a priority for many years. The Legislature's intent to conserve water became well defined in 1972 with passage of the Groundwater Management District Act ("GMD Act")[1], which declares:

> It is hereby recognized that a need exists for the creation of special districts for the proper management of the groundwater resources of the state; for the conservation of groundwater resources; for the prevention of economic deterioration; for associated endeavors within the state of Kansas through the stabilization of agriculture; and to secure for Kansas the benefit of its fertile soils and favorable location with respect to national and world markets.[2]

This expansive goal is to be accomplished within the "basic water use doctrine of the state" while also allowing local water users to determine their destiny insofar as it "does not conflict with the basic laws and policies of the state of Kansas."[3] Groundwater management districts were granted specific authority to undertake research, suggest rules and regulations that would further the conservation of water[4], and to develop management plans to carry out these duties.[5] GMD4 was formally established under the GMD Act in 1975 and the initial meeting of the district was held in 1976.[6] Since that time, GMD4 has engaged in numerous conservation efforts, including purchasing water rights, monitoring annual usage, identifying high priority areas, and ending new development within district boundaries.[7]

A. Additional Authority to Conserve Water

[1] K.S.A. 82a-1020 *et seq.*
[2] K.S.A. 82a-1020.
[3] *Id*.
[4] K.S.A. 82a-1028.
[5] K.S.A. 82a-1029.
[6] *GMD4 Testimony*, Agency Record ("AR") at 1452.
[7] *Id*.

In 1978, the Legislature expanded the tools available for the conservation of water by authorizing the establishment of Intensive Groundwater Use Control Areas ("IGUCA"), which provided specific statutory authority to reduce groundwater withdrawals and other corrective controls in areas facing declines in their water level, declines in water quality, or for any other conditions which required regulation in the public interest.[8] Eight IGUCAs were established to limit pumping in alluvial aquifers related to streamflow or to improve water quality in several areas, but none were used to address groundwater declines within the Ogallala Aquifer.[9]

In 2012, GMD4 requested new conservation authority to address groundwater declines within their district and the Legislature responded by authorizing the creation of local enhanced management areas ("LEMA") by enacting K.S.A. 82a-1041 ("LEMA statute").[10] A key difference between a LEMA and the already existing IGUCA, is that a LEMA management plan[11] is developed by a groundwater management district and is presented to the Chief Engineer for review and adoption.[12] An IGUCA is initiated by the Chief Engineer and the corrective controls (methods in which a reduction in groundwater withdrawals can be required) are entirely at the discretion of the Chief Engineer based on the evidentiary record created at a public hearing. In a LEMA, the corrective controls cannot be made more restrictive than those proposed by the groundwater management district and any changes the Chief Engineer suggests must be approved the groundwater management district before the LEMA can be approved and designated by the Chief Engineer.[13] GMD4 was the first district to utilize the LEMA conservation tool and established the Sheridan 6 LEMA in one of their existing high priority

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[8] K.S.A 82a-1036.
[9] *See*, https://www.agriculture.ks.gov/divisions-programs/dwr/managing-kansas-water-resources/intensive-groundwater-use-control-areas.
[10] *GMD4 Testimony*, AR at 1452.
[11] A note regarding terms may be helpful at this point. A LEMA is the area designated as a special district, e.g., the GMD4 District-Wide LEMA. A management plan is the technical document prepared by the district that contains the corrective controls for the LEMA. An attempt has been made to use these different terms distinctly, but at times they become interchangeable.
[12] K.S.A. 82a-1041.
[13] *Id*.

areas for a five-year term beginning in 2013, which has since been renewed for a second five-year term.[14]

B. Development of the GMD4 District-Wide LEMA

Based upon the success of the Sheridan 6 LEMA[15] and its subsequent renewal, GMD4 turned to address declining water levels in other parts of their district. The process to develop what is now the District-Wide LEMA formally began in January of 2015. At the January 13, 2015 meeting of the GMD4 Board of Directors, the Board adopted a goal statement that "By 2016, the GMD 4 Board will have in place a system that establishes 'conservation water use amounts' for all of GMD4."[16] This included "triggers under which pumpage levels will be required to be reduced" and included the development of such a system by Board action to replace the current high priority area protocols (generally a method to identify the areas within GMD4 experiencing the greatest declines in groundwater levels).[17] The goal statement was shared at GMD4's annual meeting in February 2015 and detailed discussions were held by the Board at public meetings and recorded in the minutes. Public Board meetings held in February, March, April, May, June, July, August, November, and December of 2015 included detailed discussions of areas of decline, goals, water use reductions to achieve goals, and alternative legal methods that might be employed to encourage conservation.[18] The detailed minutes show that the Board gave serious consideration to multiple ideas and concerns and reviewed various alternatives to help conserve water within GMD4.

Similar work continued in 2016, with further discussions being held at public Board meetings in January and February, including the presentation of a proposed management plan at

[14] GMD4 Testimony, AR at 1452.
[15] *Id.*,1462-1464.
[16] *Affidavit*, AR at 1210.
[17] *Id.*
[18] *Id.*, 1211-1216.

the February annual meeting.[19] After further refinement at the March 2016 public Board meeting, public meetings were advertised and held in Hoxie, Colby, St. Francis, and Goodland.[20] Public comments and further review of the draft management plan continued in April, May, June, July, and August, which led to numerous adjustments to the proposed management plan.[21] At the September 2016 meeting, the Board agreed to wait 30 days to provide time to talk to their constituents about the proposed management plan and in October the board agreed to take the revised plan to the public.[22] A memorandum that summarized the proposed management plan, including maps, was mailed to all water use correspondents in GMD4 on November 4, 2016 and additional public meetings were held in late November and early December in Colby, Goodland, St. Francis, and Hoxie.[23] The proposed management plan was again presented at the 2017 annual meeting as the Board continued to make refinements to the plan at public Board meetings until it was submitted to the Chief Engineer with a request to initiate proceedings in June of 2017.[24]

C. GMD4 District-Wide LEMA Proceedings

The following is a summary[25] of the timeline followed to designate the GMD4 District-Wide LEMA once proceedings were formally initiated by the Chief Engineer:

1. On June 8, 2017, GMD4 submitted a formal request to the Chief Engineer for the approval of a LEMA including a proposed management plan for the period January 1, 2018 through December 31, 2022 pursuant to K.S.A. 82a-1041(a).
2. On June 27, 2017, the Chief Engineer found that the proposed management plan for the District-Wide LEMA was acceptable for consideration as it proposed clear geographic boundaries, pertained to an area wholly within a groundwater management district,

[19] *Id.*, 1216-1217.
[20] *Id.* at 1218.
[21] *Id.*, 1219-1220.
[22] *Id.* at 1221.
[23] *Id.*, 1221-1222.
[24] *Id.*, 1222-1224.
[25] *Order of Designation*, AR, 2498-2500, 2547.

proposed appropriate goals and corrective control provisions to meet the stated goals, gave due consideration to existing conservation measures, included a compliance monitoring and enforcement element, and is consistent with state law.

3. Pursuant to K.S.A. 82a-1041(a) and (b), the Chief Engineer initiated proceedings to designate the District-Wide LEMA and scheduled an initial public hearing. Timely notice of the initial public hearing was mailed to each water right holder located within the proposed District-Wide LEMA and published in two local newspapers of general circulation within GMD4 and in the Kansas Register. Such initial hearing was delegated to Constance C. Owen ("Initial Hearing Officer") pursuant to K.A.R. 5-14-3a.
4. The Initial Public Hearing was held on August 23, 2017 at the Cultural Arts Center at Colby Community College, 1255 S. Range Avenue, Colby, Kansas. Based on all testimony entered into the record and the applicable law, the Initial Hearing Officer issued findings[26] that the District-Wide LEMA management plan satisfied the three initial requirements as set forth in K.S.A. 82a-1041(b)(1)-(3).
5. Since the Initial Hearing Officer determined that the three initial requirements were satisfied, the Chief Engineer scheduled a second public hearing for November 14, 2017, to consider whether the District-Wide LEMA management plan was sufficient to address any of the existing conditions set forth in K.S.A. 82a-1036(a)-(d) and thus should be approved. Timely notice of the second public hearing was mailed to each owner located within the proposed District-Wide LEMA and published in the Colby Free Press on October 13, 2017, the Goodland Star-News on October 13, 2017, and in the Kansas Register on October 12, 2017.

[26] *Order on Initial Requirements*, AR, 260-281.

6. On October 10, 2017, a group of five water right holders located within the proposed District-Wide LEMA submitted a *Notice of Intervention*[27] and a *Motion for Continuance*.[28]
7. On October 17, 2017, the Intervenors filed a *Motion to Provide Due Process Protections*.[29] This motion requested additional time to prepare for the second public hearing and argued for the addition of procedures that would turn the scheduled public hearing into an adversarial proceeding. GMD4 provided their response on November 1, 2017.[30] The Chief Engineer responded on November 6, 2017 and stated in his *Decision to Expand Due Process Procedures*[31] that the prescribed hearing procedure would be modified to include greater opportunity for cross-examination. In his *Pre-Hearing Order,*[32] the Chief Engineer also granted a two-week extension of the deadline to submit written comments after the hearing, and then granted an additional extension until December 22, 2017, upon the later request of the Intervenors.
8. The second public hearing was conducted by the Chief Engineer on November 14, 2017 in Colby, Kansas at the City Limits Convention Center to consider whether the proposed management plan was sufficient to address any of the existing conditions set forth in K.S.A. 82a-1036(a)-(d).
9. Based on all testimony and evidence entered into the record of the second public hearing, the Chief Engineer determined that the District-Wide LEMA management plan was sufficient to address the decline in groundwater levels in the area in question. He also determined that the administration of the proposed management plan could be improved

[27] AR, 283.
[28] AR, 286.
[29] AR, 290 and *Memorandum in Support*, AR, 312-348.
[30] AR, 362.
[31] AR, 387-396.
[32] AR, 383.

by modifications based on testimony at the second public hearing. The *Order of Decision*[33], with the proposed modifications based on testimony at the second public hearing, was issued on February 23, 2018, and corrected by order on February 26, 2018 (the corrected order fixed several typographical errors and non-substantive omissions).

10. On March 1, 2018, the Board approved the modifications to the management plan as proposed by the Chief Engineer and on that same day returned the so modified management plan to the Chief Engineer for his acceptance.
11. Pursuant to K.S.A. 82a-1041(e), the Chief Engineer accepted the proposed management plan, as modified, on March 8, 2018.
12. On April 13, 2018, the Chief Engineer issued the Order of Designation,[34] designating the GMD4 District-Wide LEMA.
13. Petitioners timely sought review of the Order of Designation by the Secretary of Agriculture on April 29, 2018 and such review was declined on May 18, 2018.[35]
14. Petitioners timely filed for judicial review with this Court pursuant to the KJRA on June 13, 2018.

D. Contents of the Approved District-Wide LEMA Management Plan[36]

At issue in this case is whether the District-Wide LEMA management plan put in place by the Order of Designation is lawful as applied and on its face. A brief summary of the management plan is helpful to provide a basic understanding of what the approved management plan does to water rights within the designated area.

Overall, the management plan is in place for a five-year term from 2018-2022 and limits total groundwater withdrawals from within the LEMA boundary, excluding vested rights, to 1.7

[33] AR, 2434.
[34] AR, 2498.
[35] *Petition for Administrative Review*, AR, 2581-2061; *Order Declining Review*, AR, 2602-2604.

million acre-feet for irrigation use during the term. The goal of 1.7 million acre-feet represents five times the designated legally eligible acres multiplied by the amount designated for each respective irrigation water right. Allocations are assigned to each water right based on the maximum reported and/or verified acres irrigated between 2009-2015 (the eligible acres) according to the method described below. The allocations do not alter the base water right, nor prevent the maximum annual amount of the certified water right from being pumped in any given year, but they do place limitations on the five-year total that can be withdrawn. That is, the total over five-years is less than if the certified water right were pumped at its authorized annual maximum each year for five-years. There are also protections in place to ensure no water right holder suffers cuts that prevent them from operating. For example, no water right can be reduced by more than 25% of its average historical pumping for the historical period unless it would allow an allocation greater than the maximum allowed allocation of 18 inches per acre per year (90 inches per acre per five-years.).[37] An additional protection prevents any water right holder from be allocated less than the net irrigation requirement for corn under average precipitation conditions.[38]

Once the verified acres have been determined, then a five-year water use allocation is put in place based on the rate of decline in groundwater levels in each township within GMD4. Ranging from east to west, six zones were created to reflect annual precipitation amounts in each zone. Then, for each zone, based on the average annual rate of decline in groundwater levels by township, ranging from 0.05% declines to 2% or greater declines, an allocation of inches per acre is assigned based on precipitation and on the severity of the declines in the area. The annual allocation is then multiplied by five to determine the total allocation for the five-years of the

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[37] *Order of Designation*, AR, 2780-2788.
[38] *Id.* at 2776; *National Engineering Handbook*, Part 652, Irrigation Guide, NRCS, available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_030990.pdf.

management plan.[39] The five-year allocation prevents the loss of unused water from year to year, subject to the certified maximum amount in any given year, but otherwise the water may be used as the water right owners sees fit during the five-year period. For example, a water right owner in a zone that provides for 16 inches per acre and who has 125 verified acres, results in an allocation of 835 acre-feet of water (an average 167 acre-feet per year) to use over the five-year period.

II. STANDARD OF REVIEW

This Court's review is proper pursuant to the KJRA, which act establishes the exclusive means of judicial review of an agency action.[40] A review of disputed facts under the KJRA shall be confined to the agency record as supplemented by additional evidence taken pursuant to this act.[41] In the present case, the burden of proving the invalidity of the Chief Engineer's agency action (i.e. the Order of Designation establishing the GMD4 District-Wide LEMA) is on Petitioners as the party asserting invalidity.[42] The Court shall only grant Petitioners relief if the Court determines that at least one of the following, as applied to the Chief Engineer's action as the time that it was taken, applies:

1. The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
2. The agency has acted beyond the jurisdiction conferred by any provision of law;
3. The agency has not decided an issue requiring resolution;
4. The agency has erroneously interpreted or applied the law;
5. The agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

[39] *Id.* at 2802; Modified Request for District-Wide LEMA, AR, 2476.
[40] K.S.A. 77-606.
[41] K.S.A. 77-618.
[42] K.S.A. 77-621.

6. The persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
7. The agency action is based on a determination of fact made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record of as a whole;
8. The agency action is otherwise unreasonable, arbitrary or capricious.[43]

For purposes of these standards, "in light of the record as a whole" means that the adequacy of the evidence in the record to support a particular finding of fact shall be judged in light of all relevant evidence in the record, including any determinations of veracity by the presiding officer and the court shall not reweigh the evidence or engage in de novo review.[44] Further, due account shall be taken by the court of harmless error.[45]

Petitioners almost exclusively present challenges that are questions of law and characterize the actions of the Chief Engineer in issuing the Order of Designation as either unlawful actions requiring statutory construction, unreasonable, or as arbitrary and capricious. The Court will review all challenges that amount to questions of law under *de novo* review.[46]

The Court will review all challenges that the agency action was arbitrary and capricious under the substantial evidence test—in that only if the agency's determination of fact are clearly overcome by substantial contrary evidence will the Court reverse the agency's actions.[47] "An administrative action is unreasonable when it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested

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[43] K.S.A. 77-621.
[44] *Id.*
[45] *Id*.
[46] *See Katz v. Kan. Dep't of Rev.* 45 Kan. App. 2d 877, 895 (2011) for de novo review to determine if an agency's action was unconstitutional. *See Friedman v. Kan. State Bd. Of Healing Arts*, 296 Kan. 636, 620 (2013) for de novo review to determine if an agency's action exceeded its authority. *See Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362 (2015) for de novo review to determine if the agency erroneously interpreted or applied the law. *See Sheldon v. Kan. Pub. Employees Ret. Sys.*, 40 Kan. App. 2d 75, 81 (2008).
[47] *Williams v. Petromark Drilling, LLC,* 299 Kan. 792, 795 (2014).

parties, and was so wide of the mark that its unreasonableness lies outside the realm of fair debate. Whether an action is reasonable or not is a question of law, to be determined upon the basis of the facts which were presented to the [agency].(citation omitted)"[48] "The arbitrary or capricious test relates to whether a particular action should have been taken or is justified, such as the reasonableness of an agency's exercise of discretion in reaching a determination or whether the agency's action is without foundation in fact. (citation omitted)"[49]

III. STATUTORY CONSTRUCTION

Petitioners primary argument is whether the applicable LEMA statute is lawful and hence claim that this Court must interpret its meaning. When analyzing the meaning of statutes, "the most fundamental rule of statutory construction is that the intent of the legislature governs if that can be ascertained. (citation omitted.) We presume that the Legislature 'expressed its intent through the language of the statutory scheme, and when a statue is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.' (citation omitted.) Moreover, when interpreting the plain language of a statute, we must refrain from reading language into the statute that is not readily found therein."[50] Only when the statute is determined to be ambiguous, may the court then, in determining legislative intent, "properly look to the purpose to be accomplished, and the necessity and effect of the statute,"[51] and "if possible…reconcile different provisions [of the same act] so as to make them consistent, harmonious, and sensible."[52]

Additionally, when determining if a statute is constitutional, the Court must resolve all doubts of validity in favor of finding the statute constitutional. This must be done without

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[48] *Katz,* 877.
[49] *Id.* at 886.
[50] *Schneider v. City of Lawrence*, 2019 WL 494486, 3 (2019).
[51] *State v. Keely*, 236 Kan. 555, 559, 694 P.2d 422 (1985).
[52] *Id*.

concern for the wisdom, economic policy, or social desirability of the law.[53] Therefore, as to any argument plaintiffs make regarding the constitutionality of the LEMA statute, the Court must presume the statue is valid.

IV. ARGUMENTS AND AUTHORITIES

Petitioners' arguments can be broadly summarized and grouped into five categories:

1. It is unlawful to make any reductions in existing water rights through a LEMA process.
2. The LEMA statute itself violates the due process and equal protection clauses of the United States Constitution and the Kansas Constitution.
3. The District-Wide LEMA management plan must set any reductions in groundwater withdrawals only by utilizing the prior appropriation doctrine.
4. The Chief Engineer's decision not to promulgate administrative rules and regulations pursuant to the LEMA statute is fatal to the establishment of a LEMA.
5. The Chief Engineer failed to follow prescribed procedures, including the Kansas Administrative Procedures Act ("KAPA").

This memorandum will address each of these claims in turn.

A. Is it lawful to require reductions in groundwater withdrawals?

Petitioners' describe the District-Wide LEMA management plan as an "unlawful collateral attack" on existing water rights.[54] Petitioners do not cite any authority or provide any standards against which to consider a collateral attack on a usufruct property right and therefore, it is unclear what Petitioners hope to achieve with this argument. Perhaps they imply that there is a regulatory taking of some sort, but they do not argue that directly and that issue is not proper for KJRA review. However, Petitioners do rely on *Clawson v. Div. of Water Resources*[55] in

[53] *F. Arthur Stone & Sons v. Gibson*, 203 Kan. 224, 226 (1981).
[54] *Petitioners' Memo* at 38.
[55] 49 Kan.App.2d 789, 315 P.3d 896 (2013).

which the Kansas Court of Appeals found that the Kansas Water Appropriation Act ("KWAA") does not grant the Chief Engineer the authority to "retain jurisdiction" of a water right in order to "reevaluate and reconsider an approval once a permit has been issued."[56] This case is easily distinguished from the District-Wide LEMA because *Clawson* specifically dealt with the Chief Engineer's ability to *retain jurisdiction* to make permanent changes to a water without any explicit statutory authority to allow such jurisdiction or changes.[57]

The Order of Designation and the management plan it implements can be distinguished from the order at issue in *Clawson* for several reasons. First, the LEMA statute gives the Chief Engineer specific authority to make reductions in groundwater withdrawals under certain circumstances. The *Clawson* Court reaffirmed a previous decision that, when authorized by statute to do so, the Chief Engineer can make adjustments to certified water rights.[58] Citing to *Wheatland Elec. Co-op., Inc., v. Polansky*[59], the KWAA provided specific authority to the Chief Engineer to evaluate and makes changes to water rights after they had been certified under certain conditions. Petitioners have misapplied *Clawson* in order to create the impression that the Chief Engineer cannot exercise explicit statutory authority when Kansas Courts have allowed such actions.[60] The situation in *Clawson* can be further differentiated because the District-Wide management plan makes no permanent changes to any water rights, but only reduces withdrawals in a reasonable and sustainable way for a temporary period.[61] In fact, greater quantities may be withdrawn in the future should the water level declines decrease in rate, if the water level were to rise, or if the District-Wide LEMA is not renewed.

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[56] *Id*. at 808.
[57] *Id*., 799-807.
[58] *Clawson* at 805.
[59] 46 Kan. App.2d 746 (2011).
[60] *Clawson*, at 805.
[61] *AR* at 2539.

Petitioners also argue that because the Legislature adopted K.S.A. 82a-711 and 82a-711a, which allowed the appropriation of new water rights subject to water level declines within reasonable economic limits, the Legislature (at least as Petitioners argue) intended to allow, in perpetuity, the decline of the state's aquifers.[62] Professor Earl B. Shurtz's analysis is poignant, that the nature of groundwater and aquifers meant that it would have surely slowed economic development to prohibit any development that could lower the static groundwater level.[63] This argument does not accurately reflect Kansas public policy as both the Legislature and Kansas Courts have made it clear that a state of permanent depletion unto extinction was not the policy of the state of Kansas as explained below.

Petitioners rely too heavily on the Shurtz report, as there is no evidence that it was the intent of the Legislature to change the usufruct nature of water rights nor to restore an absolute right to access groundwater that existed prior to adoption of the KWAA. Another reason Petitioners rely too heavily on Prof. Shurtz is that his same 1957 comments were also part of the considerations of the *Interim Report of the Governor's Task Force on Water Resources*, which met in 1977 and 1978 and ultimately suggested the authorization IGUCAs. Prof. Shurtz is summarized by that committee as concluding that there is a "possible need for the Kansas Water Appropriation Law to be redefined and clarified from time to time to keep it in tune with changing times."[64] This evidences that the Legislature was having meaningful conservations about slowing the decline in groundwater levels, and that by moving forward with the IGUCA statutes in the 1978 Legislature, that they believed they had the authority to authorize reductions in groundwater withdrawals with or without the use of the prior appropriation doctrine. This is not to present an exclusive position from Prof. Shurtz but is useful to illustrate that Petitioners

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[62] *Petitioners' Memo*, 48-50.
[63] *Report on the Laws of Kansas Pertaining to the Beneficial Use of Water*, Bulletin Number 3, Kansas Water Resources Board, November 1956, 91-92.
[64] *Interim Report of the Governor's Task Force on Water Resources*, Shelby Smith, Chairman, State of Kansas, 1977, 53-54.

fail to fully acknowledge the complexity of policy forces at work within the Legislature over the last 70 years.

It is important to examine the beginnings of the KWAA to understand why Petitioners' arguments miss key elements behind the legislative intent of Kansas water law and how Kansas Courts have interpreted that intent. Upon adoption in 1945, the KWAA made broad sweeping changes to the right to withdraw water in Kansas. Upon its adoption, the KWAA included K.S.A. 82a-702, "All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner prescribed herein." Petitioners spend no time considering the meaning of K.S.A. 82a-702, but in *Williams v. City of Wichita*[65] the Kansas Supreme Court declared that this is the "heart of the statute. The rest of it treats of details and procedure."[66]

In 1944, the committee that reported to the legislature about the initial adoption of the KWAA recognized (an acknowledgement notably absent from Petitioners' arguments) that the

> needs of the people in Kansas, have changed so greatly since the early adoption of the common law as applied to water use, that the time has come to modify the common law….The power of the state either to modify or reject the doctrine of riparian rights because unsuited to the conditions in the state and to put into force the doctrine of the prior appropriation doctrine and application to beneficial use or of reasonable use has long been settled by the adjudicated cases. (citation omitted.)"[67]

The Legislature was authorized to take control and regulate the state's water and that water was no longer controlled by an absolute right of individuals but rather through a qualified and regulated right to withdraw water and put it to beneficial use.[68] If the Kansas Supreme Court has upheld the police power of the state to fully regulate and assume control of all water,[69] then certainly the state has the police power to put into place specific statutory schemes to regulate

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[65] 190 Kan. 317, 374 P.2d 578 (1962).
[66] *Id*. at 336.
[67] *Id.*, 331-332.
[68] K.S.A. 82a-707.
[69] *See, State ex rel. Emery v. Knapp*, 167 Kan. 546 (1949).

how that public resource is used, as long as they do not remove someone's ability to use that resource.

There are two primary elements at play when considering how water should be distributed within Kansas. The first is beneficial use and the second is the prior appropriation doctrine. K.S.A. 82a-707 states that "appropriation rights shall remain subject to the principle of beneficial use," and that "appropriation rights in excess of the reasonable needs of the appropriators shall not be allowed." It is important to note the K.S.A. 82a-707(b) deals with who shall have the "right to divert" when "supply is not sufficient to satisfy all water rights," and as long as a holder of a water right is "making proper use of it under the terms and conditions of such holder's water right and the laws of this state," they shall not be deprived of the use of the water. Water right holders are entitled to their usufruct property right to withdraw water and to put it to a beneficial use, but such right is subject to regulation by the state and the principles of beneficial use cannot be completely ignored by the presence of the prior appropriation doctrine. What is reasonable may change over time, whether that be through technological improvement of conservation methods or whether a reasonable lowering of the static water table becomes no longer reasonable. The fact that all water rights remain subject to beneficial and reasonable use is just as important as the priority number they are given. This is evidence that the Legislature intended for ongoing regulation by the Chief Engineer. Therefore, the Legislature has specifically authorized through K.S.A 82a-1041, a method by which the Chief Engineer can continue to regulate existing water rights in the public interest while not destroying the usufructuary property interest that exists. In commenting on the adoption of the KWAA, specifically that the state took control of all water, the Kansas Supreme Court noted that

"Individuals do not live alone in isolated areas where they, at their will, can assert all of their individual rights without regard to the effect upon others."[70]

When the totality of the KWAA is considered, including the limited nature of water rights as property, and the fact that water right holders own only a right to access water in ways and purposes deemed appropriate by the state, it is clear the Legislature intended to prescribe the continued regulation of access to water. The adoption of the KWAA eliminated the absolute right to access groundwater that existed prior to 1945 with the creation of vested rights (the most protected rights under current law), as the Legislature set specific conditions under which water rights that were recognized to exist prior to the enactment of the KWAA were modified.

> *We hold that it was within the competency of the legislature* to define the 'vested rights' of common-law water users, or *to establish a rule as to when and under what conditions and to what extent a vested right should be deemed to be created in such a water user*. . . . The effect of the common-law doctrine in Kansas under the Act is little more than legal fiction. *The right of the plaintiff to ground water underlying his land is to the usufruct of the water and not to the water itself.* Legislation limiting the right to its use is in itself no more objectionable than legislation forbidding the use of property for certain purposes (citation omitted).[71]

When the Legislature later amended the KWAA to require that water use could only be achieved with a permit, the Kansas Supreme Court again upheld the principle that the Chief Engineer can regulate existing water rights:

> In *Williams* . . . we held the landowner has no absolute right to the water under his land, only a right to the use of it. We held water use regulation is an appropriate exercise of the state's police power. The provisions of K.S.A. 82a-728 comport with that exercise of authority. The statute does not effect an unconstitutional taking of property.[72]

Perhaps if the Chief Engineer were not specifically authorized to reduce groundwater withdrawals through K.S.A 82a-1041, Petitioners arguments would carry more weight. However, considering the pervasiveness of ongoing regulation and a restriction to a regulated beneficial use combined with a qualified right to access, not an absolute right to access or own, the

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[70] *Williams,* 336.
[71] *Id.* at 339.
[72] *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 630 P.2d 1164, 237 (1981).

Legislature acted fully within the state's police power to authorize such actions by the Chief Engineer.

B. Does the LEMA Statute violate the Constitutions of the United States and Kansas?

Petitioners present several constitutional challenges, some of which have been dealt with above. Petitioners repeat the argument that the right to withdraw water can never be reduced, that the LEMA statute violates separation of powers because the Legislature failed to define "excessive", that the management plan itself violates the equal protection clause because it allows different types of use to be treated differently, and that the management plan violates due process by not providing for a proper review process. Regarding the right to reduce withdrawals, see the arguments presented above. Petitioners' other arguments are addressed below.

1. Did the Legislature violate separation of powers by failing to define when groundwater declines are excessive?

Petitioners argue that since the Legislature did not provide precise definitions of "excessive decline" and allowed for the use of the prior appropriation doctrine "in so far as may be reasonably done," the LEMA statute violations the separation of powers doctrine. Specifically, Petitioners argue that the LEMA statue gives the Chief Engineer improper legislative power because the use of such terms lacks "limits, contours, standards, restraining banks in a definitely defined channel, or 'protection against arbitrary action, unfairness, or favoritism.'"[73] These claims fail under further scrutiny.

The Legislature put robust protections in place in the LEMA statute to protect those water right holders potentially subject to reductions by providing for two public hearings, specific criteria that must be considered at each hearing, review by the Secretary of Agriculture, and then judicial review. The fact that the Legislature did not define each phrase used in the statute is

[73] *Petitioners' Memo* at 64.

understandable because water is a technical subject, the state of Kansas is quite diverse geologically speaking, and the Legislature has entrusted the Chief Engineer to act as the foremost water manager in the state. The Chief Engineer must address all these concerns by establishing a clear evidentiary record before taking any action that would reduce groundwater withdrawals. Based on the plain text of the statute, the District-Wide management plan is based on ample evidence in the record indicating that declines in the groundwater level exist and that the plan was reasonable.[74] Further, all actions considered are well with the bounds of the plain text of K.S.A. 82a-1041 and there is no basis that any action was unreasonable, arbitrary, or capricious.

2. *Does the District-Wide LEMA Management Plan violate the equal protection rights of water right holders by treating different uses of water differently?*

The management plan provides a reduced allocation for irrigation rights, while non-irrigation rights are not provided allocations, nor are they required to reduce their use. Livestock and poultry uses are encouraged to use 90% of the amount of water provided for based on the maximum amount supportable pursuant to K.A.R. 5-3-22, municipalities are encouraged reduce the amount of unaccounted-for water reported annually and reduce the gallons used per capita per day, and all other non-irrigation users are encouraged to utilize best management practices.[75]

The proposed management plan does treat the various types of uses of water differently. Let us be clear, the KWAA itself treats various uses differently. The statutes and regulations that apply to municipal use are different from stock water use as are the requirements for domestic use or sand and gravel pits. It should come as no surprise to anyone that the various uses are treated differently in the absence of impairment.[76] Petitioners' claims should be rejected on their

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[74] *Testimony from Brownie Wilson, Kansas Geological Survey*, AR 242-246; *Order on Initial Requirements*, AR, 260-281.
[75] *Order of Designation*, AR, 2468-2469.
[76] *See e.g.,* K.S.A. 82a-705; 82a-734; and K.A.R. 5-1-4(b).

face because water law in Kansas does not create "indistinguishable classes of individuals being treated differently."[77] K.S.A. 82a-707 establishes various uses of water, including domestic, municipal, irrigation, industrial, etc. Further types of use, such as use for livestock are contained in K.A.R. 5-1-1. Each of these uses requires different amounts of water, which itself may vary based on geographical location. Each use often utilizes different equipment to withdraw, store, and apply water. There are various ways these rights are distinguishable, and even if they could not be distinguished, there are numerous reasons to justify the different regulation of each right under the rational basis test allowing the Chief Engineer can carry out his duties to "control, conserve, regulate, allot and aid in the distribution of the water resources of the state…."[78] To require the same standards of water applied to irrigation as to that used for municipal supply is nonsensical. Various statues also require the Chief Engineer to make decisions based on the public interest, including new applications and changes to existing water rights.[79] There is no discrimination against similar classes in the Order of Designation.

In the absence of impairment Kansas statutes do not prohibit different treatment of different types of use. K.S.A. 82a-707 states that the "date of priority…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*." In the case of an impairment, priority administration would be applied, and the type of use would not be considered. No evidence was provided that the failure to provide additional restrictions on these small, dispersed uses of water would harm neighboring irrigation use. Therefore, except where impairment exists, the LEMA statute allows such distinctions to be made if in the public interest.[80] K.S.A. 82a-707 prohibits deprivation of a water

[77] *Miami County Bd. of Com'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 315, 255 P.3d 1186 (2011).
[78] K.S.A. 82a-706.
[79] K.S.A. 82a-711 and 82a-708b.
[80] *Order of Designation*, AR, 2531-2532.

right holder from exercising his right to withdraw water but does not prohibit further regulation under "the laws of this state" of that right to withdraw water.

Petitioners argue that because the District-Wide LEMA is requiring reductions in groundwater withdrawals, there inherently must be a shortage in the supply of groundwater, thus triggering priority administration.[81] Petitioners' argue that "impairment" should not only exist in direct nearby well to well interference situations, but also because of a regional decline in the groundwater table, which has occurred in GMD4. While regional impairment can occur, K.S.A. 82a-707(b) cannot be read, as Petitioners suppose, to create an impairment were none exists. Simply because groundwater levels are declining, it does not follow that supply is automatically insufficient. The LEMA statute allows for the designation of a LEMA for several reasons, including when groundwater levels are declining and when withdrawals of groundwater exceed recharge. It is undeniable that groundwater levels have declined within the District-Wide LEMA.[82] However, there is no record of impairment and there is no record that there is a shortage of groundwater supply that is preventing anyone from operating his or her water right as allowed under the law. The LEMA tool was developed principally to extend the time where this will remain to be the case by creating reasonable allocations based on the established rates of decline in groundwater levels. Said another way, the purpose of the GMD Act and the LEMA statute is to preserve groundwater so that supply will remain available to all water rights for as long as possible before impairment claims and enforcements must be made and undertaken to protect senior water rights. It is simply unreasonable to jump to the conclusion that because groundwater levels are declining, and have been declining for many years, that every water right in an area is impaired or has insufficient supply. Likewise, it would be unreasonable for the Chief Engineer to declare that every water right in GMD4 was impaired because of a declining

[81] *Petitioners' Memo*, 70-72.
[82] *Testimony from Brownie Wilson, Kansas Geological Survey*, AR, 242-246.

groundwater level and it is not necessary to apply the prior appropriation doctrine to any reductions in groundwater withdrawals.

3. *Is the LEMA management plan inadequate because it does not provide for review by an independent, unbiased tribunal?*

Petitioners state in error that review of the management plan allocation was not subject to review by an independent unbiased tribunal.[83] This is simply a misunderstanding of the law on the part of Petitioners. The management plan itself does provide for review by GMD4 staff and the Board. Any water right holder unhappy with the allocation of his water right has the right, pursuant to K.S.A. 60-2101, to judicial review of any decision regarding allocations made by GMD4.

4. *Are the record keeping requirements of the LEMA management plan vague?*

The LEMA Management plan requires water flowmeter readings to be recorded every two weeks and this can be accomplished by simply recording the readings of the water flowmeter, which all water rights in GMD4 are required to have and maintain in good operating order, or to provide an alternative method of calculating usage.[84] The plan does not technically require any information that is not required on an annual basis by existing law, only that the water right holder is asked to check his or her meter every two weeks to ensure accuracy. The management plan specifically provides a method to report when a meter is broken and the opportunity to provide an alternative calculation method upon discovery without penalty.[85] Further, when water flowmeters inevitably break under current laws and regulations, it is common for water right holders to use hours of operation and rate of diversion as alternative methods to compute usage for their annual water use report. It is unclear why requiring more

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[83] *Petitioners' Memo*, 76-77.
[84] *Modified Request for a District-Wide LEMA*, AR, 2472-2473; K.S.A 82a-732, requiring an annual water use report; K.A.R. 5-24-9, requiring water flowmeters within GMD4.
[85] *Modified Request for a District-Wide LEMA*, AR at 2473.

frequent water flowmeter checks and readings, which in any case would actually decrease the amount of unknown pumping that had to be accounted for, is vague or how it violates any constitutional standard. It is reasonable to require more frequent checks in order to help ensure less water is being withdrawn and is more accurately reported.

C. Is a LEMA Management Plan Required to Make Reductions in Water Use Only by Using the Prior Appropriation Doctrine?

1. Does the plain reading of the LEMA statute, without any further context, require reductions to be based only on the prior appropriation doctrine?

K.S.A. 82a-1041(f) allows the following corrective controls to be implemented in a LEMA:

> (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.

Petitioners attempt to argue that the plain meaning of the LEMA statute, without additional context, requires that the prior appropriation doctrine be applied to all reductions in water use done under subsections (f)(2) and (f)(3) because subsections (f)(2) and (3) must be "read together, reconciled, and harmonized."[86] However, Petitioners make no attempt to read the LEMA statute in a reasonable way that reconciles and harmonizes the various corrective controls

[86] *Petitioners' Memorandum in Support of Petition for Judicial Review* ("*Petitioners' Memo*") at 16.

as written. Petitioners state that the other three corrective control methods are dissimilar based upon a plain reading of the statute and apparently that the prior appropriation doctrine does not apply in those cases, but only in the specific way devised by Petitioners.[87] The first issue with Petitioners' argument is that there is no ambiguity if each subsection is simply read to provide a distinct remedy. The second issue is that in no case does the LEMA statute *require* that the prior appropriation doctrine be applied.

There is no need to resort to the canons of statutory construction if the statute is clear and unambiguous.[88] When the entire LEMA statute is considered, the Legislature meant for each corrective control to stand on its own and Petitioners have drawn artificial similarities and distinctions. Therefore, even if Petitioners made an attempt to establish that K.S.A. 82a-1041 is unclear or ambiguous, they would fail; however, Petitioners do not even claim the statute is ambiguous.

First, Petitioners state that since subsections (f)(2) and (3) deal with the "same subject" they must be read together and "construed" together.[89] Petitioners' analysis is *ad hoc* and contrary to the spirit of attempting to harmonize the statute. This argument is most easily dealt with by the fact that the Legislature included "or" in the list of corrective controls, meaning each control is intended to stand on its own as a separate corrective control.

This becomes more evident as conflict and ambiguity are created only when Petitioners interpretation is applied to the statute by stating that (f)(2) and (3) are really a single corrective control divided into two-parts, while the other three subsections are supposedly still distinct corrective controls.[90] Without any further context, it makes little sense organizationally to create four corrective controls in five separate subsections, with no indication that any are linked as a

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[87] *Id.* at 17.
[88] *Cochran v. State, Dept. of Agr., Div. of Water Resources*, 291 Kan. 898, 903, 239 P.3d 434 (2011).
[89] *Petitioners' Memo*, 16-17.
[90] *Id.* at 17.

single corrective control. Further, if the legislature meant for (f)(2) and (3) to be part of the same corrective control, why would each subsection provide the ability to set individual allocations? Subsection (f)(2) states that the "chief engineer shall apportion such permissible total withdrawal *among the valid groundwater right holders*," whereas in (f)(3), it refers to "reducing the permissible withdrawal of groundwater *by any one or more appropriators*…or wells." If this is all part of the same corrective control, then the Legislature has needlessly duplicated itself (not to mention instituted a confusing organizational structure), and as Petitioners state, the "Legislature does not enact useless provisions."[91] If these sections were intended to be read as distinct steps in the same process, why re-create the same authority for each step?

It is possible to harmonize the corrective controls written in subsection (f) as each provides a distinct remedy and methodology. Subsection (f)(2) provides authority to address declining groundwater levels across a large area by setting total withdrawal goals that may be sensitive to specific times of the year or any other necessary factors. If operating under subsection (f)(2), there is no need to refer to subsection (f)(3) to set up the individual allocations under the larger withdrawal goal because (f)(2) itself provides that such water shall be apportioned among the water right holders. It is also worth noting that allocating by the prior appropriation doctrine as referenced in subsection (f)(2) is not mandatorily required, but rather it is only to be applied "insofar as reasonably may be done." Petitioners insist on interpreting the statute as if "reasonably" were not in the text. There may be a variety of situations, especially in groundwater systems that have a slow rate of groundwater movement, such as in GMD4, where these provisions may not be practicable, and in which it is not reasonable to apply the prior appropriation doctrine when setting corrective controls. The Legislature wisely left it to the discretion of groundwater management districts and the Chief Engineer to discern when it was

[91] *Id.*

proper to apply. The purpose of the GMD Act is to provide local solutions to declines in groundwater levels and that is exactly what the Legislature authorized.

Subsection (f)(3) allows for a different solution, one based in localized areas. This is the case with the management plan presented in the District-Wide LEMA. Since the rate of water level decline varies across the state (and in GMD4 itself), the Legislature allows for setting localized reductions. Even if individual allocations are tallied up into a total measurable goal (as GMD4 did), it does not diminish the statutory authority to set specific reductions in water use among individual wells in specific locations. Since (f)(3) is separate and distinct from (f)(2), a conflict is only created if the corrective controls are read together as one—which they should not be.

Petitioners argument that subsections (f)(2) and (3) are so similar that they must be read together and that the other three must be read separately also fails to stand up under scrutiny. The claim that subsection (f)(4) is too dissimilar to be read in conjunction with subsection (f)(2) contradicts their argument. Subsection (f)(4) allows for a rotation of water rights. This is fundamentally no different than setting total withdrawals based on the day, month, or year as provided in subsection (f)(2), because the water right holder who is told he cannot irrigate for a season or part of a year due to the rotation system imposed, will certainly view that as a reduction. It simply does not make sense to pick and choose which corrective controls are really merged together when they all present different ways to reduce water use. This argument is not meant to say that the prior appropriation doctrine should also apply to (f)(4), but to illustrate how inconsistently Petitioners have cobbled together their interpretation. A conflict in the plain language of the LEMA statute only exists when corrective controls are improperly merged together as Petitioners suggest is necessary for interpretation. Petitioners "plain language" interpretation of the statues serves only to create tension and ambiguity and it is not necessary to resort to the various cannons of statutory construction when the intent of the Legislature is clear.

The lack of ambiguity should end Petitioners' argument; however, the remainder of Petitioners constructions will be addressed.

2. *Is it necessary to interpret the LEMA statute by reading it in para materai with the GMD Act and the Kansas Water Appropriation Act ("KWAA") to require that reductions be based only on the prior appropriation doctrine?*

Even more so than Petitioners' attempt to interpret the plain meaning of the LEMA statute, Petitioners, in arguing that the LEMA statute must be read *in pari materia,* fail to establish the necessary criteria to justify the wide-ranging statutory construction methods employed. As stated above, "when the language of a statute is plain and unambiguous, courts 'need not resort to statutory construction."[92] On its own, the LEMA statute can be harmonized, and the Legislature's intent can be clearly discerned from the text. Petitioners make no attempt to show ambiguity exists and simply move to alternative ways to interpret the statute. Even if Petitioners could show that the statute is ambiguous, they force an incompatible interpretation upon the LEMA statute without even considering how it could be harmonized with the GMD Act and the KWAA. For example, K.S.A. 82a-1041 plainly states that water should be apportioned under date of priority "insofar as reasonably may be done." If it was the intent of the Legislature that the prior appropriation doctrine apply to all groundwater withdrawal reductions in a LEMA, why would they even bother to qualify the use of the prior appropriation doctrine in this way?

Petitioners rely on two provisions within the GMD Act to argue that all LEMA management plans must only make reductions based upon the prior appropriation doctrine. The first provision comes from the GMD Act's legislative declaration in K.S.A. 82a-1020:

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

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[92] *Order of Designation*, *Supra* note 37.

The second provision was added to the GMD Act at K.S.A. 82a-1039 when the IGUCA statutes were added:

> Nothing in this act shall be construed as limiting or affecting any duty or power of the chief engineer granted pursuant to the Kansas water appropriation act.

Again, without establishing any ambiguity in the plain language of the LEMA statute itself, or any clear intent in K.S.A. 82a-1020 or 82a-1039 (e.g., the lack of a direct mention of the prior appropriation doctrine in either). Petitioners have concluded that these statutes must mean that the only intended use of the LEMA statute was to reduce groundwater use by applying the prior appropriation doctrine.

K.S.A. 82a-1039 and 82a-1020 are part of the GMD Act, the LEMA statute, as a part of the GMD Act, is subject to both. Using the standards set forth by Petitioners, "statutes relating to the same subject matter must be interpreted to create a rational, coherent, and consistent body of law."[93] As with Petitioners' other statutory constructions, Petitioners insist on interpreting the LEMA statute and K.S.A. 82a-1020 and 82a-1039 as at odds with each other by picking and choosing only those elements of the KWAA that, Petitioners claim, the Legislature meant to include but somehow failed to reference in each.[94]

Petitioners argue that the requirement that nothing shall limit or affect any power or duty of the Chief Engineer contained in K.S.A. 82a-1039 can only be interpreted to mean that the prior appropriation doctrine must be used in any LEMA management plan.[95] This argument, however, must fail because it does not take into account the full scope of the Chief Engineer's duties or his relationship to groundwater management districts. Petitioners' also fail to mention that at the same time the IGUCA statutes and K.S.A. 82a-1039 were adopted, there was an ongoing debate about how much authority groundwater management districts should have and

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[93] *Petitioners' Memo* at 25.
[94] *Id.*, 21-23.
[95] *Id.,* 22-23.

how they should interact and be overseen by the Chief Engineer.[96] This, by itself, indicates that Petitioners are in the best light ignoring relevant policy concerns in stating their position.

Petitioners have strained reasonable methods of interpretation by requiring statutory construction of three different statutes that were handpicked to reach their desired outcome and have utterly failed to harmonize the statues as they were written by the Legislature. The corrective controls contained in the IGUCA and LEMA statutes are nearly identical and as established above, the Court can find those statues clear and unambiguous to avoid statutory construction. In fact, it is the Petitioners' conclusion that the "legislature gave the Chief Engineer the authority to order the reduction of groundwater withdrawals by any one or more appropriators or well in an IGUCA *but only so long as the reductions comply with the prior appropriation doctrine*," that cannot be harmonized.[97] Both the IGUCA and LEMA statutes grant the Chief Engineer explicit authority to reduce groundwater withdrawals with methods that do not require the application of the prior appropriation doctrine under specific hydrological conditions. Providing for reductions in groundwater was not a minor decision by the Legislature and if they intended that the prior appropriation doctrine be applied to every water reduction under an IGUCA or LEMA they would have said as much. For such an important issue, the Legislature could not have intended that it would take a strained application of multiple statutes in order to reach the conclusion that reductions must be done according to priority. If the Legislature had intended the prior appropriation doctrine to apply to all IGUCA and LEMA corrective controls, they simply would have said as much in a few words. Instead Petitioners argue that because the appropriation doctrine is mentioned once, in a qualified way, that it must be read into every method of corrective control.

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[96] *Interim Report of the Governor's Task Force on Water Resources*, Shelby Smith, Chairman, State of Kansas, 1977, 65-70.
[97] *Id.* at 22.

The language cited by Petitioners in the GMD Act's legislative declaration can also easily be read in harmony with the LEMA and IGUCA statutes. Petitioners ignore that the primary purpose of groundwater management districts is for the "conservation of groundwater."[98] Petitioners focus on the fact that such conservation may be achieved only "insofar as it does not conflict with the basic laws and policies of the state of Kansas."[99] The Legislature authorized reductions in groundwater withdrawals in the first place with full knowledge that the right to withdraw groundwater was granted under the prior appropriation doctrine. In order to accept Petitioners' position, one must assume that the Legislature did not actually intend to allow reductions in groundwater use as enumerated in the corrective controls and that those corrective controls were useless legislation.

K.S.A. 82a-1020 and 82a-1039 protect the ability of the Chief Engineer to use the authority granted under the KWAA. They do not dictate restrictions on using explicit authority granted by the Legislature as Petitioners contend.. It is important to remember that the GMD Act sets forth the powers granted to groundwater management districts, and as happens when local units of government share regulatory authority with the state, it is possible that local bodies may attempt to supersede the regulatory positions of the state. Thus, it was important for the Legislature to clarify that even though the they were granting authority to reduce groundwater withdrawals through an IGUCA, or later through a LEMA, that did not limit the Chief Engineer to using only those tools to <u>reduce</u> use, specifically that in the case of an impairment, he maintained the ability to use his strict administration tools to entirely curtail or cut off water use. The KWAA grants broad authority to the Chief Engineer in dedicating all water as subject to the people of the state of Kansas and charging him with aiding in administering the beneficial use of such water.[100] When the GMD Act and the KWAA are considered in their full context, the

[98] K.S.A. 82a-1020.
[99] *Id*.
[100] K.S.A. 82a-702; 82a-706.

LEMA statute becomes part and parcel of the tools the Kansas Legislature developed to address groundwater level declines and promote groundwater conservation to ensure the waters of the state are used for public benefit.

Petitioners also seriously mischaracterize the Chief Engineer's position on the prior appropriation doctrine. Petitioners state that GMD4 and the Chief Engineer have taken the "position that [the prior appropriation doctrine] doctrine was cast aside when the 2012 Legislature copied the IGUCA provision into the LEMA statute without mentioning the doctrine in LEMA subsection (f)(3)."[101] Although Courts are not required to defer to agency interpretations, the Chief Engineer spent considerable time addressing exactly how the prior appropriation doctrine intertwines with the explicit authority granted in the LEMA statute and did not simply cast aside the doctrine.[102]

The Legislature has plainly laid out how the prior appropriation doctrine should be applied within the state of Kansas. K.S.A. 82a-707, aptly titled "principles governing appropriations; priorities," 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." The important phrase is "when the supply is not sufficient to satisfy all water rights." This implies that in order for priority under the doctrine to be applied and enforced (by the Chief Engineer or by a court of law), someone must have an insufficient supply of water to operate their senior water right—i.e., there must be impairment. K.S.A. 82a-706b further regulates these situations by providing that "It shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same." The Kansas Court of Appeals has upheld the idea that this unlawful prevention of water from to a senior water right holder, i.e., impairment that triggers

[101] *Petitioners' Memo* at 27.
[102] *Order of Designation*, A.R., 2528-2532.

the prior appropriation doctrine, only occurs when a junior water right prevents a senior water right from operating as allowed under the law.[103] The KWAA plainly states that the prior appropriation doctrine matters when a junior user is preventing a senior user from exercising the senior user's water right. The KWAA provides no practical remedy for a water right with insufficient supply if there is no junior water right preventing them from operating. When all the water is gone, even the senior water right holders are out of luck.

Here, there is no evidence that an impairment exists within this LEMA. DWR staff testified at the public hearing that if there were an impairment confirmed within the LEMA, they would enforce the prior appropriation doctrine as to the rights involved regardless of any reductions put in place by the management plan.[104] The Chief Engineer agrees with Petitioners that the prior appropriation doctrine is an important element of his duties when a junior water right is impairing a senior water right, but to construe the LEMA statute, the GMD Act, and the KWAA in the way Petitioners have argued only serves to create tensions and effectively make the Legislature's plain intent in the LEMA statute meaningless. For example, if Petitioners position were adopted, then the Chief Engineer, under the conditions required to establish a LEMA, could actually strictly administer water rights in any area where groundwater levels are declining, regardless of the level of supply available to junior and senior water rights.

D. Does the Chief Engineer's Failure to Adopt Rules and Regulations violate Due Process and Equal Protection Rights?

K.S.A. 82a-1041(k) states that "The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section." Petitioners present two primary arguments related to the Chief Engineer's failure to adopt rules and regulations pursuant to K.S.A. 82a-1041. First, that the Chief Engineer has violated the law by not promulgating rules and

[103] *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 388-389 (2015).
[104] *Order of Designation*, AR at 2512.

regulations as directed by the Legislature and second, that these omitted rules and regulations were intended to deal with the specific procedures required within the public hearing process established by the Legislature.[105]

1. *Has the Chief Engineer violated K.S.A. 82a-1041 by not to promulgating administrative rules and regulations?*

The Chief Engineer does not possess a mandatory duty to adopt rules and regulations pursuant to K.S.A. 82a-1041. The Kansas Supreme Court set forth the differences between a "mandatory" shall and a "directory" shall in *State v. Rashke*.[106] There are four factors:

> to be considered in determining whether the legislature's use of 'shall' makes a particular provision mandatory or directory." (citation omitted). These are "(1) legislative context and history; (2) substantive effect on a party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision." (citation omitted). Generally, this court must first attempt to determine legislative intent through the statutory language enacted, giving common words their ordinary meanings. (citation omitted).
>
> Where there is no ambiguity, the court need not resort to statutory construction. Yet where a statute's language or text is unclear or ambiguous, this court can use canons of construction or legislative history to construe legislative intent. (citation omitted). The Kansas Supreme Court has noted that it "has sometimes interpreted 'shall' to be directory. So its meaning is not necessarily plain." (citation omitted). So it is appropriate to examine the ***Raschke*** factors.[107]

Therefore, we must turn to the *Raschke* factors to determine if the Legislature intended for the promulgation of rules and regulations to be mandatory or directory.

The first factor to look at is the legislative history and context of the statutory language. In this instance, the Legislature did not provide any guidance as to what the proposed rules and regulations required by K.S.A. 82a-1041(k) should contain. However, the legislature did provide explicit details on the procedures to be followed in a LEMA proceeding, including the criteria necessary to establish a LEMA, public notice provisions, the requirement of written orders, and a fully developed review process. This attention to detail indicates that the Legislature explicitly

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[105] *Petitioners' Memo*, 79-84.
[106] *State v. Rashke, 289 Kan. 911, 219 P.3d 481 (2009).*
[107] *Matter of Davis*, 56 Kan.App.2d 39, 49-50, 423 P.3d 1044 (2018).

put their substantive concerns into the statute, and that anything left to rules and regulations merely regards form and not substance. Considering the LEMA statute as a whole, it appears that the requirement to adopt rules and regulations pursuant to K.S.A. 82a-1041(k) was intended to be directory and that because of the robust procedures put in the statute, there is no indication that the statute cannot operate without rules and regulations being promulgated.

The second factor examines whether the provision at issue has a substantive effect on a party's rights or whether it deals with form or procedural effect; the third, related factor examined together with the second factor, is the existence or non-existence of consequences or noncompliance. "Generally, 'mandatory provisions deal with substance and directory provisions with form.'"[108] "Statutory provisions dealing with form or procedural effect may be considered mandatory if 'accompanied by negative words impetrating the acts required shall not be done in any other manner or time than that designated.'"[109] No legal right is conferred by the adoption of rules and regulations pursuant to K.S.A. 82a-1041(k), and there is no penalty provided for the failure to adopt rules and regulations. For example, the Legislature could have required the adoption of regulations by a date certain or connected the regulations to specific provisions of the statute, such as those subsections that deal with the prescribed hearing procedure. The Legislature did none of those things. There are no consequences within the statute that require the adoption of rules and regulations. Thus, both factors support the conclusion that the promulgation of rules and regulations is a directory requirement.

The fourth and final factor examines the subject matter of the statutory provision. Here, the LEMA statute provides that the "chief engineer shall adopt rules and regulations to effectuate and administer the provisions of [K.S.A. 82a-1041]." The purpose of this provision is open ended. Perhaps there are ways the LEMA process could be aided by the adoption of rules and

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[108] *Id*. at 51.
[109] *Id*.

regulations, but because the detailed procedure and review process are set forth in statute, all due process rights are sufficiently protected. As management plans are developed locally by groundwater management districts, it would not make sense for the Chief Engineer to dictate to those districts how they might create local plans.

2. *Must any potential rules and regulations be concerned with additional requirements for the statutorily required public hearings?*

Petitioners raise a speculative argument that the Legislature's requirement 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. Petitioners present their view of what exactly these rules and regulations should contain, but such interpretation is just that, Petitioners' speculation, which, absent something explicit in statute or in the legislative history, is not convincing evidence of legislative intent.

In the conduct of LEMA hearings, no generally applicable policy or rules have been applied by the Chief Engineer. In each case of the adoption of a LEMA to date, a pre-hearing conference has been held in order to discuss what procedures are necessary for each proceeding. In fact, each LEMA proceeding has used different procedures based on the needs and requests of those potentially subject to the proposed management plan. This illustrates that local concerns are paramount in how hearings are conducted, and the wellbeing of the community as a whole is considered. Each process is tailored to fit specific local needs.

There is a stronger argument based on similar water statutes that the Legislature did not intend to require 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 IGUCAs, which are similar to but not exactly the same as a LEMA.[110] The development of a LEMA management

[110] K.S.A. 82a-1036 *et seq.*

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.[111] 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 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 in statute or regulation. In all those cases, the terms of each hearing were dealt with at the local level. A corresponding regulation that further outlined how IGUCA public hearings were to be conducted was adopted in 2009, but even that leaves the conduct and procedure at the required public hearings to the discretion of the Chief Engineer. [112] In any case, K.A.R. 5-20-1 has never been applied to any of the already existing IGUCAs. Any additional due process procedures implemented were provided at the discretion of the Chief Engineer, not because of an inferred Legislative mandate. It does not seem logical that the Legislature intended to impose more extensive due process procedures in 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

[111] K.S.A. 82a-1037 and 82a-1038.
[112] K.A.R. 5-20-1.

proceeding. It is difficult to understand why the Legislature would require a higher level of due process in the case of LEMA proceedings.

Petitioners also cite the due process procedures the Legislature set forth in the Water Transfer Act. K.S.A. 82a-1501 *et seq.*[113]. Specifically, that KAPA shall apply to all Water Transfer Act proceedings, and that there shall be a formal hearing phase, and specific intervention rules.[114] This example only shows that the Legislature is aware of the necessity of due process when dealing with water rights. As such, 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. Despite Petitioners changing their argument on what the inclusion of KAPA proceedings in the Water Transfer Act means from the administrative level to judicial review, it is clear the Legislature has set a precedent of determining the minimum standards necessary to protect water right holders. Just because a minimum bar is set, as happened in the present case, additional procedures and protections were put in place by the Chief Engineer.

Petitioners also claim that because of the nature of the proceedings, they were prejudiced, in both the actual hearing procedures and because of the hearing schedule. As outlined above, in Section I, Petitioners attempted to alter the course of a public hearing at the last hour. For example, there were no objections to the date of the initial public hearing and ultimately, a delay in the second hearing was requested by only five of the 1,781 water right holders within the proposed District-Wide LEMA.[115] Some of the current Petitioners even participated for years in the LEMA development process and the first public hearing.[116] To be sure, a public hearing is just a step in the administrative process, but many of Petitioners' concerns and complaints about

[113] *Memorandum for Due Process*, AR, 34-35.
[114] K.S.A. 82a-1503.
[115] *Order of Decision*, AR at 2442.
[116] *Id.*

the process were due to a lack of diligence in participating in proceedings about which they were given proper advance notification. It is important to remember that his process was not a public hearing for an individual but was a process for all water rights holders within GMD4.

While the Chief Engineer was not required to promulgate rules and regulations regarding any particular topic and proper due process was nevertheless provided, including extensive review procedures. Even if this Court finds that the Chief Engineer must promulgate rules and regulations, the lack of such rules and regulations up to this point should be determined to be a harmless error pursuant to K.S.A. 77-621. There was no harm to Petitioners or additional rights denied them in this action that were mandated by the Legislature to be included in rules and regulations. Further, the record shows that the Chief Engineer extended numerous due process protections and Petitioners have failed to present any evidence that they were harmed by the procedures followed.

E. Other Procedural Concerns

Petitioners identify two additional procedural concerns in their memorandum. First, that the Chief Engineer improperly delegated the first public hearing,[117] and second, that the Chief Engineer's orders violate KAPA.[118]

1. Did the Chief Engineer improperly delegate the initial hearing?

K.S.A. 82a-1041(b) requires that whenever LEMA proceedings are initiated, the "chief engineer shall conduct an initial public hearing" pursuant to specifically defined statutory criteria. K.A.R. 5-14-3a sets forth hearing procedures that may be used, in whole or in part, by the Chief Engineer in any hearings that are conducted. Included in that is the requirement that any "hearing shall be presided over by the chief engineer or the chief engineer's designee."[119]

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[117] *Petitioners' Memo* at 83-84.
[118] *Id*. at 54.
[119] K.A.R. 5-14-3a(b).

Further, the Chief Engineer has the inherent power to delegate such hearings. K.S.A. 82a-1036 *et seq.*, which establishes IGUCAs, does not contain a provision authorizing the Chief Engineer to promulgate rules and regulations; however, the Attorney General has determined such authority is a part of the Chief Engineer's duties in administrating the KWAA.[120] The Chief Engineer did promulgate regulations regarding the establishment of IGUCAs and specifically allowed for an initial hearing to be delegated to a presiding officer.[121] Since all parties have argued the similarities of the LEMA and IGUCA statutes, strong precedent exists that such delegation is well within the Chief Engineer's authority and was proper.

Finally, Petitioners allege no actual harm from the delegation, and fail entirely to address how a review of the most basic criteria necessary to create a LEMA by an independent hearing officer, whose decision is subject to review by the Chief Engineer, the Secretary of Agriculture and the courts of this state is improper or prejudicial. Therefore, this Court should find that even if such delegation was unlawful or an abuse of discretion, it was harmless error pursuant to K.S.A. 77-621.

2. *Do additional procedural problems exist with the various orders issued in the LEMA proceedings and does the Chief Engineer have the authority to rule on the constitutionality of statutes?*

Petitioners argue that the Chief Engineer's failure to issue a formal initial order upon his determination to initiate LEMA proceedings violates KAPA.[122] Petitioners misunderstand and misapply KAPA in this argument. K.S.A. 77-503 makes clear that KAPA "applies only to the extent that other statutes expressly provide that the provisions of [KAPA] govern proceedings under those statutes." Further, KAPA "creates only procedural rights and imposes only

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[120] Kan. Atty. Gen. Op. No. 2007-32.
[121] K.A.R. 5-20-1.
[122] *Petitioners' Memo*, 54-55.

procedural duties."[123] Neither the LEMA statutes itself, nor the GMD Act applies KAPA to any proceedings. The KWAA applies KAPA in only a limited matter. This is done pursuant to K.S.A. 82a-1901, which applies KAPA only to review of actions already taken by the Chief Engineer, allowing, pursuant to K.S.A. 77-531, for the Secretary Agriculture to conduct a review of any order issued. Therefore, KAPA did not apply to the determination to initiate LEMA proceedings.

Even if KAPA were found to apply at this stage of the proceedings, the Court should find that the lack of a formal order with findings and conclusions regarding the initial review of the management plan was harmless error pursuant to K.S.A. 77-621. K.S.A. 82a-1041 requires only a limited review to makes sure the plan addresses the basic elements required to designate a LEMA. This determination simply sets in motion a full review of the management plan to include two public hearings, administrative, and judicial review. No LEMA can be designated without the establishment of an evidentiary record. This first review is designed to weed out the time and expense involved in holding hearings on a plan that clearly could never be designated as a LEMA. It should also be noted that the LEMA statute clearly requires findings of fact and conclusion of law in the orders of decision and designation, but such requirements are not tied to the initial review of a management plan.

Petitioners also argue that it was erroneous, unreasonable, arbitrary, and capricious (and a violation of KAPA) for the Chief Engineer to decline to conduct a constitutional review of the LEMA statute during the public hearings.[124] As established above, KAPA does not apply to these proceedings. Kansas Courts have spoken plainly on the matter, making it clear that "constitutional issues may be raised at the agency level, but they are decided by the Courts."[125]

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[123] K.S.A. 77-503.
[124] *Petitioners' Memo* at 57.
[125] *Katz,* 45 Kan.App.2d 877, 895, citing *Martin v. Kansas Depart of Revenue*, 285 Kan. 625, Syl. No. 5, 176 P.3d 938 (2008).

The Chief Engineer cannot be erroneous, unreasonable, arbitrary, and capricious when he has no authority to take the action desired by Petitioners. Petitioners have adequately presented and preserved their challenges for this tribunal.

V. CONCLUSION

Petitioners go to great lengths in their attempt to establish a reading of K.S.A. 82a-1041 that is viewed only through the lens of other statutes. Petitioners make no attempt to harmonize the LEMA statute within the larger context of Kansas water law and place all their emphasis on some parts of the KWAA and simply ignore other parts. The most fatal flaw in Petitioners argument is that they fail to show the LEMA statute is ambiguous as written.

Petitioners illustrate in their memorandum that the Legislature created polices that allowed overdevelopment of the aquifers underlying GMD4, but when clear legal authority was enacted to deal with that very situation, Petitioners argue that the Legislature could not really have intended to address the same situation they created. Petitioners instead insist that the Legislature unwittingly created a meaningless statute that amounted to nothing more than a different (and more complex method) for the Chief Engineer to strictly administer water rights. In fact, it makes perfect sense that when impairment or a shortage of supply is not the issue at hand, the Chief Engineer needs a different tool set to address problems specific to groundwater systems in decline. That is exactly what the Legislature provided in the LEMA statute.

It is unnecessary to read elements that are not present into the LEMA statute (or to read elements that are present out of the statute). Since it is apparent on its face that LEMA statute is not ambiguous, Petitioners have no other arguments to stand upon. They attempt to apply KAPA procedures where they are not required, they read words into statutes and apply only the most inharmonious meaning, and they bring forth several harmless errors and charges that all fall well within the discretion of the Chief Engineer or contradict evidence in the record. Petitioners hardly deal with the record itself, in fact stating that the conditions necessary to establish a

LEMA "appear to be satisfied."[126] It is telling that Petitioners can only reach a different conclusion by creating ambiguity in the law.

Finally, it is worth considering the extremely harsh impact that will be created should K.S.A. 82a-1041 be found unconstitutional. Although there is currently only one other LEMA in place, the corrective controls and many other provisions of the LEMA statute are identical or similar to those contained in K.S.A. 82a-1036 *et seq*., which allows the establishment of IGUCAs. There are currently eight IGUCAs in place across the western half of the state. If the LEMA statute is unconstitutional, then it is likely the IGUCA statute is also unconstitutional. Repudiation of this tool will undue years of water conservation by nullifying existing IGUCAs and cause economic devastation in several areas of the state. It would create a manifest injustice to undo years of work on other problems addressed by the IGUCA statute.

Removal of LEMAs and IGUCAs from the water conservation landscape would be a statement that the Legislature did not really mean what it said when it dedicated all water in the state to the use of the people. The Legislature has learned from past policy decisions and has responded by providing specific statutory methods to protect the right to access water and apply it to beneficial use. A judicial declaration that priority is the only aspect of the KWAA that matters would do a disservice to the Legislative intent and the long history of public policy created by that body, as well as ensure the Legislature could never take action preserve an individual's right to access a public to access a public resources as it continues to decline.

Respectfully submitted,

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[126] *Petitioners' Memo* at 11.

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CERTIFICATE OF SERVICE

I certify that on the 22nd of March 2019, the above *Defendant Chief Engineer's Response to Petitioners' Memorandum in Support of Petition for Judicial Review* was electronically filed with the District Court Clerk using the Court's electronic filing system, which will send a notice of electronic filing to registered participants:

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