

**In the Twenty-Third Judicial District  
District Court of Gove County, Kansas**

JON and ANN FRIESEN; FRIESEN  
FARMS, LLC, et. al.,

Petitioners,

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-10

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Pursuant to K.S.A. Chapter 77

**Northwest Kansas Groundwater Management District Number 4's  
Response to Petitioners' Motion to Alter or Amend and  
to Amend and Make Additional Findings**

The Northwest Kansas Groundwater Management District Number 4 (GMD 4), by Counsel, Adam C .Dees, Clinkscales Elder Law Practice, P.A., responds to the Petitioners' Motion to Alter or Amend and to Amend and Make Additional Findings (Motion to Alter) as follows.

In its October 15, 2019, Memorandum Decision (Decision), the Court decided against Petitioners. In rendering its Decision, the Court fully considered the case; extensively cited case law and the record; and, carefully articulated its conclusions. The Court need not reconsider its Decision, even though Petitioners' restated their unsuccessful arguments in their Motion to Alter or Amend. Therefore, the Court should deny the Motion to Alter.

## 1. Arguments and Authorities

On each issue Petitioners present, the Court made—and articulated—a decision. The Petitioners’ present eight sections in their Motion to Alter, which can be focused to three issues the Court already addressed. First, whether the Kansas Legislature subjected Local Enhanced Management Area (LEMA) plans to the prior appropriation doctrine.<sup>1</sup> Second, whether the LEMA statute authorizes the temporary LEMA plan before the Court to manage and reduce the authorized quantity of a water a user may withdraw during the LEMA term.<sup>2</sup> Third, whether the process provided by the Kansas Legislature and utilized by the GMD 4 and the Chief Engineer (CE) to create a LEMA was fair and adequate.<sup>3</sup> Because the Court addressed each issue in its Decision, it should not amend or alter that Decision.

### **1.1. The Court determined the Legislature unambiguously did not subject LEMA plans to the prior appropriation doctrine. Petitioners’ request the Court alter or amend its decision regarding this first issue (Petitioners’ Motion to Alter Sections I and VI). Because the Court clearly articulated its holding, it need not alter its Decision.**

The Court determined that the Legislature unambiguously *did not* subject LEMA plans to the prior appropriation doctrine.<sup>4</sup> The Court held that the Legislature’s intent was “rather clear” when it passed the LEMA statute and that the Legislature’s intent governs.<sup>5</sup> Coming to this conclusion, the Court expressly considered K.S.A. 82a-707.<sup>6</sup> Therefore, the Court already determined the issue and there is no need for the Court to amend or alter its Decision or to further address K.S.A. 82a-707. Petitioners’ Motion to Alter should be denied.

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<sup>1</sup> Motion to Alter, pp. 5-25; pp. 34-35.

<sup>2</sup> Motion to Alter, pp. 26-34.

<sup>3</sup> Motion to Alter, pp. 35.

<sup>4</sup> Decision at 23.

<sup>5</sup> Decision at 23.

<sup>6</sup> Decision at 23.

**1.2. The Court determined that the LEMA Statute and Kansas case law allows for a temporary reduction in the authorized quantity a water user may withdraw during a term. Petitioners’ request the Court amend or alter its Decision regarding this issue (Petitioners’ Motion to Alter Sections III and IV). Again, because the Court clearly articulated its Decision, it need not alter its Decision.**

The Court determined that under *Clawson* and *Wheatland*, the CE could enforce *new* restrictions on previously perfected permits “*if expressly granted by statute* (emphasis added).”<sup>7</sup> The LEMA statute expressly allows the CE to temporarily reduce or further regulate the withdrawal of water from the aquifer.<sup>8</sup> As the Court correctly held, the LEMA statute requires LEMAs be reviewed under certain conditions and that the LEMA plan before the court allows for review every five years. If anything, the Court should modify its findings, because the LEMA plan currently ends, and must be renewed by the GMD 4 and CE, at the end of five years.<sup>9</sup> The relevant finding, though—that the LEMA Plan is temporary—need not be modified by the Court. Similarly, the Court should not change its holding that the LEMA statute and Kansas case law allows the CE to temporarily modify the amount of water that may be withdrawn during a term as expressly allowed by K.S.A. 82a-1041. Therefore, the Petitioners’ Motion to Amend should be denied.

**1.3. The Court determined the Legislature created a fair process because the Legislature provided sufficient guidance to the CE and GMDs. The Court determined the CE and GMD 4 followed that guidance. The Petitioners continue arguing that the process was not fair because the CE did not promulgate rules and regulations (Petitioners’ Motion to Alter Section VII). Therefore, the Court addressed this issued and need not alter its Decision.**

In determining the process was fair, the Court first determined that LEMA statute does not provide the CE with much discretion.<sup>10</sup> A LEMA plan may only be implemented if one in five prerequisites are met and the CE can only decide on six parts of any LEMA brought before him.<sup>11</sup>

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<sup>7</sup> Decision at 10, citing to *Clawson v. Div. of Water Res.*, 49 Kan.App.2d 789, 807 (2013) and *Wheatland Elec. Co-op., Inc. v. Polansky*, 46 Kan.App.2d 746 (2013).

<sup>8</sup> Decision at 11.

<sup>9</sup> Decision at 17.

<sup>10</sup> Decision at 13.

<sup>11</sup> Decision at 13.

Additionally, the Legislature implemented a hearing process, subjected the CE to judicial review, and the GMD is an elected body that can be held accountable by eligible voters.<sup>12</sup> Given that the GMD 4 and CE followed the process outlined by the Kansas Legislature in K.S.A. 82a-1041 and that the LEMA statute does not give the CE much discretion, the CE need not promulgate rules and regulations. But even if the CE should have promulgated rules and regulations, given the extensive process described by the Legislature and the lack of discretion afforded the CE, failing to promulgate rules and regulations would be harmless error.<sup>13</sup>

## 2. Conclusion

Petitioners make the same arguments in their Motion to Alter that they made in their Brief, that Defendants responded to, and that the Court considered when it issued its Decision. The Petitioners first made these arguments during the LEMA hearing process, then on appeal to the Kansas Secretary of State, next on appeal to the District Court, and now in their Motion to Alter. Through this process, the Court reviewed the extensive record, multiple briefs, and issued a complete Decision. Still Petitioners request the District Court reexamine its conclusions. But because the Court clearly decided the issues Petitioners' present, there is no need for the District Court to alter or amend its Decision and the Court should deny Petitioners' Motion to Alter.

SUBMITTED BY:

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<sup>12</sup> Decision at 13.

<sup>13</sup> See Decision at 26-27.

### Certificate of Service

I certify that on the date and time above, the above *Northwest Kansas Groundwater Management District Number Four's Response* was electronically filed with the Clerk of the District Court using the Court's electronic filing system, which will send a notice of electronic filing to the following registered participants:

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By: /s/ Adam C. Dees

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