

**BEFORE THE DIVISION OF WATER RESOURCES  
KANSAS DEPARTMENT OF AGRICULTURE**

In the Matter of the Designation of the )  
Groundwater Management District No. 4 District Wide )  
Local Enhanced Management Area in Cheyenne, Decatur, )  
Gove, Graham, Logan, Rawlins, Sheridan, Sherman, ) **002 – DWR-LEMA – 2017**  
Thomas, and Wallace Counties, Kansas. )  
)  
**Pursuant to K.S.A. 82a-1041.** )  
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**ORDER OF DESIGNATION REGARDING THE GROUNDWATER MANAGEMENT  
DISTRICT NO. 4 DISTRICT WIDE LOCAL ENHANCED MANAGEMENT PLAN**

COMES NOW, David W. Barfield, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”), who, pursuant to K.S.A. 82a-1041, having issued the Order of Decision Returning the Local Enhanced Management Plan with Proposed Modifications (“Order of Decision”) in the above captioned matter on February 23, 2018, and having issued a notice of acceptance of the modified management plan on March 8, 2018, hereby issues this Order of Designation Regarding the Groundwater Management District No. 4 District Wide Local Enhanced Management Plan (“Order of Designation”).

**I. Procedural Background**

1. On June 8, 2017, the Northwest Kansas Groundwater Management District No. 4 (“GMD4”) submitted a formal request to the Chief Engineer for the approval of a local enhanced management area (“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, 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 owner located within the proposed District Wide LEMA and published in two local newspapers of general circulation and 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 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 is 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.
6. On October 10, 2017, a group of five water right owners (“Intervenors”) located within the proposed District Wide LEMA submitted a *Notice of Intervention* and a *Motion for Continuance*. The Chief Engineer did not rule on the *Motion for Continuance*, as K.S.A. 82a-1041 does not mandate that the public hearings be conducted as adversarial hearings and all required notice requirements were met. In accordance with the requirements of K.S.A. 82a-1041, the intent was to allow anyone to submit evidence, testimony, or other information before, during, and after the second public hearing, with the opportunity to ask clarifying questions and submit written follow-up testimony afterwards.

7. On October 17, 2017, the Intervenor filed a *Motion to Provide Due Process Protections*. 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. The Chief Engineer responded on November 6, 2017, and stated in his *Decision to Expand Due Process Procedures* that the prescribed hearing procedure would be modified to include greater opportunity for cross-examination. In his *Pre-Hearing Order*, 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 Intervenor. A summary and discussion of the procedural challenges brought forth by the Intervenor's Submittal are presented below in Section III.
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 District Wide LEMA 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, however, he also determined that the administration of proposed management plan could be improved by modifications based on testimony at the second public hearing. The Order of Decision, 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.
10. On March 1, 2018, the GMD4 Board of Directors 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.

## II. Applicable Law

1. The formation of a local enhanced management area is governed pursuant to K.S.A. 82a-1041. When the Chief Engineer finds that a local enhanced management plan submitted by a groundwater management district is acceptable for consideration, then the Chief Engineer shall initiate proceedings to designate a local enhanced management area as soon as practicable.
2. Once the proceedings are initiated, the Chief Engineer shall hold an initial public hearing to resolve the following:
  1. Whether one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d), and amendments thereto, exist;
  2. Whether the public interest of K.S.A. 82a-1020, and amendments thereto, requires that one or more corrective control provisions be adopted; and
  3. Whether the geographic boundaries are reasonable.
3. The following circumstances are specified in K.S.A. 82a-1036(a) through (d):
  1. Groundwater levels in the area in question are declining or have declined excessively;
  2. The rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area;
  3. Preventable waste of water is occurring or may occur within the area in question;
  4. Unreasonable deterioration of the quality of water is occurring or may occur within the area in question.
4. K.S.A. 82a-1020 recognizes that it is in the interest of the public to create “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. 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.”

5. K.S.A. 82a-1041(b)(3) directs the Chief Engineer to conduct a subsequent hearing only if the initial public hearing is favorable on all three issues of fact and the expansion of geographic boundaries is not recommended.
  
6. K.S.A. 82a-1041(c) limits the subject of the second hearing to the local enhanced management plan that the Chief Engineer previously reviewed and in subsection (d) requires the Chief Engineer to issue an order of decision regarding the plan within 120 days:
  1. Accepting the local enhanced management plan as sufficient to address any of the conditions set forth in K.S.A. 82a-1036(a)-(d);
  2. Rejecting the local enhanced management plan as insufficient to address any of the conditions set forth in K.S.A. 82a-1036(a)-(d);
  3. Returning the local enhanced management plan to the groundwater management district, giving reasons for the return and providing the district with the opportunity to resubmit a revised plan for public hearing within 90 days of the return of the deficient plan; or
  4. Returning the local enhanced management plan to the groundwater management district and proposing modifications to the plan, based on testimony at the hearing or hearings, that will improve the administration of the plan, but will not impose reductions in groundwater withdrawals that exceed those contained in the plan. If the groundwater management district approves of the modifications proposed by the chief engineer, the district shall notify the Chief Engineer within 90 days of receipt of return of the plan. Upon receipt of the groundwater management district's approval of the modifications, the chief engineer shall accept the modified local management plan. If the groundwater management district does

not approve of the modifications proposed by the Chief Engineer, the local management plan shall not be accepted.

7. Pursuant to K.S.A. 82a-1041(e), if the Chief Engineer issues an order of decision accepting the management plan, then an order of designation that designates the area in question as a local enhanced management area shall be issued within a reasonable time following the order of decision.

### **III. Purpose of the Order of Designation and Procedural Adequacy**

1. Prior to recounting the testimony provided, it is useful to examine the purpose of the order of designation and how it fits into the LEMA process. Pursuant to K.S.A. 82a-1041(d)-(h), an order of designation shall be a final order that designates the boundaries of the LEMA, puts in place the corrective controls proposed in the management plan, and shall be in full force and effect upon its entry in the records of the Chief Engineer's office. Further, the Chief Engineer shall detail the circumstances and findings upon which the LEMA decision is based. It is also important to note that two public hearings have been held in this process, with findings from the initial hearing as well as in the Order of Decision. This Order of Designation is a culmination of the entire process, and should be considered together with previous findings and orders in this matter.
2. Therefore, this order will summarize the testimony offered regarding the District Wide LEMA Management Plan, address the circumstances and findings upon which this order is based, and address, insofar as the Chief Engineer has the authority to do so, all issues raised in testimony presented at the second public hearing.
3. Prior to holding the second public hearing, the adequacy of the entire LEMA process was raised by the Intervenor. Many of their arguments were addressed prior to the second public hearing in the *Decision Regarding Motion for Expanded Due Process* and will only be summarized here. As these issues made up such a large part of the testimony presented, the remainder of Section III shall be dedicated to addressing the adequacy of the LEMA proceedings.

4. The following procedural challenges, summarized, were brought forth in the *Intervenors' Submittal in Opposition to the Proposed District Wide LEMA* ("*Intervenors' Submittal*"), *Section VI*:

1. The Chief Engineer failed to properly issue an initial order accepting the proposed District Wide LEMA Management Plan when he determined that the initial plan was acceptable for consideration;
2. The GMD4 District Wide LEMA process failed to provide adequate time for preparation and improperly limited discovery procedures;
3. The Chief Engineer has failed to adopt administrative rules and regulations regarding LEMA proceedings;
4. The Chief Engineer unlawfully delegated his obligation to conduct the initial hearing.

Other substantive questions of law were raised in the *Intervenors' Submittal*, and such issues, as the Chief Engineer has the authority to address them, shall be dealt with below.

6. First, did the Chief Engineer properly find that the District Wide LEMA Management Plan was acceptable for consideration? K.S.A. 82a-1041(a) requires that when a groundwater management district recommends the approval of a local enhanced management plan, the Chief Engineer shall review whether the plan: (1) proposes clear geographic boundaries; (2) pertains to an area wholly within a groundwater management district; (3) proposes goals and corrective control provisions adequate to meet the stated goals; (4) gives due consideration to prior reductions in water use; (5) includes a compliance monitoring and enforcement element; and (6) is consistent with state law. If based on such review, the Chief Engineer finds that the local enhanced management plan is acceptable for consideration, the Chief Engineer shall initiate, as soon as practicable thereafter, proceedings to designate a local enhanced management area. A "review" is not the same as a formal order and since there are no further instructions for the Chief Engineer and the next subsection, K.S.A. 82a-1041(b) describes the initial public hearing

process, it appears that the legislature did not require that a formal order be issued prior to the commencement of the LEMA proceedings.

7. The *Intervenors' Submittal* argues that K.S.A. 82a-1041(a) requires that a formal order, which includes findings of fact, conclusions of law, and other considerations be issued, and that failure to issue such an order creates a fatal flaw in the LEMA process, puts opposed parties at a significant disadvantage, and endangers the ability for proper judicial review if necessary. *Id.* at 46-47.
  
8. There is no evidence in K.S.A. 82a-1041(a) that the legislature intended a formal order to be issued by the Chief Engineer prior to initiating LEMA proceedings. First, when the legislature intended for the Chief Engineer to issue a formal order containing findings, conclusions, and other circumstances in this process, it plainly required it in the order of decision and order of designation. K.S.A. 82a-1041(d) and (e). Second, requiring a formal order before the commencement of the public hearings would not provide an order that is subject to judicial or administrative review because it would only be an intermediate order. (This issue of reviewing such an order has already been extensively addressed by both the Chief Engineer and the Secretary of Agriculture, *See, Decision Regarding Intervenors' Motion for Reconsideration and Order Declining Petition for Administrative Review.*) Third, all six of these initial factors are fully considered over the course of the public hearings and must be addressed in the order of designation, which is fully subject to administrative and judicial review. If evidence is not presented that shows these conditions are met, any proposed management plan will fail. Since all of these issues must be addressed at public hearing and set forth in a reviewable final order, it is unclear how any prejudice against opposed parties is created. The Chief Engineer conducted the initial review as required by statute and determined that the management plan was acceptable for consideration by the public at public hearing, whereby a formal record and review of such plan could be conducted and reviewed. K.S.A. 82a-1041 does not forbid the issuance of such an initial order, but a formal order is also not required nor does it appear that such order is necessary in the LEMA process.

9. Second, did the Chief Engineer provide adequate time to prepare for the second public hearing and were adequate discovery measures allowed? This issue was raised prior to the second public hearing and was previously addressed in detail in the *Decision regarding Motion for Expanded Due Process* (“*Decision re: Due Process*”). In summary, it is important to note that all required notice provisions of K.S.A. 82a-1041 were timely met. *Decision re: Due Process*, 6-7. However, the opportunity to gather information and offer input to the process began in January of 2015 when the GMD4 Board of Directors began work on developing a management plan, after which the topic was discussed at numerous board meetings and other public meetings specifically held as part of the development process. *Id.* at 7. Proper statutory notice was given prior to all public hearings, and of the 1,781 water right owners within the proposed LEMA boundaries, only five requested a delay in the second public hearing. *Id.* at 8. No party requested a delay in the initial public hearing. Ultimately, the delay was requested by five water right owners, two of whom were former board members, one of whom served during the development of the management plan, and who both appear to be active participants in the public process. *Id.* Further, these five water right owners waited until just a month prior to the second public hearing to hire an attorney. While that attorney was put in an unenviable position, no evidence of prejudice was presented that would justify delaying a scheduled hearing that was properly noticed and that was part of a two-plus-year process that more than 1,700 water right owners did not object to holding. *Id.*
10. There was also no evidence presented regarding prejudice for lack of opportunity to conduct discovery. The timeline for these proceedings was published and frequently discussed at open and advertised GMD4 meetings. However, no formal inquiries were made until just weeks before the second public hearing. Further, no evidence was ever presented that indicated any information was withheld from the opposing parties. All information was freely available through the Kansas Open Records Act and much of the relevant information was available on the GMD4 and KDA websites including specifics on provisional allocations by water right. The primary complaint brought forth against the process was not the ability to obtain information, but that the attorney was hired too late in the process to have adequate time to review all the information requested. Again,

while an unenviable position, the entire process was well publicized, the information was freely available, and since this issue was raised by only the five opponents, no evidence of prejudice was presented that justified delaying a long scheduled public process.

11. Third, does the Chief Engineer's failure to adopt administrative rules and regulations regarding the LEMA process invalidate the proceedings? The simple answer is no and this is dealt with in detail in the *Decision re: Due Process*. In the *Intervenors' Submittal*. Intervenors propose that since K.S.A. 82a-1041 requires the adoption of administrative rules and regulations, any administrative rules and regulations adopted by the Chief Engineer must further expand and outline specific public hearing procedures to be used when forming a LEMA. *Intervenors' Submittal*, p. 48-49. There is no direct evidence in K.S.A. 82a-1041 indicating that the legislature's intent was for the Chief Engineer to put in place further hearing requirements or require discovery procedures, etc. In fact, when the legislature explicitly intends for greater procedural requirements in water law matters, they have plainly written them. For example, in K.S.A. 82a-1503 and 82a-1504 of the Water Transfer Act, the legislature explicitly set forth the additional procedures to be followed. In contrast, it is helpful to examine K.S.A. 82a-1036, *et seq.*, which deals with Intensive Groundwater Use Control Areas ("IGUCAs"). Similar to LEMAs, IGUCAs only require that public hearings be held without prescribing specific requirements. After the tool was created in 1978, multiple IGUCAs were established without any further due process procedures being formally adopted by statute or regulation. The Chief Engineer may in fact develop procedural administrative rules and regulations at some point, as was ultimately done for IGUCA proceedings in 2009 after the formation of all of the state's IGUCAs, but there is no evidence in the plain text of K.S.A. 82a-1041, or any other water statutes, that the legislature intended for the Chief Engineer to put additional procedural rules in place for LEMA proceedings, and there is certainly no evidence that failure to further outline the applicable procedures in regulation would invalidate the legislature's intent to allow the formation of LEMAs.
12. Fourth and finally, did the Chief Engineer delegate the initial public hearing in error? The *Intervenors' Submittal* states that this is more than a "technical" violation, however, no

evidence of actual prejudice is brought forth, other than a vague suggestion that no person other than the Chief Engineer could be qualified to take evidence and exercise the judgement of someone familiar with water and water law principles. *Id.* at 50. The procedures set forth in K.A.R. 5-14-3a, including the designation of a hearing officer, may be applied to any hearing required to be conducted by the Chief Engineer. In this case, notice that the initial hearing would be delegated to a hearing officer was first given in the *Division of Water Resources ("DWR") Letter to GMD No. 4 Finding LEMA Acceptable for Consideration*, dated June 27, 2017 and further notice was provided when the *Order Setting the Prehearing Conference* was issued on July 17, 2017 by Constance C. Owen. Ms. Owen has been delegated by the chief engineer to conduct numerous hearings in the past, has considerable experience dealing with water law matters, and was deemed to be competent to conduct this initial public hearing by the Chief Engineer.

13. Upon review of the arguments presented in the *Intervenors' Submittal* regarding the hearing process to date, no compelling evidence suggests the LEMA process set forth in K.S.A. 82a-1041 nor the Chief Engineer's efforts to follow such requirements has resulted in any significant or prejudicial, much less fatal flaws in process that require or justify the termination of these proceedings. The record established by these hearings provides a sufficient basis for the determinations made herein.

#### **IV. Testimony**

##### Formal Testimony

1. Ray Luhman, Manager, GMD4 – Mr. Luhman presented the primary case for establishment of the District Wide LEMA on behalf of GMD4. Written testimony was submitted prior to the second public hearing and additional testimony was received after the second public hearing. Mr. Luhman largely summarized the written testimony submitted by GMD4. He highlighted the process used to develop the proposed management plan. He explained that the process was originally initiated in January of 2015 when a more restrictive management plan was developed. This plan was discussed at four public meetings and the GMD4 Board of Directors ultimately decided to revise the plan because there was not sufficient public support to move their original plan

forward. A new, less restrictive plan was developed and four additional public meetings were held before the plan was approved and submitted to Chief Engineer. *Transcript* p. 20-21, 44-48. As early as January 2015, GMD4 had established a webpage to keep the public up to date on the LEMA process and the proposed management plan was discussed at a minimum of 28 board meetings. *Id.* at 22-23.

2. Mr. Luhman testified that the proposed management plan called for improved management of water and for the withdrawal of water for irrigation to not exceed 1.7 million acre-feet over a five-year period within the district townships with a rate of decline of one-half percent or greater. *Id.* at 23. Based on data provided by the Kansas Geological Survey (“KGS”) decline levels for each public land survey section were developed for the period 2004-2015 and this data was combined into townships and an annual average decline for each township was calculated. *Id.* at 23-24. The townships were then categorized as having no decline, an average annual decline in saturated thickness per year of zero to one-half percent, one-half percent to one percent decline, one percent to two percent decline, and greater than two percent decline. *Id.* at 24. The Natural Resources Conservation Service (“NRCS”) net irrigation requirements for corn in the applicable areas were consulted, and two irrigation zones per county were determined as a basis for establishing allocations in the townships with greater rates of decline. *Id.* Finally, for those townships with average decline rates greater than one-half percent per year, based on the amount of decline and the amount of water required per the NRCS calculations, proposed annual water allocations on an acre-inch per acre basis were assigned to each zone and ultimately, to each water right. *Id.* at 24-25. The plan stipulates that no user shall be reduced by more than 25 percent, except for those water rights that must be reduced to meet the maximum allocation of 18 inches per acre per year (provided as a five-year allocation of 90 inches). *Id.* at 25, 71-74. The plan also specifies that all allocations would be provided as five-year allocations which could be used flexibly so long as the water right’s authorized quantity is not exceeded in any individual year. *Id.* In no case would a water right be reduced to an allocation that is below the net irrigation requirement for corn under average precipitation conditions (50 percent chance rain NIR), and most water rights will have allocations that are at or above net irrigation

requirement for corn in dry years (the 80 percent chance rain NIR). *Id.* at 30, 68-70. The townships in GMD4 that are experiencing low or no decline (zero to one-half percent decline) would not be restricted by having an allocation assigned to them, and would not be subject to any enhanced management except for increased compliance monitoring and enforcement of over-pumping of the existing water rights. *Id.* at 34.

3. Mr. Luhman, on behalf of the GMD4 Board of Directors, requested that two modifications be made to the management plan as submitted to the Chief Engineer. First, for stock water use, rather than require a mandatory reduction, the management plan would encourage adoption of best practices with the goal to use only 90% of authorized quantity. Second, that any conversion of a water right from irrigation to a non-irrigation use be done in accordance with the consumptive use provision in K.A.R. 5-5-9, K.A.R. 5-5-10, or any applicable groundwater management district regulation, and not be subject to the irrigation allocation established by the management plan. *Id.* at 26-27, 41-43. The primary reason for asking for no mandatory reductions on existing non-irrigation rights, specifically stock water rights, is that such uses make up only one-half percent of use in GMD4 and that such reductions could unduly limit production animal feeding and dairy operations and cause harm to the local economy. *Id.* at 26-27.
4. On cross-examination, Mr. Luhman testified that it was necessary to develop proper boundaries for determining allocations based on the rate of decline, and in this case, the best representation in his opinion was at the township level based on the available data. *Id.* at 104-107, 203. The annual decline was based on saturated thickness changes between 2004 and 2015. *Id.* at 158.
5. Mr. Luhman also clarified that under the plan's proposed allocations, no allocation would result in a cut of more than 25% from the average 2009-2015 use, except in those cases where a reduction to the 18 inches per acre per year cap (provided as a five-year allocation of 90 inches) is applied. *Id.* at 184-185. In other words, in those townships with greater than one-half percent per year decline in water levels, no one (except for vested rights) will be allowed a five-year allocation of greater than 90 inches per acre for the

five-year period (18 inches per acre per year cap), but no other allocation will result in reductions from the average 2009-15 use of greater than 25%.

6. Brownie Wilson, Kansas Geological Survey (“KGS”) - Mr. Wilson presented the same written testimony as at the initial public hearing and his previous written testimony was made a part of the record at this second hearing. Along with Mr. Wilson’s written testimony, a full discussion of the factors causing decline in the GMD4 District Wide LEMA is contained in the *Order on Initial Requirements*.
  
7. Mr. Wilson testified that the major reason for the decline in the water table in GMD4 is groundwater pumping and the proposed management plan would result in water savings. *Id.* at 213, 217. He explained the design and data sources for the High Plains Aquifer monitoring network, how the data is reviewed, and the analysis completed by KGS for GMD4 which was used as the basis for establishing the allocations within the proposed LEMA. Further, the decision to aggregate the decline rate at the township, rather than the section, level is, in his opinion, justified and reasonable based on the resolution and distribution of the data collected from the monitoring network, and the relative homogeneity of the aquifer in northwest Kansas. *Id.* at pp. 218-222, 234-235.
  
8. Brent Rogers, President, GMD4 Board of Directors, Sheridan County – Mr. Rogers, a farmer in Northeast Sheridan County and Western Graham County, testified that while the proposed management plan would not place any restrictions on him, he wants to take actions to make sure that declines do not increase in his townships. He stated that the far western portions of his irrigated acres see significant water level drawdowns in the latter part of the pumping season and that he believes that this township will be regulated in a future LEMA plan because of the continued declines. He has adopted technological improvements and hybrid seeds and has seen “tremendous yields” with less water and fertilizer. He further testified that conservation will help the members of GMD4 in the future. *Id.* at pp. 238-241.

9. Lynn Goossen, Colby – Mr. Goossen, a farmer in Southern Thomas County for 34 years, testified that the proposed management plan is a good start to slowing down the rate of decline in the area and that it is better for the whole area to solve this problem together rather than for senior water rights to attempt to shut down junior water rights. *Id.* at pp. 241-243.
  
10. Kelly Stewart, Water Commissioner, DWR – Mr. Stewart testified that DWR staff under his supervision reviewed and analyzed the data provided by GMD4 and determined that the proposed management plan would be able to meet the stated goal of limiting pumping to 1.7 million acre-feet of water over the five-year period. DWR staff also helped develop an online tool to allow members of the public to look up their proposed LEMA allocations. He further testified that he believed the corrective controls would meet the goals set forth in the proposed management plan and that his staff was prepared to help GMD4 as needed. *Id.* at 244-247. DWR also submitted written testimony into the record.
  
11. Lane Letourneau, Water Appropriation Program Manager, DWR – Mr. Letourneau testified that even though the allocations in the proposed management plan are not based on the priority date of the water rights, should any impairment complaints be received by DWR, an impairment investigation would be conducted, and if necessary, any junior water rights would be curtailed as required to secure the senior water right. On cross examination, Mr. Letourneau testified about his 30 years of experience at DWR, about how past water rights have been issued and perfected. He also testified about how DWR assists groundwater management districts with staff and the Governor’s Water Vision in implementing LEMAs. *Id.* at 248-265.
  
12. Bert Stramel, Colby – Mr. Stramel, one of the Intervenors, testified that the second public hearing was probably the most informational meeting during the LEMA process. He further testified that requests for additional data points had been ignored and that while he wants to preserve water for his children’s use, it is also a problem to take away rights for the greater good. Additionally, he testified that the appeals process was unclear, that he was related to members of the board and whether or not that created potential conflicts of

interest, or if a farmer and board member are competing for the same lease or property, what impact that might have on how the board handles the appeals process. He also stated that 2017 was a big year for producers and that the previous two years of declining farm income may have influenced attendance. Finally, he requested that an additional hearing be held to provide information to the public. *Id.* at 267-270.

13. Mr. Stramel further testified that the proposed management plan was posted online when the LEMA proceedings were formally initiated, but that otherwise no other handout with all the plan's details were provided at public meetings, except maybe at a GMD4 Board meeting. He further testified that plan was usually explained only in generalities and lacked detail, that there was no discussion as to increased meter logging requirements and that penalties were increased inside the LEMA. *Id.* at 270-273. On cross examination, Mr. Stramel testified that he had attended numerous public meetings and provided comments, and that prior to the posting of the proposed management plan online, he had never requested a copy of the plan, draft or otherwise. *Id.* at 273-276.

#### Public Comments - Oral

14. Irene Siebert, Thornton, Colorado – Ms. Siebert grew up in rural Thomas County, Kansas, and spoke about her experiences growing up in the 1930s and 1940s. She also talked the benefits and work involved with irrigation wells, and her concerns about increased regulations. Ms. Siebert also expressed concerns about the use of water by Colorado irrigators and wanted to know how Kansas, Colorado, and Nebraska would work cooperatively to protect the existing water supply so that it is not exhausted. (Transcript, pp. 107-114.)
15. Scott Ross, Stockton - Mr. Ross raised several questions about the proposed management plan and the LEMA process. He questioned the sufficiency of the data used to determine rates of decline and asked if further efforts have been made to establish additional water level measurements points throughout GMD4. He also expressed concerns about the economic impact upon area communities if irrigators were required to use less water than they currently use, if the management plan provided adequate consideration of past conservation, and he was concerned that the LEMA tool was not

suites to be applied to an area as large as that proposed by GMD4, but rather was meant to focus on small, specific, high priority areas. (Id., pp. 114-126.) Mr. Ross also submitted similar written testimony.

16. Aaron Popelka, Kansas Livestock Association – Mr. Popelka testified regarding the small amount of water used for livestock purposes. He stated that less than one-percent of the use with GMD4 is for livestock and that 97-98% is used for irrigation. Mr. Popelka did not support the reduced allocations that the proposed plan provided for livestock uses because the allocation was based on feedlot permits issued or in place on December 31, 2015. He noted that several livestock operations had plans to expand operations or already had expanded since that time, thus creating a potential shortage of water for their animals. He also testified that water used for livestock should be treated the same as other non-irrigation uses, and encouraged the adoption of best management practices instead an allocation. Another concern presented was that the proposed plan would unfairly impose permanent reductions to water rights that undergo a change from irrigation to another type of use during the LEMA plan. Finally, Mr. Popelka expressed concern about how past conservation would be credited. (Id., pp. 126-136.) Mr. Popelka also submitted similar written testimony.
17. Jerry Binning, McDonald – Mr. Binning, a farmer in Rawlins County, testified that he was concerned with how the boundary lines were drawn because his well, which is being impacted five to twelve percent by his neighbor across the road, is within an area with restrictions and his neighbor is not being restricted. (Id., pp. 136-138.)
18. Jace Mosbarger, Goodland – Mr. Mosbarger, a farmer and rancher, testified that he does not believe that economic results experienced in the Sheridan 6 LEMA are applicable to the entire GMD4 area. He was specifically concerned with the difference in available crops, access to local markets, precipitation, and later planting dates in the western parts of GMD4. He testified that a district wide economic study should be conducted before implementation of the proposed management plan. (Id., pp. 139-141.) Mr. Mosbarger

further testified that he did not believe enough detailed information about the plan was available or understood prior to the formal public hearing process. (Id., pp. 282-284).

19. Mike McKenna, Jennings – Mr. McKenna is an appraiser and a dryland farmer in Decatur County and was representing a client of his that owns land in within GMD4. He testified that he was concerned about a lack of data and the ultimate effect of reductions on property value and the underlying water right. (Id., pp. 142-145.) Mr. McKenna also submitted written testimony.
20. Brian Baalman, Menlo – Mr. Baalman is an owner/operator of a feed yard within GMD4. He testified that he has water rights that can no longer pump their authorized quantity and that losing such rights is part of doing business. He also testified that in owning land just outside of the Sheridan 6 LEMA he has learned how to deal with less water. He further testified that a lack of water is a problem for a livestock operation, but that it may be necessary to buy water if more supply is needed. (Id., pp. 146-147.)
21. Steve Ziegelmeier – Mr. Ziegelmeier presented testimony in the form of several questions. He asked if the proposed plan suspends the prior appropriation system and administration based upon priority over the five years of the plan. He also testified about his concerns that some people may “suck [the aquifer] dry,” because they may not have children to take over their operations. He was specifically concerned about the water level declines near Leoti and that something similar could happen to water levels in GMD4 without any action, therefore, some sort of conservation action should be taken. (Id., pp. 150-154.)
22. Mike Schultz, Brewster – Mr. Schultz, a farmer and rancher in Thomas County and the City Superintendent for the City of Brewster, testified that his livestock watering wells have been impaired by irrigation uses. He also testified about the water quality problems that irrigation causes, specifically that the City of Brewster may have to spend \$1.5 million to build a water treatment plant due to nitrate contamination from irrigation. Mr. Schulz testified that the proposed plan would not stop current declines and advocated for

stricter corrective controls. He further testified about his concerns regarding over production and waste of “good” water. (Id., pp. 277-281.)

Public Comments - Written

23. Sharon Stramel, Colby – Ms. Stramel is 78 years old and has been involved in farming all her life. She submitted written testimony supporting across the board cuts to water use that do not include ways for big irrigators to continue their present pumping. She also stated that over the last two years, she has had to lower her well pipe and that she wants water to be available for her grandchildren to drink.
  
24. Galen Jamison – Mr. Jamison submitted written testimony that he was against all pumping of water for irrigation and was worried that continued pumping for irrigation would use up all available water.
  
25. Tracy Streeter, Director, Kansas Water Office – Mr. Streeter submitted testimony in support of the proposed management plan because it is consistent with the regional goals adopted by the Upper Republican Regional Advisory Committee (“RAC”) and approved by the Kansas Water Authority. He also testified that plan was based on public comments heard by both the Upper Republican RAC and at GMD4 public meetings.
  
26. Gary Moss, Rexford – Mr. Moss is a fourth-generation farmer that has farmed in Sheridan County since the 1970s. He submitted written testimony stating that he was in favor of adopting the proposed management plan. As a participant in the Sheridan 6 LEMA, he has learned over the last five years that there was waste of water happening with the old mentality of irrigation. He believes that a good corn crop can be raised with less water thanks to technological improvements like soil moisture probes. Although he understands concerns about the boundaries of the allocation zones, he believes the lines must be drawn somewhere and he wishes conservation measures had been taken sooner in his own area.

27. Richard Felts, President, Kansas Farm Bureau – Mr. Felts submitted written testimony on behalf of Kansas Farm Bureau supporting and encouraging the GMD in its management efforts as long as they are consistent with state law. He expressed concern that the proposed management plan was providing allocations only to irrigation rights was not consistent with state law.

28. A form letter stating opposition to approval of the proposed management, at least until GMD4 provides more detailed information to irrigators, by 33 people that have an interest in 40 or more continuous acres within GMD4 or have an interest in a well that uses at least one acre-foot of water per year.

29. The same or a nearly identical form letter was submitted by an additional 17 people that have an interest in 40 or more continuous acres within GMD4 or have an interest in a well that uses at least one acre-foot of water per year. These letters contained the same information as summarized in no. 28 above, except that they also contained one or more of the following additional comments:

- Restrictions should apply to everyone within GMD4.
- The GMD4 Board of Directors should hold a district wide vote before implementing the proposed management plan.
- The LEMA process should have greater due process protections and allocation should be done according to priority.
- The proposed management plan would result in an alteration of property rights and that may lead to action by the state to alter other rights in the future.
- The GMD4 Board of Directors did not accept suggestions from area producers even though they did hold meetings, the proposed management plan should have been built on a per well basis, not by sections, and the board wrongly assumed growing conditions were the same in the eastern and western parts of GMD4.
- Some wells are located in areas where the decline does not need to be managed in the same way it has been managed in the Sheridan 6 LEMA.

- The economic cost of implementing the proposed management plan will be significant, there are many questions regarding the appropriateness and legality of the proposed management plan and process, and there are certainly constitutional takings involved with the proposed management plan.
- All irrigators should be treated the same so as to not reward those irrigators who do not take conservation seriously.
- The allocations set forth in the proposed management plan are unfair because some users will take large cuts, while other users may see the amount of water they pump increase.
- The proposed management plan does not include a proper valuation of irrigated acres and the effects of restrictions on the withdrawal of water because irrigated land will still be valued the same for tax purposes, but will ultimately be less productive with less water.
- The proposed management plan will result in a taking of property, a district wide vote should have been held, and there was not sufficient local involvement in the formulation of the proposed management plan.
- There are problems with the way overlapping water rights are provided allocations when they share a place of use in townships with different rates of decline and water rights still under perfection are wrongly not provided an allocation.
- When our well located with the Sheridan 6 LEMA was provided an allocation, we suffered a huge income loss and were not compensated for the taking of our property.
- The proposed management plan arbitrarily reduces pumping and constitutes a taking of property. There are also concerns that reduced revenue from reduced pumping will create economic problems, including debt service and loan default problems.
- The Board has failed to represent the water right owners who elected them by creating a district wide proposal rather than a more localized solution. GMD4 lacks adequate data to determine water levels.

30. Joan McKenna, Jennings – Ms. McKenna is a landowner in Sheridan County. She submitted written testimony stating that the data upon which the proposed management plan was based was insufficient and that data from private wells should have been utilized. Further, the proposed management plan could result in unnecessary regulation and reductions in water rights. The plan was not developed to address declines on a local enough level and proper consideration was not given to the difference in precipitation and growing season from east to west.
31. Bert Stramel – Mr. Stramel submitted written testimony stating that the proposed management plan does not provide proper allocations for certified acres that have recently been put back into production. He also stated that he is concerned with the fairness of the appeals process.
32. Leonard Kashka, Jr. – Mr. Kashka submitted written testimony and stated that he agreed with testimony provided by the Kansas Livestock Association. Further, he stated that the LEMA would be viewed as making conservation less desirable because there are no incentives for being conservative with water use. He also expressed concerns that water right owners were not aware of the various public meetings leading up to the process, and that some area waterways and lakes are drying up.
33. Brian Friesen, Colby – Mr. Friesen submitted written testimony expressing his dissatisfaction with the “due process” provided by law for the LEMA process and that water rights are property rights that may only be reclaimed by the exercise of eminent domain.
34. Doyle Saddler and Sarah Jane Saddler, Colby – The Saddler’s each submitted identical written testimony in opposition to the proposed management plan because it does not follow prior appropriation, he does not know how this would affect his water right, and because the Chief Engineer cannot take away perfected water rights. He also expressed concerns that the Chief Engineer has not adopted administrative rules and regulations pursuant to K.S.A. 82a-1041.

35. F. Doyle Fair, Trustee, A.L. Abercrombie Martial Trust, Wichita – The trust owns land in Sheridan County and submitted written testimony questioning why additional wells and data were not utilized in determining the rate of decline in GMD4. Mr. Fair also stated areas experiencing a rate of decline less than a half-percent should not have been included in the LEMA.
  
36. Dwayne Kersenbrock, Hoxie – Mr. Kersenbrock owns a dryland farm in Sheridan County and previously worked the NRCS for 31 years, including experience with irrigation. He submitted written testimony and stated that the boundary lines selected for the LEMA were a necessary part of program and that he regularly attended GMD4 Board meetings, where the proposed management plan was discussed and where information was freely available. He also cites recent land sales, one property located within the Sheridan 6 LEMA and one outside, of similar quality, where both properties sold for the same money and the one inside the Sheridan 6 LEMA did not lose value.
  
37. A petition signed by four persons in support of the proposed management plan was submitted.

## **V. Discussion and Circumstances of Findings**

1. The various issues raised during this LEMA proceeding can be broadly categorized into four categories: the 1) procedural challenges; 2) issues raised but ultimately addressed by modifications to the management plan; 3) issues raised but addressed by evidence in the record; and 4) any remaining issues within the authority of the Chief Engineer to address.

### Procedural Challenges

2. As discussed in detail in Section III (above), several procedural concerns were presented prior to and during the second public hearing. However, all the statutory requirements of K.S.A. 82a-1041 have been fulfilled, no evidence of actual prejudice or harm was

presented, and therefore, nothing in the Chief Engineer's duties grants him the authority to invalidate these proceedings based a lack of due process or other procedural error.

Issues Addressed by Management Plan Modifications

3. At the conclusion of the second public hearing, the Chief Engineer proposed modifications to the proposed management plan pursuant to K.S.A. 82a-1041(d)(4). The *Order of Decision* contains a complete discussion of changes and the rationale for making such changes, but in summary, it was proposed that the management plan be modified to 1) change the requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) change the boundaries of the District Wide LEMA Management Plan; 3) adjust allocations where the lands authorized for irrigation are in two or more allocation zones; 4) remove any LEMA management plan quantity restrictions on water rights in their perfection period; 5) change the appeal process to ensure every water right holder understands the basis of the allocations provided by the LEMA management plan and that water rights are provided allocations on acres where they demonstrate to the appeals board that they have lawfully expanded their place of use from that of 2009-2015 and have the means to irrigate such expanded acres; 6) require the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarify the Board of Directors' intent for allocations in the areas indicated as "18 inch max restriction." These changes will allow for the better administration of the proposed management and are the best way to achieve the stated goal of the proposed management plan at this time.
  
4. Based upon both oral and written testimony, and the *Intervenors' Submittal*, the following issues were generally raised, but were addressed by modifications to the management plan: a) an annual decline rate of one half-percent or less is not excessive; b) failure to provide due consideration for past conservation; and c) reasonable boundaries.
  - a. Rate of Decline – In order to move past the initial LEMA hearing, it must be determined that one of the conditions set forth in K.S.A. 82a-1036(a)-(d) is present in the area of the proposed management plan. GMD4's reliance on the criteria in

K.S.A. 82a-1036(a) stating that “Groundwater levels in the area in question are declining or have declined excessively” has been challenged. For example, the Intervenor state that a decline of one half-percent or less is not “excessive,” and that further, the legislature did not give the Chief Engineer any guidance in determining how to define excessive. *Intervenor’s Submittal*, pp. 11-15. First and foremost, the argument is moot. K.S.A. 82a-1036(a) plainly includes all areas that are currently declining. Any decline will suffice to fulfill the statutory criteria. Excessive is only considered an area is not currently declining, but that may have experienced excessive declines over time. Even if Intervenor had not ignored the plain language of the criteria, the issue remains moot as all townships experiencing a one half-percent decline or less were removed from the management to improve its administration.

- b. Consideration of Past Conservation – K.S.A. 82a-1041(a)(4) requires that any management plan give “due consideration to water users who already have implemented reductions in water use resulting in voluntary conservation measures.” Testimony from multiple parties, including some examples of what may or may not be considered voluntary conservation were raised during the hearing. It was asserted in testimony that the appeal provisions do not protect those who have conserved in the past. Specific concerns were raised about acres that were not in production during the specified time frame, but that had been historically authorized. In response, first, rather than using historical reported water use as the basis of allocation, allocations are based on maximum acres during 2009-2015, multiplied by the allowable allocation per acre. Thus, those who have conserved in the past are not penalized by use of historic reported use in developing allocations. Second, the allocations in the proposed management plan are based on maximum verified acres for the years 2009-2015 with appeal provisions noted below. *Request of for a District-Wide LEMA*, as modified, Section 1, p. 3. Third, the existing appeals process should provide an adequate method to ensure that past voluntary conservation is duly considered. Further, the appeals process was modified to ensure any lawful expansion of historic acres that were not irrigated during 2009-2015 shall receive an appropriate allocation and that GMD4 and DWR are required, within 60 days, to

make the basis of all allocations publicly available to assist those water right owners who need to utilize the appeals process. Therefore, there are adequate safeguards in place to ensure past voluntary conservation is given due consideration. With the adjustments required, the appeal procedures contained in the District Wide LEMA Management Plan are adequate to ensure that due consideration is given to water users who have voluntarily implemented past conservation. The District Wide LEMA Management Plan provides for appeals that include timely notice and a clear process where water users can bring evidence to support a different allocation. Such procedure includes the consideration of other years prior to 2015, and “any and all aspects of the water right, use, place of use, point of diversion, or any other factors the reviewer determines appropriate to determine eligible acres and allocated water”.

- c. Reasonable Boundaries – This issue was addressed in detail in the Order of Decision and for similar reasons as stated above in this section, the issue is moot because the management plan has been modified to exclude all townships with declines rates less than one half-percent. Testimony was also presented about a lack of data upon which to base allocation rates, but this will be addressed below.

#### Issues Addressed by Evidence in the Record

- 5. A concern over the sufficiency and reliability of the data used by GMD4 in creating the management plan was raised by several parties in testimony. The related question of the appropriate resolution for allocation zones (by water right, by section, by township, or county) was also raised. As the sufficiency of the data cannot be assessed without knowing the resolution of management, this issue will be addressed first. The management plan proposed allocation zones based on township rate of decline. At the hearing, David Traster (attorney for the Intervenor) provided maps (*Exhibits D, E, and F.*) which presented rate of decline on a section level basis instead of township level basis. His data showed section-level decline rates were in some cases equal to, in some cases greater than, and in some cases less than the township-level decline rate. However, in the end, these section level estimates were based on interpolated data from the same data as the township estimates. During cross-examination, Brownie Wilson from the KGS said that he had more confidence in the township level estimates than the section

level estimates based on the data availability (Section IV, Testimony, paragraph no. 7). While the section-level, township-level, or perhaps other levels may be defensible as a reasonable method based on available data, there is nothing in the record that is compelling that township level based allocations are unreasonable or that some other level is more reliable. Given the Groundwater Management District Act's call on districts to develop management programs to address water resource declines and the effort of the district to study the problem, working with the state's data experts, I find the township-level management a reasonable compromise between data availability and practical considerations such as simplicity and understandability to the regulated community.

6. Returning to the sufficiency and reliability of the data used by GMD4, some testimony suggested that additional water level data available via required water-level measurement tubes at private wells and not currently part of a monitoring network could increase the data available in determining the water level and the confidence such data. The District Wide LEMA Management Plan is based on the KGS water level measurement network as described in the testimony provided. It was the judgement of both GMD4 and KGS that the network is sufficient to inform the management decisions that led to the allocations based on township-level rates of decline. When removing the areas of no or limited decline, this judgement is enhanced as the sparsest parts of the network are generally in areas with limited development. While additional water level data might be available via self-reporting by water users or by taking additional measurements from water level measurement tubes, evaluating whether and how this can be done in a manner that improves the network will take some time. As Mr. Wilson indicated, additional, reliable data is always welcome to improve confidence in results. But the argument that additional data is needed prior to additional management action is unreasonable because decades of records evidencing water level declines have created calls for action that caused the legislature to pass the Groundwater Management District Act of 1972 to address the declines that existed even at the time. The declines have continued and created additional calls for action, again resulting in additional legislative action in 2012 to allow for the creation of LEMAs. The problem is sufficiently clear from available data. Further, the public interest is served by the level of action envisioned in the plan at this

time. The five-year term of the LEMA will allow for additional data review, assessment of the plan's performance provides basis for adjusting any future LEMA management plans. Based on the testimony, it is reasonable to proceed with the proposed LEMA based on the existing network, and to charge the advisory committee to evaluate whether the network can be improved for future management decisions. Further, the plan is reasonable because it was ultimately determined by KGS that reliance on a sub-township size level was risky. *Memorandum in Support*, p. 9, submitted by GMD4.

7. A concern over the process used by GMD4 in developing the LEMA was raised during the hearing. Specifically, that GMD4 was "less than proactive in its efforts to involve the public." *Intervenors' Submittal* at 21. Another general concern was that the public was not aware of the specific details contained in the proposed management plan. No suggestions were offered at hearing that differed from what GMD4 had already been doing. The record of public engagement during the entire LEMA process is impressive. A comprehensive list of public meetings and a recap of LEMA discussions at regular board meetings is available in the *Affidavit Timeline of LEMA Public Meetings, Board Meetings, and Notices*, submitted by GMD4 as written testimony. The amount of discussion that occurred in developing the plan is extensive, but a summary, as contained in the *Memorandum in Support* (pp. 6-14), is appropriate.

- January 13, 2015 – GMD4 Board adopts a goal statement to adopt, by board action, a plan that establishes conservation water use amounts for the entire district.
- February 11, 2015 – Goal statement presented to the public at the GMD4 annual meeting.
- Extensive discussion of potential plans was had at the May, June, July, August, and September board meetings.
- Discussions continued at the December meeting, where the board agreed to begin preliminary discussion with DWR.
- February 10, 2016 – An overview and framework of the first proposed management plan was presented at the annual meeting which included the same

rate of decline estimates by township as the current plan and similar, but with more stringent allocations.

- March 9, 2016 – Extensive discussion on specific proposals and corrective controls was conducted at the regular board meeting.
- March 23 – March 30 – Public meetings regarding the first proposed management plan were held in Hoxie, Colby, St. Francis, and Goodland.
- August 4, 2016 – Following the public hearings, the proposed management plan was modified, and the board accepted the changes and voted to send the plan to DWR for review.
- September 1, 2016 – The board requested a month to discuss the plan with area producers before moving forward with public meetings.
- October 6, 2016 – The board agreed to hold public meetings to discuss the plan.
- November 3, 2016 – The board reviewed the memorandum that was to be mailed out to all water use correspondents and suggested that presentation be given at the public meetings to explain to the public what the various allocation zones were based on.
- November 4, 2016 – The memorandum with map and details were mailed to water use correspondents.
- November 29 – December 5 – Public meetings regarding the second proposed management plan were held in Colby, Goodland, St. Francis, and Hoxie.
- February 1, 2017 – Discussion about the proposed management plan at the annual meeting.

This summary is not an exhaustive list, but it illustrates that the GMD4 Board of Directors was engaged in conversations about the proposed management plan for more than two years before it was submitted to the Chief Engineer for review and initiation of formal proceedings. No evidence was presented that anyone that requested additional information was denied such information. Further, the number of public meetings and the fact that the initial plan was revised and a second of round public meetings was held illustrates that the board was responsive to the concerns of those they represented. GMD4, working with DWR, published information on the proposed management plan on their respective web sites during the extensive period the proposed management plan was

under review via the hearing process. The information on the websites included a tool which allowed water right holders to determine the plan's proposed allocations for each particular water right. It is difficult to imagine what additional steps the GMD4 Board could have taken to attempt to engage the public in this process.

8. A number of comments referenced the potential of an economic loss occurring due to the allocations proposed. While the question was raised, no evidence, beyond speculation, was offered. The allocation provided herein may have some limited short-term economic consequences and/or require adaptation of new technology or cropping. However, there may be countervailing long-term economic gains as the declining supply is extended. The LEMA plan with its allocations to extend the life of the aquifer provided herein appear fully consistent with the mission given to groundwater management districts in the Groundwater Management District Act: *"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."* (emphasis added)(K.S.A. 82a-1020).
  
9. It is also worth mentioning the economic results that have been seen in the Sheridan 6 LEMA that was recently renewed for an additional five-year term. Initial data indicates that, while water use has declined and adjustments have been made to cropping practices, producers within the Sheridan 6 LEMA have managed to maintain a level of profitability at or near their neighbors outside the LEMA. *See generally, Monitoring the Impacts of Sheridan County 6 Local Enhanced Management Area, Interim Report for 2013-2015*, by Dr. Bill Golden; *Memorandum in Support*, pp. 29-31. While more data is required to determine the long-term impact of implementing a LEMA, Dr. Golden's initial report, coupled with stable land values within the LEMA provide justification for moving forward with less restrictive allocations in the rest of the GMD4.

10. It was asserted in the *Intervenor's Submittal* (pp. 16-18), that using NIR does not provide enough water to fully irrigate because it is less than the reasonable amount set in DWR's regulations, K.A.R. 5-3-19 and K.A.R. 5-3-20, which address maximum reasonable annual quantity for irrigation use. First, the allocations provided by the proposed management plan are not annual maximums but five-year allocations. Water users can still use their full authorized quantity in any year, subject to the five-year allocations. The most restrictive allocations are based on net irrigation requirements for corn under average conditions (50% chance rainfall NIR), varying by county according to the climatic conditions of the area (lower in the east; higher in the west). These 50% NIR allocations apply to only two townships that are experiencing the greatest rate of decline and therefore have the greatest need to conserve water resources. Even here, the allocations are significantly less restrictive than those provided in the Sheridan 6 LEMA (67.5 inches for five years under the District-wide LEMA vs 55 inches for five-years in the Sheridan 6 LEMA). Outside of these two townships, the allocations are set at the NIR for corn in dry years, an allocation generally two inches higher. Second, the maximums of the referenced regulations were established some 20 years ago; today's irrigation technologies generally allow for full irrigation with less water.

11. The plan is not "One Size Fits All." Rates of groundwater declines vary over the District in response to varying density of development and recharge, and are considered on a township by township basis. Differences in precipitation and growing seasons are reflected in allocations based on net irrigation requirements which reflect these factors.

#### Legal Issues

12. It is also worth addressing some general concerns about how the allocations proposed in the management plan will be applied alongside the doctrine of prior appropriation, which K.S.A. 82a-706 directs the Chief Engineer to use in administering water rights. First, K.S.A. 82a-1041(f) allows for the use of four specific corrective controls plus any additional requirements that the public interest may require. Of these, the only mention of the prior appropriation doctrine is in K.S.A. 82a-1041(f)(2), which relates to determining the total permissible withdrawal in an area apportioned "insofar as may be reasonably

done” with the relative dates of priority. This is a logical instruction from the legislature, as no LEMA management plan permanently changes the underlying base water rights. Since the rates of decline and the remaining saturated thicknesses vary across GMD4, strict use of prior appropriation could reduce the effectiveness of the LEMA and create disproportionate economic harm to some water right owners. Therefore, it is reasonable to use other factors when determining allocations. For example, K.S.A. 82a-1041(f)(3) explicitly allows for “reducing the permissible withdrawal of groundwater by *any* one or more appropriators...” (*emphasis added.*) It is also important to note that the priority to use water only comes into effect when the “supply is not sufficient to satisfy all water rights.” K.S.A. 82a-707b. Further, as testimony by DWR staff shows, priority is still very much alive and well if impairment, or the inability of a senior water right to access water because of a junior water right’s use occurs. The prior appropriation doctrine will be used to secure water to the senior appropriator. To borrow a phrase from the proceedings in the Sheridan 6 LEMA, the “concern over not basing allocations on prior appropriation is more apparent than real.” The allocations are based on the rate of decline in the underlying aquifer and the irrigation requirements in each county. The strictest allocations proposed are five-year allocations based on five times the local net irrigation requirement for corn under average precipitation conditions, and these allocations would only be implemented in the areas with the most severe declines (two townships). K.S.A. 82a-1041 allows for reductions to address specific problems, and provides the flexibility to implement management plans that adequately address such problems while still protecting senior water rights.

13. Assertions that impairment is defined by K.S.A. 82a-711, specifically that impairment up to a reasonable economic limit is allowable, are moot in the case of this LEMA, because K.S.A. 82a-711 applies only to new applications. The establishment of a LEMA is not subject to the review required when applying for a new water right. Impairment among existing water rights only comes into effect when K.S.A. 82a-706b is violated, specifically, when a junior water right prevents water from moving to a person with a senior right. Further, the Kansas Court of Appeals in *Garetson Bros. v. American Warrior, Inc.*, 51 Kan.App.2d 370, 388-389, in discussing an impairment between two

existing water rights, adopted the dictionary definition of impairment, “to cause to diminish, as in strength, value, or quality,” while rejecting the application of an impairment within a reasonable economic limit to existing water rights. Therefore, since there is no evidence of senior water rights failing to have access to their supply of water because of use by a junior water right, no violations of priority have occurred.

14. Ultimately any interpretation of K.S.A. 82a-1041 that limits the solutions and corrective controls proposed in a management plan to strict administration creates an apparent contradiction in the plain meaning of the statute. This order is not the proper place to review the canons of statutory construction, nor is it the duty of the Chief Engineer to rule on the constitutionality of such statutes within an administrative procedure, but as it appears, the plain meaning of K.S.A. 82a-1041 is simply to solve a stated goal. This can be accomplished pursuant to K.S.A. 82a-1041(f)(1)-(5), which allow the closing of the area to further appropriation, determining a total withdrawal amount and “insofar as may be reasonably done,” apportion that withdrawal among all water right holders in accordance with relative dates of priority, reduce the permissible withdrawal of any appropriator or well, require a system of rotation, or “any other provisions making such additional requirements as are necessary to protect the public interest.” If the intent of the legislature was to require that every corrective control be based upon priority, then why mention it in relation to only one type of control, especially since it is provided as optional should it be determined that it is not “reasonable” to apply prior appropriation. If prior appropriation must apply to every type of corrective control implemented by a management plan because the Kansas Water Appropriation Act demands it, as the Intervenor contend, then it would be unnecessary to mention priority at all. What would be the point of a statute that allows implementation of any additional requirements necessary to protect the public interest, if the only possible solution is ultimately a form of strict administration? If this was the intent, the Chief Engineer already has the authority to limit water rights based on priority during an impairment and there was no need to enact K.S.A. 82a-1041 in the first place. The purpose of the LEMA statute is to address the problems set forth in K.S.A. 82a-1036(a)-(d). The problems this management plan attempts to address are not about impairment, rather they reflect an effort by the

legislature to provide reasonable tools to correct past policies that led to the existing problems.

15. Another concern expressed in testimony was that the implementation of a LEMA could result in the “taking” of a water right. These fears are also unfounded. The allocations provided in the proposed management plan do not make any permanent changes in the water right or limit the amount that can be pumped in any single year. The LEMA will last for only five-years and will be evaluated at the end of that period to determine if the controls should be continued. Based on the authority granted in K.S.A. 82a-1041, these types of corrective controls were provided for use in developing effective management plans.
  
16. The proposed management plan does treat the different types of use of water differently. Irrigation water rights are provided a reduced allocation, while non-irrigation rights are not provided allocations, nor are they required to reduce their use. Livestock and poultry 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. Similar to paragraph 7 above, 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. However, when developing a management plan to achieve specific goals, in this case to reduce pumping by 1.7 million acre-feet, reductions to non-irrigation rights were not necessary. Non-irrigation rights make up approximately 7.7% of all water rights in GMD4 and such rights could suffer considerable and disproportionate economic harm from an allocation, without adding any significant water savings to the ultimate LEMA goal. 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 it is in the public interest.

## VI. Findings of Fact

1. The *Order on Initial Requirements*, the *Decision Regarding Motion for Expanded Due Process*, and the *Order of Decision* are hereby adopted by reference and made a part of this record.
2. The *Request for a District-Wide LEMA Submitted to the Chief Engineer, Kansas Department of Agriculture, Division of Water Resources Incorporating the Modifications Proposed by the Chief Engineer in the Order of Decision dated February 23, 2018* (“Exhibit 1”), is hereby adopted by reference and made a part of this record.
3. The proposed geographical boundaries of the GMD4 District Wide LEMA shall consist of the following township in so far as those townships are located within the boundaries of GMD4:

### Cheyenne County

Township 3 South, Range 37 West  
Township 4 South, Range 37 West  
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Township 5 South, Range 42 West

### Gove County

Township 11 South, Range 26 West  
Township 11 South, Range 27 West  
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Township 11 South, Range 31 West  
Township 12 South, Range 26 West  
Township 12 South, Range 27 West

Township 12 South, Range 28 West

Logan County

Township 11 South, Range 36 West

Rawlins County

Township 3 South, Range 36 West

Township 4 South, Range 36 West

Sheridan County

Township 6 South, Range 28 West

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Township 10 South, Range 29 West

Township 10 South, Range 30 West

Sherman County

Township 6 South, Range 37 West

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Township 10 South, Range 42 West

Thomas County

Township 6 South, Range 31 West  
Township 6 South, Range 33 West  
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Township 7 South, Range 31 West  
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Township 10 South, Range 33 West  
Township 10 South, Range 36 West

Wallace County

Township 11 South, Range 42 West  
Township 11 South, Range 43 West

4. Groundwater levels in the area contained within the proposed GMD4 District Wide LEMA have declined or are still declining, in some cases precipitously; these levels have declined excessively; and the rate of withdrawal of groundwater there exceeds the rate of recharge.
5. The boundaries of the proposed management plan are entirely within the boundaries of GMD4. Such boundaries are clear and reasonable, and are based upon a technical consensus among GMD4, DWR, and KGS concerning the hydrogeology of the area.
6. The goal of the proposed management plan is to restrict groundwater pumping for irrigation to no more than 1.7 million acre-feet over a five-year period in order to reduce decline rates and extend the life of the aquifer in GMD4 in the areas that have experienced one-half a percent or greater annual decline in saturated thickness over 2009-2015.
7. The corrective control provisions of the proposed management plan are sufficient to meet this goal, varying according to the rate of decline of the aquifer.
8. The irrigators within the proposed management plan can sustain their irrigated farming operations with the proposed allocations since no user will be allocated less than the net irrigation requirement under average conditions for corn provided as a five-year allocation.
9. The proposed management plan, specifically the appeals procedure therein, provides due consideration to water users who have already implemented reductions in water use resulting in voluntary conservation measures.

## **VII. Conclusions of Law**

1. Notice of the initial public hearing and the second public hearing was proper and complied with the requirements of K.S.A. 82a-1041(b).

2. As determined at the Initial Public Hearing, the initial requirements for the establishment of a LEMA were met.
3. The second public hearing took place pursuant to the requirements of K.S.A. 82a-1041.
4. All other procedures required pursuant to K.S.A. 82a-1041 have been complied with in the formation and submittal of the District Wide LEMA Management Plan.
5. Corrective controls are required within the GMD4 District Wide LEMA in order to address declines in the groundwater level and to address rates of withdrawal that exceed the rate of recharge as set forth in K.S.A. 82a-1036.
6. A corrective control provision that only reduces the rate of decline, but does not prevent decline, is in the public interest as contemplated by K.S.A. 82a-1020.
7. Pursuant to K.S.A. 82a-1041(d)(4) and based on the testimony submitted at the hearings, the proposed District Wide Management Plan's administration will be improved by modifications proposed by the Chief Engineer. Such modifications were properly proposed by the Chief Engineer and were properly accepted by the GMD4 Board of Directors.
8. The proposed District Wide Management Plan is consistent with the Kansas Water Appropriations Act and other Kansas law.

#### **VIII. Order of Decision**

**THEREFORE**, the Chief Engineer pursuant to K.S.A. 82a-1041(e)-(h), and based upon substantial competent evidence, as provided by the testimony and comments offered at, or in relation to, the public hearings regarding the proposed District Wide LEMA Management Plan, hereby finds that the District Wide LEMA Management Plan, as modified consistent with the Order of Decision issued February 23, 2018, is approved and that the District Wide LEMA shall

consist of the following townships in so far as those townships are located within the boundaries of GMD4:

Cheyenne County

Township 3 South, Range 37 West  
Township 4 South, Range 37 West  
Township 4 South, Range 38 West  
Township 4 South, Range 40 West  
Township 5 South, Range 37 West  
Township 5 South, Range 39 West  
Township 5 South, Range 40 West  
Township 5 South, Range 41 West  
Township 5 South, Range 42 West

Gove County

Township 11 South, Range 26 West  
Township 11 South, Range 27 West  
Township 11 South, Range 28 West  
Township 11 South, Range 29 West  
Township 11 South, Range 30 West  
Township 11 South, Range 31 West  
Township 12 South, Range 26 West  
Township 12 South, Range 27 West  
Township 12 South, Range 28 West

Logan County

Township 11 South, Range 36 West

Rawlins County

Township 3 South, Range 36 West  
Township 4 South, Range 36 West

Sheridan County

Township 6 South, Range 28 West  
Township 6 South, Range 29 West  
Township 6 South, Range 30 West  
Township 7 South, Range 27 West  
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Township 7 South, Range 29 West  
Township 7 South, Range 30 West  
Township 8 South, Range 28 West  
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Township 9 South, Range 26 West  
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Township 10 South, Range 26 West  
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Township 10 South, Range 29 West  
Township 10 South, Range 30 West

Sherman County

Township 6 South, Range 37 West  
Township 6 South, Range 40 West  
Township 6 South, Range 41 West  
Township 6 South, Range 42 West  
Township 7 South, Range 37 West  
Township 7 South, Range 38 West  
Township 7 South, Range 39 West  
Township 7 South, Range 40 West  
Township 7 South, Range 41 West  
Township 7 South, Range 42 West  
Township 8 South, Range 37 West  
Township 8 South, Range 38 West  
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Township 8 South, Range 40 West  
Township 8 South, Range 41 West  
Township 8 South, Range 42 West  
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Township 9 South, Range 39 West  
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Township 10 South, Range 42 West

Thomas County

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Township 7 South, Range 35 West  
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Township 8 South, Range 31 West  
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Township 9 South, Range 35 West  
Township 9 South, Range 36 West  
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Township 10 South, Range 32 West  
Township 10 South, Range 33 West  
Township 10 South, Range 36 West

Wallace County

Township 11 South, Range 42 West  
Township 11 South, Range 43 West

**IT IS FURTHER ORDERED**, the corrective controls and all other elements necessary for the administration and management of the District Wide LEMA Management Plan shall be in full force and effect beginning on the effective date of this order and until December 31, 2022 within the boundaries of the local enhanced management area described above, including the following corrective controls:

The total groundwater diversions, excluding vested rights, for years 2018 to 2022 shall be limited to 1.7 million acre-feet for irrigation use and shall represent five (5) times the designated legally eligible acres multiplied by the amount designated for irrigation water rights. The procedures below shall be used to determine the allocations for each water right, no vested rights or points of diversion which draw their whole supply from an alluvial source shall be included. All administration and management of the District Wide LEMA Management Plan shall be done in accordance with the management plan unless otherwise required by this order.

**1. Allocations – Irrigation**

a) Proposed allocations were determined based on the maximum reported and/or verified acres for years 2009-2015. Proposed allocations are subject to change in the case where incorrect water use data is verified via the review process and/or via the appeals process described herein.

b) All irrigation water rights within the LEMA, excluding vested rights, shall be limited to the allocation according to the water right point(s) of diversion on the accompanying map over the five-year period beginning January 1, 2018 and ending December 31, 2022. If a vested right and an appropriation right have the same place of use or same point of diversion, the vested right will be the vested water right's authorized quantity and the appropriation right will be limited to the total system allocation minus the vested water right's authorized quantity.

c) The base water rights will not be altered by this order, but will be subject to the additional terms and conditions described herein for the duration of the LEMA.

d) Wells pumping to a common system or systems shall be provided a single allocation for the total system acres, subject to the appeals process. The total amount pumped by all of the wells involved must remain within the system allocation.

e) Where the place of use of a water right or group of water rights receiving a single allocation span two different allocation zones, the total allocation granted shall be based on a weighted average of allocations based on authorized acres in each zone.

f) No water right shall receive more than the currently authorized quantity for that right, times five.

g) No water right within a K.A.R. 5-5-11, five-year allocation status shall receive an allocation that exceeds its current five-year allocation limit.

h) No water right shall be allowed to pump more than its authorized annual quantity in any single year.

i) In all cases the allocation shall be assigned to the point of diversion and shall apply to all water rights and acres involving that point of diversion.

- j) For water rights enrolled in EQIP and/or AWEP that will be coming out of either program on or before September 30, 2022, the allocation quantity shall be set at the annual allocation for only the remaining years of the 2018-2022 LEMA period.
- k) If a water right is or has been suspended, or limited for any year of this LEMA, due to penalty issued by DWR, then the GMD4 and DWR will reduce the allocated quantity for such water right accordingly for the 2018-2022 LEMA period.
- l) For water rights enrolled in a KAR 5-5-11 change, MYFA, WCA, or other flexible water plan, the most water restrictive plan shall apply.
- m) No water right shall be reduced by more than 25% of their average historical pumping based on years pumped 2009-2015 unless it would allow a quantity over 18 inches per acre to be pumped.
- n) Should GMD4 request a new LEMA beyond the first five-year period, the GMD4 Board of Directors will consider a maximum 10% carry-over of the LEMA allocation if a new district-wide LEMA is considered or pursued as a result of the LEMA Order Review.
- o) Water rights which are still in their perfection period shall not be restricted by this LEMA.

## **2. Allocations – Non-Irrigation**

- a) Livestock and poultry use will be encouraged to maintain their use at 90% of the amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the number of animals authorized by a current facility permit authorized by the Kansas Department of Health and Environment. At no time will a stock water right be authorized to pump more than its authorized quantity.
- b) Municipal water users will be encouraged to reduce the amount of unaccounted for water in their systems and reduce the gallons of water used per capita per day.
- c) All other non-irrigation users are encouraged to utilize best management practices.
- d) When converting from irrigation to non-irrigation use, the base water right will be converted under the procedures in K.A.R. 5-5-9, 5-5-10, or GMD4 regulations.

e) The base water rights will not be altered by any Order issued under this request, but will be subject to the additional terms and conditions described herein for the duration of the LEMA.

### **3. Individual Allocation Amounts**

The five-year allocations for every water right shall be converted to a five-year acre-feet total, containing the assigned eligible irrigation restriction according to the township. Each water right will be restricted to its total acre-feet allocation within the LEMA order issued through this process, subject to the appeals process.

### **4. Data**

Any data errors may be corrected or updated via the processes outlined in Sections 5 and 6 of the management plan. All data upon which allocations are based shall be publicly available. The source of data for allocations may be modified with the Chief Engineer's approval and as otherwise required by this Order or pursuant to the management plan including its appeals process.

### **5. Eligible Acres Process**

a) GMD4 and DWR used the maximum reported authorized irrigated acres from 2009-2015 that could be verified as being legally irrigated.

b) If the authorized place of use was not irrigated from January 1, 2009 to December 31, 2015, then earlier years that the water user irrigated the acres may be considered.

c) DWR will provide every water right owner within 60 days of issuance of the Order of Designation, and others known to them as operators or interest holders in the water, the eligible acres and allocations assigned to their water right(s), informing them of their opportunity to appeal the assigned acres and allocations to GMD4 under the process described below. The GMD4 Board of Directors' decision is final and the eligible acres determined will be used to calculate and assign the final allocations.

### **6. Appeals Process**

a) The following process shall govern appeals regarding eligible acres and allocations:

(1) GMD4 and DWR shall coordinate to ensure that no later than 60 days after the order of designation, the basis of the allocations provided shall be publicly available through the DWR and GMD4 websites.

(2) Any appeal of the eligible acres and allocated water must be filed before March 1, 2019. Failure to file an appeal of the eligible acres and allocated water by March 1, 2019 will cause the assigned eligible acres and allocated water to become final during the LEMA period.

(3) Only eligible acres and allocated water may be appealed through this appeal process. No other issues including, but not limited to, the LEMA boundaries, violations, meter issues, etc., may be appealed through this process.

(4) Any appeal will first be heard by the GMD4 staff who will determine eligible acres based on the factors above.

(5) Any determination made by the GMD4 staff may be appealed to the GMD4 Board of Directors.

(6) GMD4 and DWR will use the acres and allocations determined through the processes contained in this Order and in Sections 5 and 6 of the management plan to calculate and assign allocations.

b) The following factors, in order of importance, will be used when reviewing a determination of eligible acres and allocated water on appeal:

(1) First, the reviewer will consider the location of the well(s) and their township allocations.

(2) Second, the reviewer may consider the authorized place of use.

(3) Third, the reviewer may consider any and all aspects of the water right, use, place of use, point of diversion, or any other factors the reviewer determines appropriate to determine eligible acres and allocated water

c) Should a water right holder or water use correspondent bring evidence that demonstrates that they have lawfully expanded their place of use from 2009-2015, the appropriate allocation for such additional lands will be provided.

## **7. Violations**

- a) The LEMA order of designation shall serve as notice of the creation of the LEMA and its terms and conditions to all water right owners within the GMD4 on its effective date.
- b) Upon GMD4 learning of an alleged violation, GMD4 will provide DWR with the information GMD4 believes shows the alleged violation. DWR, at its discretion, may investigate and impose restrictions and fines as described below or as otherwise allowed by law.
- c) DWR may address violations of the authorized quantities as follows:
  - (1) Exceeding any total allocation quantity by less than four acre-feet within the allocation period will result in a \$1,000 fine for every day the allocation was exceeded.
  - (2) Exceeding any total allocation quantity by four acre-feet or more within the allocation period will result in an automatic two-year suspension of the water right and a \$1,000 fine for every day the allocation was exceeded up to a maximum of \$10,000.
- d) In addition to other authorized enforcement procedures, if the GMD4 Board of Directors finds by a preponderance of evidence that meter tampering, removing the meter while pumping, or any other overt act designed to alter the metered quantity as described in K.A.R. 5-14-10 occurred, then the GMD4 Board of Directors will make a recommendation to the Chief Engineer that a written order be issued which states:
  - (1) The nature of the violation;
  - (2) The factual basis for the violation;
  - (3) That the water right is suspended for 5 years; and
  - (4) That the water right loses all remaining assigned quantities under the District Wide Local Enhanced Management Area.

## **8. Metering**

- a) All water right owners shall be responsible for ensuring their meters are in compliance with all applicable laws and regulations. In addition to maintaining compliance and annually reporting the quantity of water diverted from each point of diversion, all water right owners shall implement at least one of the following additional well/meter monitoring procedures:

(1) Inspect, read and record the flow meter at least every two weeks the well is operating. The records of this inspection procedure shall be maintained by the well owner and provided to the district upon request. Should the flow meter reported readings be in question and the bi-weekly records not be available and provided upon request of the district, the well shall be assumed to have pumped its full annual authorized quantity for the year in question. Following each year's irrigation season, the person or persons responsible for this data may, at their discretion, transfer the recorded data to the district for inclusion in the appropriate water right file for future maintenance.

(2) Install and maintain an alternative method of determining the time that the well is operating. This information must be sufficient to be used to determine operating time in the event of a meter failure. Should the alternative method fail or be determined inaccurate the well shall be assumed to have pumped its full annual authorized quantity for the year in question. Well owners/operators are encouraged to give the details of the alternative method in advance to GMD4 in order to ensure that the data is sufficient.

b) Any water right owner or authorized designee who finds a flow meter that is inoperable or inaccurate shall within 48 hours contact the district office concerning the matter and provide the following information:

- (1) water right file number;
- (2) legal description of the well;
- (3) date the problem was discovered;
- (4) flow meter model, make, registering units and serial number;
- (5) the meter reading on the date discovered;
- (6) description of the problem;
- (7) what alternative method is going to be used to track the quantity of water diverted while the inoperable or inaccurate meter is being repaired/replaced; and (8) the projected date that the meter will be repaired or replaced.

(8) Any other information requested by the GMD4 staff or Board of Directors regarding the inoperable or inaccurate flow meter.

c) Whenever an inoperable or inaccurate meter is repaired or replaced, the owner or authorized designee shall submit form DWR 1-560 Water Flowmeter Repair/Replacement Report to the district within seven days.

d) This metering protocol shall be a specific annual review issue and if discovered to be ineffective, specific adjustments shall be recommended to the chief engineer by the advisory committee.

## **9. Accounting**

DWR, in cooperation with GMD4, shall keep records of the annual diversion amounts for each Water Right within the LEMA area, and the total five-year quantity balances, and will make this information available to the Water Right Holder and the GMD4 on their request.

## **10. Advisory Committee**

a) A District Wide LEMA Advisory Committee shall be appointed and maintained by the GMD4 Board of Directors consisting of fourteen (14) members as follows: one (1) GMD4 staff member; one (1) GMD4 Board Member; one (1) representative of DWR as designated by the Chief Engineer; and the remaining positions to be filled by irrigators with regional distribution identical to GMD4 board member distribution. At the first meeting of the Advisory Committee, one member of the committee shall be elected chair and they shall be directed to further organize the committee and ensure that annual meetings are held to consider:

- (1) water use data;
- (2) water table information;
- (3) economic data as is available;
- (4) violations issues – specifically metered data;
- (5) any new and preferable enhanced management authorities become available;
- (6) other items deemed pertinent to the advisory committee.

b) The advisory committee in conjunction with DWR shall produce an annual report which shall provide a status for considerations (1) through (6) and any recommended modifications to the current LEMA Order relative to these six items. Said report shall be forwarded to the GMD4 Board of Directors and the Chief Engineer.

c) The advisory committee shall keep an accounting of any changes to allocations approved through the appeals process and during LEMA implementation, and shall assess the effects of these changes on the LEMA goal to restrict pumping in the LEMA to 1.7 million acre-feet should GMD4 request a new LEMA beyond the first five-year period.

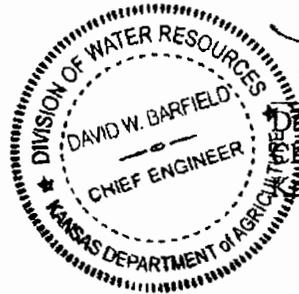
d) The advisory committee shall review what additional water level data is available, its quality and suitability for use in improving the water level data network used for future water management decisions should GMD4 wish to continue with LEMA management based on water level decline rates.

**11. Formal Review of the LEMA Order**

a) In addition to the annual LEMA Order reviews, the District Wide LEMA Advisory Committee shall also conduct a formal review of the LEMA Order 1.5 years prior to the ending date of the LEMA. Subjects of review shall include, but not be limited to, the economic impacts to the LEMA area and the local public interest, and water level data.

b) The committee, in conjunction with DWR and GMD4, shall also produce a report following this review to the Chief Engineer and the GMD4 Board of Directors which contains specific recommendations regarding future LEMA actions. All recommendations shall be supported by reports, data, testimonials, affidavits or other information of record.

ENTERED THIS 13<sup>th</sup> DAY OF APRIL 2018.



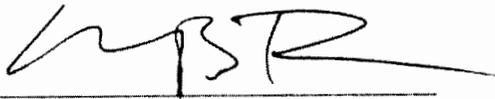
*David W. Barfield*

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

PREPARED BY:



*Karen Hunter*  
4/13/2018



Kenneth B. Titus #26401  
Chief Legal Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502  
Phone: (785) 564-6715  
Fax: (785) 564-6777  
Email: [kenneth.titus@ks.gov](mailto:kenneth.titus@ks.gov)

Attachment:

**Exhibit 1:** “Request for a District-Wide LEMA Submitted to the Chief Engineer, Kansas Department of Agriculture, Division of Water Resources Incorporating the Modifications Proposed by the Chief Engineer in the Order of Decision dated February 23, 2018.”

## **RIGHT TO PETITION FOR ADMINISTRATIVE REVIEW**

If you are aggrieved by this Order, then pursuant to K.S.A. 82a-1901(c), you may petition for administrative review of the Order by the Secretary of Agriculture. A petition for review shall be in writing and state the basis for requesting administrative review. The request for review may be denied if the request fails to clearly establish factual or legal issues for review. See K.S.A. 77-527.

The petition must be filed within 30 days after service of this Order as provided in K.S.A. 77-531, and be filed with the Secretary of Agriculture, Attn: Legal Section, Kansas Department of Agriculture, 1320 Research Park Drive, Manhattan, Kansas 66502, or by FAX (785) 564-6777.

If no petition for administrative review is filed as set forth above, then this Order shall be considered a final agency action as defined in K.S.A. 77-607(b). Failure to timely request administrative review may preclude further judicial review under the Kansas Judicial Review Act.

**CERTIFICATE OF SERVICE**

On this 13<sup>th</sup> Day of April 2018, I hereby certify that the original of the foregoing Decision was sent by U.S. Mail and a true and correct copy by electronic mail to:

Aaron Oleen, Staff Attorney  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502  
[aaron.oleen@ks.gov](mailto:aaron.oleen@ks.gov)

Ray Luhman, District Manager  
Northwest Kansas Groundwater Management District No. 4  
P.O. Box 905  
1290 W. 4<sup>th</sup> Street  
Colby, Kansas 67701  
[rluhman@gmd4.org](mailto:rluhman@gmd4.org)

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David M. Traster, Attorney for Intervenors  
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KDA Staff Person

**Request for a District-Wide LEMA Submitted To the Chief Engineer, Kansas Department of Agriculture, Division of Water Resources  
Incorporating the Modifications Proposed by the Chief Engineer in the Order of Decision dated February 23, 2018**

**June 9, 2017**

In order to reduce decline rates and extend the life of the aquifer in Northwest Kansas Groundwater Management District No. 4 (GMD 4) the Board of Directors of GMD 4 proposes the following five year plan be submitted via the Local Enhanced Management Area (LEMA) process contained in KSA 82a-1041 for the entire area within the boundary of the Northwest Kansas Groundwater Management District No. 4, except that no provisions of this proposal will apply to points of diversion located in the following townships:

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Cheyenne County

- Township 2 South, Range 37 West
- Township 2 South, Range 38 West
- Township 2 South, Range 39 West
- Township 2 South, Range 40 West
- Township 2 South, Range 41 West
- Township 2 South, Range 42 West
- Township 3 South, Range 38 West
- Township 3 South, Range 39 West
- Township 3 South, Range 40 West
- Township 3 South, Range 41 West
- Township 3 South, Range 42 West
- Township 4 South, Range 39 West
- Township 4 South, Range 41 West
- Township 4 South, Range 42 West
- Township 5 South, Range 38 West

Decatur County

- Township 5 South, Range 29 West
- Township 5 South, Range 30 West

Graham County

- Township 6 South, Range 21 West
- Township 6 South, Range 22 West
- Township 6 South, Range 23 West
- Township 6 South, Range 24 West
- Township 6 South, Range 25 West
- Township 7 South, Range 21 West
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Rawlins County

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Township 5 South, Range 33 West  
Township 5 South, Range 34 West  
Township 5 South, Range 35 West  
Township 5 South, Range 36 West

Sheridan County

Township 6 South, Range 26 West  
Township 6 South, Range 27 West  
Township 7 South, Range 26 West  
Township 8 South, Range 26 West  
Township 8 South, Range 27 West

Sherman County

Township 6 South, Range 38 West  
Township 6 South, Range 39 West  
Township 10 South, Range 38 West  
Township 10 South, Range 39 West

Thomas County

Township 6 South, Range 32 West  
Township 10 South, Range 34 West  
Township 10 South, Range 35 West

Overview and Goal Expression

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To promote improved management of water used district-wide with a goal not to exceed 1.7 million acre-feet (AF) for irrigation over five years within townships displaying an annual decline rate for the period 2004 – 2015 of 0.5% or greater annual decline and promote more efficient use by non-irrigation uses.

This LEMA shall exist only for the five- year period beginning January 1, 2018 and ending December 31, 2022. The proposed LEMA shall include all points of diversion located within the boundaries of GMD 4 excluding the points of diversions located in the above listed townships, vested rights, and points of diversion whose source of supply is 100% alluvial.

The total program diversion amount of 1.7 million AF for irrigation use for townships with annual decline rates of 0.5% or greater shall represent five (5) times the sum of designated legally eligible acres times the amount designated for irrigation water rights;

The Northwest Kansas Groundwater Management District No. 4 shall use the procedures herein to determine the 5-year allocation for each regulated water right, and specify said values in Section 3). All allocation values shall be expressed in terms of total acrefeet for the five-year LEMA period.

#### 1) Allocations – Irrigation

---

- a) Proposed allocations provided in Sections 3 and 4 were determined based on the maximum reported and/or verified acres for years 2009-2015. Proposed allocations are subject to change in the case where incorrect water use data is verified via the process in Sections 5 and 6.
- b) All irrigation water rights, excluding vested rights and those water rights that have points of diversion in the above listed townships, shall be limited to the allocation for the water right location on the accompanying map over the 5-year period beginning January 1, 2018 and ending December 31, 2022. If a vested right and an appropriation right have the same place of use or same point of diversion, the vested right will be the vested water right's authorized quantity and the appropriation right will be limited to the total system allocation minus the vested water right's authorized allocation.
- c) The base water rights will not be altered by any Order issued under this request, but will be subject to the additional terms and conditions described herein for the duration of the LEMA.
- d) Wells pumping to a common system or systems shall be provided a single allocation for the total system acres, subject to the review process in Sections 5 and 6. The total amount pumped by all of the wells involved must remain within the system allocation.
- e) Where the place of use of a water right or group of water rights receiving a single allocation span two different allocation zones, the total allocation granted shall be based on a weighted average of allocations based on authorized acres in each zone.
- f) No water right shall receive more than the currently authorized quantity for that right, times five (5).

- g) No water right within a K.A.R. 5-5-11, 5-year allocation status shall receive an allocation that exceeds its current 5-year allocation limit.
- h) No water right shall be allowed to pump more than its authorized annual quantity in any single year.
- i) In all cases the allocation shall be assigned to the point of diversion and shall apply to all water rights and acres involving that point of diversion. Moreover, in all cases the original water right shall be retained.
- j) For water rights enrolled in EQIP and/or AWEP that will be coming out of either program on or before September 30, 2022, the allocation quantity shall be set at the annual allocation for only the remaining years of the 2018-2022 LEMA period.
- k) If a water right is or has been suspended, or limited for any year of this LEMA, due to penalty issued by the Kansas Department of Agriculture, Division of Water Resources (DWR), then the GMD 4 and DWR will reduce the allocated quantity for such water right accordingly for the 2018-2022 LEMA period.
- l) For water rights enrolled in a KAR 5-5-11 change, MYFA, WCA, or other flexible water plan, the most water restrictive plan will apply.
- m) No water right shall be reduced by more than 25% of their average historical pumping based on years pumped 2009-2015 unless it would allow a quantity over 18 inches per acre to be pumped.
- n) Should GMD 4 request a new LEMA beyond the first five-year period, the GMD 4 Board will consider a maximum 10% carry-over of the LEMA allocation for the regions depicted in the purple, yellow, and red on Attachment 1 if a new district-wide LEMA is considered or pursued as a result of the LEMA Order Review discussed in Section 11.
- o) Water rights which are still in their perfection period shall not be restricted by this LEMA.

## 2) Allocations – Non-irrigation

---

- a) Livestock and poultry use will be encouraged to maintain their use at 90% of the amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the number of animals authorized by a current facility permit authorized by the Kansas Department of Health and Environment. At no time will a stock water right be authorized to pump more than its authorized quantity.
- b) Municipal will be encouraged to reduce the amount of unaccounted for water reported annually on the water use report and reduce the gallons per capita per day.

- c) All other non-irrigation users will utilize best management practices.
- d) When converting from irrigation to non-irrigation use, the base water right will be converted under the procedures in K.A.R. 5-5-9, 5-5-10, or Groundwater Management District No. 4 regulations.
- e) The base water rights will not be altered by any Order issued under this request, but will be subject to the additional terms and conditions described herein for the duration of the LEMA.

### 3) Individual Allocation Amounts

---

The five-year allocations for every water right per Sections 1.a and 2 above shall be converted to a five-year acre-feet total, with Attachment 1 containing the assigned eligible irrigation restriction for each township. Each water right will be restricted to its total acre-feet allocation within the LEMA order issued through this process, subject to the review processes outlined in Sections 5 and 6.

### 4) Data Set

---

The relevant data for this LEMA proposal came from the Water Rights Information System (WRIS) maintained by the Kansas Department of Agriculture, Division of Water Resources (DWR).

If any data errors are discovered, then the GMD 4 Board requests that the person or entity discovering the errors contact GMD 4 to update or correct any alleged errors via the processes outlined in Sections 5 and 6.

Attachment 2 contains pdf files of irrigation and stockwater water right numbers and allocations. Associated spreadsheets will be kept by GMD 4 and DWR; will be available on the GMD 4 and DWR websites; and may be changed with the Chief Engineer's approval or through the processes outline in Section 5 and 6. The GMD 4 and the DWR will document or track any changes made to the irrigation water and stock water right allocations attached hereto.

### 5) Eligible Acres Process

---

Based on input from stakeholders, it was agreed that the following procedure would be used to assign eligible acres to every irrigation water right in the District-Wide LEMA and to include in any future LEMA request.

The GMD 4 and DWR determined eligible acres as follows:

- a) The GMD 4 and DWR used the maximum reported authorized irrigated acres from 2009-2015 that could be verified as being legally irrigated with the GMD 4 in-house aerial photography and water right file information.

b) If the authorized place of use was not irrigated from January 1, 2009 to December 31, 2015, then earlier years that the water user irrigated the acres may be considered.

c) The DWR will contact every water right owner within 60 days after the Order of Designation and others known to them as operators or interest holders in the water right to inform them of the eligible acres assigned to their water right(s) under the adopted process, allow them the opportunity to appeal the assigned acres under the process described below and allow them the opportunity to provide more information to the GMD 4 Board on the correct acres. The GMD 4 Board's decision is final and the eligible acres determined by the GMD 4 Board will be used to calculate and assign the final allocations.

#### 6) Appeals Process

---

a) Appeal Process. The following process will govern appeals regarding eligible acres and allocated water:

(1) GMD4 and DWR shall coordinate to ensure that no later than 60 days after the order of designation, the basis of the allocations provided in Attachment 2 shall be publicly available through the DWR and GMD4 websites.

(2) Any appeal of the eligible acres and allocated water must be filed before March 1, 2019. Failure to file an appeal of the eligible acres and allocated water by March 1, 2019 will cause the assigned eligible acres and allocated water to become final during the LEMA period.

(3) Only eligible acres and allocated water may be appealed through this appeal process. No other issues including, but not limited to, the LEMA boundaries, violations, meter issues, etc., may be appealed through this process.

(4) Any appeal will first be heard by the GMD 4 staff who will determine eligible acres based on the factors above in Section 5) Eligible Acre Process.

(5) Any determination made by the GMD 4 staff may be appealed to the GMD 4 Board.

(6) The GMD 4 and DWR will use the acres and allocated water determined through the processes contained in Sections 5 and 6, as detailed above, to calculate and assign allocations.

b) Factors to be considered by the GMD 4 Board on appeal. The following factors, in order of importance, will be used when reviewing a determination of eligible acres and allocated water on appeal.

(1) First, the reviewer will first consider the location of the well(s) and their township allocations.

(2) Second, the reviewer may consider the authorized place of use.

(3) Third, the reviewer may consider any and all aspects of the water right, use, place of use, point of diversion, or any other factors the reviewer determines appropriate to determine eligible acres and allocated water

c) Should a water right holder or water use correspondent bring evidence that demonstrates that they have lawfully expanded their place of use from 2009-2015, the appropriate allocation for such additional lands will be provided.

#### 7) Violations

---

a) The LEMA order of designation shall serve as initial notice of the creation of the LEMA and its terms and conditions to all water right owners within the GMD 4 on its effective date.

b) Upon GMD 4 learning of an alleged violation, GMD 4 will provide DWR with the information GMD 4 believes shows the alleged violation. DWR, under its discretion, may investigate and impose restrictions and fines as described below or allowed by law.

c) DWR will address violations of the authorized quantities as follows:

(1) Exceeding any total allocation quantity of less than 4 AF within the allocation period will result in a \$1,000.00 fine for every day the allocation was exceeded.

(2) Exceeding any total allocation quantity of 4 AF or more within the allocation period will result in an automatic two-year suspension of the water right and a \$1,000 fine for every day the allocation was exceeded up to a maximum of \$10,000.

d) In addition to other authorized enforcement procedures, if the GMD 4 Board finds by a preponderance of evidence that meter tampering, removing the meter while pumping, or any other overt act designed to alter the metered quantity as described in K.A.R. 5-14-10 occurred, then the GMD 4 Board will make a recommendation to the Chief Engineer that a written order be issued which states:

(1) The nature of the violation;

(2) The factual basis for the violation;

(3) That the water right is suspended for 5 years; and

(4) That the water right loses all remaining assigned quantities under the District-Wide Local Enhanced Management Area.

#### 8) Metering

---

a) All water right owners shall be responsible for ensuring their meters are in compliance with state and local law(s). In addition to being in compliance and reporting annually the quantity of water diverted from each point of diversion, all water right owners shall implement at least one of the following additional well/meter monitoring procedures:

(1) Inspect, read and record the flow meter at least every two weeks the well is operating. The records of this inspection procedure shall be maintained by the well owner and provided to the district upon request. Should the flow meter reported readings be in question and the bi-weekly records not be available and provided upon request of the district, the well shall be assumed to have pumped its full annual authorized quantity for

the year in question. Following each year's irrigation season, the person or persons responsible for this data may at their discretion transfer the recorded data to the district for inclusion in the appropriate water right file for future maintenance.

(2) Install and maintain an alternative method of determining the time that the well is operating. This information must be sufficient to be used to determine operating time in the event of a meter failure. Should the alternative method fail or be determined inaccurate the well shall be assumed to have pumped its full annual authorized quantity for the year in question. Well owners/operators are encouraged to give the details of the alternative method in advance to GMD 4 in order to insure that the data is sufficient.

b) Any water right owner or authorized designee who finds a flow meter that is inoperable or inaccurate shall within 48 hours contact the district office concerning the matter and provide the following information:

- (1) water right file number;
- (2) legal description of the well;
- (3) date the problem was discovered;
- (4) flow meter model, make, registering units and serial number;
- (5) the meter reading on the date discovered;
- (6) description of the problem;
- (7) what alternative method is going to be used to track the quantity of water diverted while the inoperable or inaccurate meter is being repaired/replaced; and
- (8) the projected date that the meter will be repaired or replaced.
- (9) Any other information requested by the GMD 4 staff or Board regarding the inoperable or inaccurate flow meter.

c) Whenever an inoperable or inaccurate meter is repaired or replaced, the owner or authorized designee shall submit form DWR 1-560 Water Flowmeter Repair/Replacement Report to the district within seven days.

d) This metering protocol shall be a specific annual review issue and if discovered to be ineffective, specific adjustments shall be recommended to the chief engineer by the advisory committee.

#### 9) Accounting

---

a) DWR, in cooperation with GMD 4, shall keep records of the annual diversion amounts for each Water Right within the LEMA area, and the total 5-year quantity balances will make this information available to the Water Right Holder and the GMD 4 on their request.

#### 10) Advisory Committee

---

a) A District-Wide LEMA Advisory Committee shall be appointed and maintained by the GMD 4 Board consisting of fourteen (14) members as follows: one (1) GMD 4 staff; one (1) GMD 4 Board Member; one (1) representative of the Division of Water Resources, Kansas

Department of Agriculture as designated by the chief engineer; and the balance being irrigators with regional distribution identical to GMD 4 board member distribution. One of the District-Wide LEMA members shall chair the committee whose direction shall be set to further organize and meet annually to consider:

- (1) water use data;
- (2) water table information;
- (3) economic data as is available;
- (4) violations issues – specifically metered data;
- (5) any new and preferable enhanced management authorities become available;
- (6) other items deemed pertinent to the advisory committee.

b) The advisory committee in conjunction with DWR shall produce an annual report which shall provide a status for considerations (1) through (6) and any recommended modifications to the current LEMA Order relative to these six items. Said report shall be forwarded to the GMD 4 board and the chief engineer.

c) The advisory committee shall keep an accounting of any changes to allocations approved through the appeals process and during LEMA implementation, and shall assess the effects of these changes on the LEMA goal to restrict pumping in the LEMA to 1.7 million acre feet should the GMD request a new LEMA beyond the first five-year period.

d) The advisory committee shall review what additional water level data is available, its quality and suitability for use in improving the water level data network used for future water management decisions should the GMD wish to continue with LEMA management based on water level decline rates.

#### 11) LEMA Order Reviews

---

a) In addition to the annual LEMA Order reviews per Section 10 the District-Wide LEMA Advisory Committee shall also conduct a more formal LEMA Order review 1.5 years before the ending date of the LEMA Order. Review items will focus on economic impacts to the LEMA area and the local public interest. Water level data may be reviewed.

b) The committee, in conjunction with DWR and GMD 4, shall also produce a report following this review to the chief engineer and the GMD 4 board which contains specific recommendations regarding future LEMA actions. All recommendations shall be supported by reports, data, testimonials, affidavits or other information of record.

#### 12) Impairment Complaints

---

While this program is being undertaken, the GMD 4 stakeholders request that any impairment complaint filed in the district while this management plan is in effect, which is based upon either water supply issues or a regional decline impairment cause, be received by the Chief Engineer, and be investigated by the Chief Engineer with consideration to the on-going Local Enhanced Management Area activities.

### 13) Water Level Monitoring

---

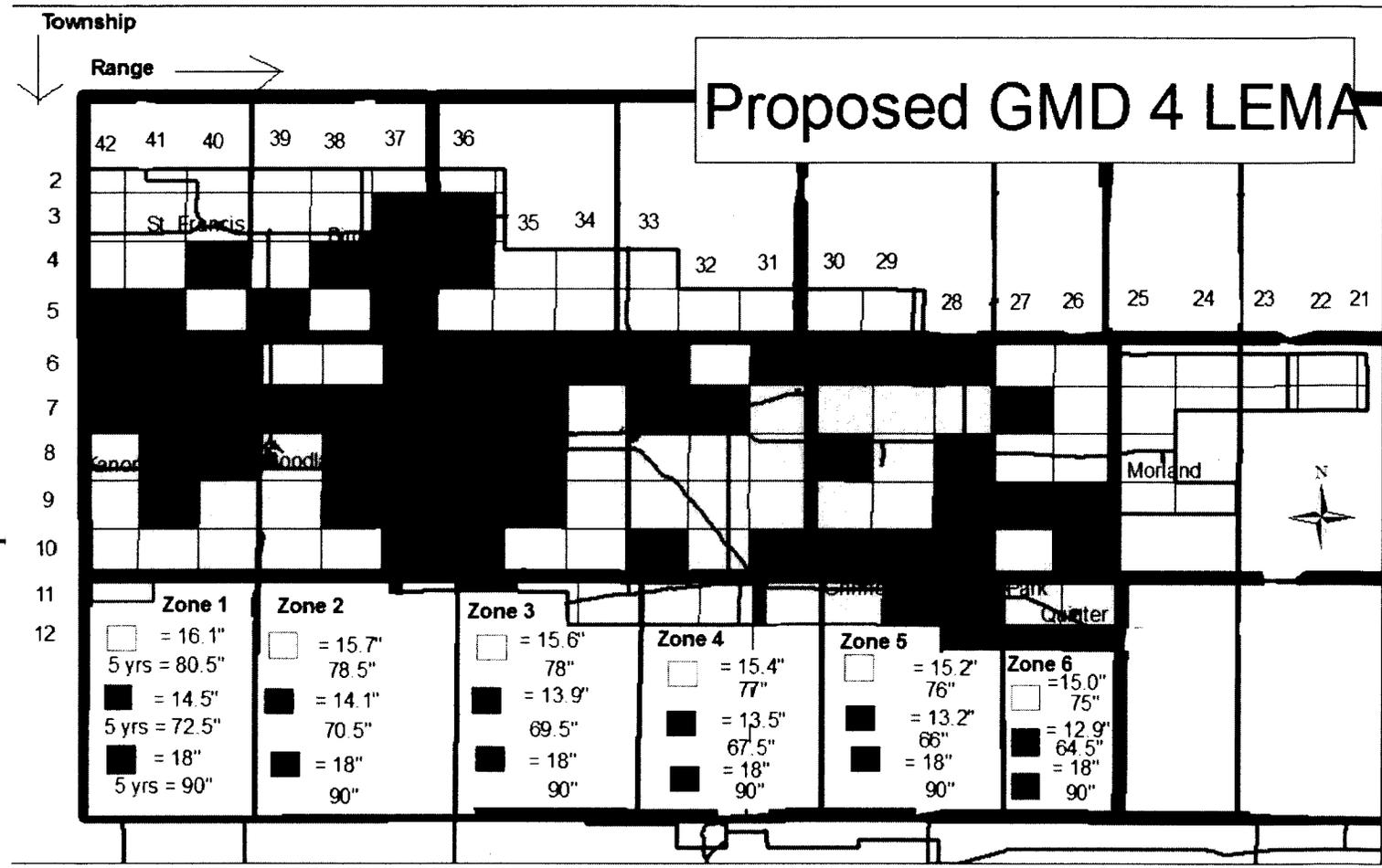
The data used to determine regional aquifer declines in Attachment 1 are based on the annual water level monitoring taken by KGS and DWR. Those measurements will continue as the data set used in determining water level declines. In the future, GMD 4 could, but is under no obligation, install additional monitoring wells.

### 14) Coordination

---

The GMD 4 stakeholders and the GMD 4 board expect reasonable coordination between the chief engineer's office and the GMD 4 board on at least the following efforts:

- a) Development of the LEMA Order resulting from the LEMA process;
- b) Accounting for annual pumpage amounts by LEMA water right owners/operators.
- c) Compliance and enforcement of the District-Wide LEMA Order.



- Townships with 2%+ Average Annual Decline in 2004-2015
- Townships with 1-2% Average Annual Decline in 2004-2015
- Townships with 0.5 - 1% Average Annual Decline in 2004-2015 (18 inch allocation, 5 years = 90 inches)

Prepared by Shannon Kenyon GMD 4

**Attachment 2  
Irrigation Allocation PDF File**

**PDF**



GMD 4 LEMA  
Irrigation Water Right

**Attachment 3  
Public Meeting Notes and Sign-in Sheets  
PUBLIC LEMA BOARD MEETINGS QUESTIONS AND COMMENTS  
COLBY (97 signed in)**

**Questions:**

Is this a 5 yr. program?  
What about restricting dairies?  
We used to flood and haven't for a while, how will that affect me?  
At the end of 5 years are you going to increase or decrease our allocation?  
Why would we do this if we're the only district doing it?  
Will we get a letter on what we will get under the plan?  
Will we be able to bank the water?  
Will there be a vote?  
How much water is this going to save?  
How is this a LEMA? It looks like an IGUCA  
Why cut people that don't have a problem ?  
What happens in 5 years?  
Can we just "knock off" the new wells?  
What happens if we do nothing?  
Why the whole district?

**Public Comments:**

0.5 – 1% should also have a reduction.  
This plan is a personal agenda.  
You need more measureable goals.  
Data other than KGS should be used.  
I've lost nine windmills, how here isn't afraid of the water going away.

# PLEASE SIGN IN <sup>Colby</sup>

Bret Rogers  
Jerry Binning  
Norma Zorn  
Kurt Stumpf  
Art Miller  
Phil Kest  
Carl Ziegelmeier  
Chuck Young  
ALAN & Andy Query  
Jeff Younger  
David Schultz  
Larry Towns  
Jim McKea  
Ken Christensen  
Curtis Dorn  
Chris P. Beamer  
Jon Fritson  
Jeremy Kersendgaard  
Tom Redmond  
Eugene Schwarz  
Shirley Bunker  
Todd Ziegler  
Shirley Harlet  
William J. Kest  
Ron Evans  
Steve Friesen

Connor Wilson  
Steve Wilson  
Don Reetbeck  
Kurt Alvarado  
Bar Hooley  
Mike Stephens  
Michael J. Jermoloff  
Jan Starvo  
Don Artholz  
Marvin Albers  
Agnes Rohl  
Richard Gail  
Robert Johnson  
Steve Brumback  
Gary Felt  
Mark Myers  
Jeremy Myers  
Jim Young  
Harold E. Jeff  
Jamie Dunn  
Dale Ford  
Alan Lutz  
Dale Lutz  
Jeff Miller  
Will  
R J M

Hawald Muehly

Selden

10/21/14

PLEASE SIGN IN <sup>Colby</sup> 97

Jay Sobor

Alex ZERR

Sarah Jane Barrett

Dave Hubbard

Thad Hahn

David Jones

Dale Adams

Jon McKee

Bob Stephens

Steve Kutler

Jeff Gutz

Robert Jones

Logan Wilson

Kevin Wilson

Willie Miller

John Flanagan

Richard Keck

Don Ryan

Mark Zeigler

Travis Towne

Kelly Stewart

Rick Kiper

Zan deWitt

Jack Zwiggert

Beard Stramp

Wayne Wilson

Don Woofler

Chris Sochner

Shawn Dieberich

Quincy Lee

Douglas Bell

Bruce Wilson

MARSHALL RHEA

Kelly Hornick Farm Credit

Glenn Morgan

Mike Baumgardner

Jared Flavin

Nathan Goetz

Bob Gillen - KSU

Keith Downing (May Ann)

Jim Kopriva

Bernard Meyer

~~Bob Gillen~~

~~Bob Gillen~~

**GOODLAND: (88 signed in)**

**Questions:**

Is the purple 18" per circle?  
What about EQIP acres?  
Does this apply to vested rights?  
How do you figure out where you are located?  
How did you come up with the zones?  
Who on the board represents Wallace County?  
Is the maximum 25% reduction based on your historical pumping?  
Will there be a vote?  
Can we do a district-wide WCA instead?  
Why was 2009-2015 used?  
What is your depletion goal?  
Are you going to install more observation wells?  
What's the reversal process if there is public outcry?  
Is SD6 going to re-up?  
Is this going to permanently reduce my water right?  
Was there an economic study?  
Has the board been advised to wait until the economic study is over?  
Is the economic study available?  
Can we vote?  
What is the time frame for implementation?  
Have you contacted the county assessor?  
Is there economic impact in SD 6?  
How many of the wells in SD 6 get measured?  
How did you get the different colors?  
When are the observation wells measured?

**Comments:**

You should do a 20% reduction of all wells and for one year in five you can't pump water.  
South of Ruleton I don't have a decline problem, but four miles away they do.  
A provision needs to be included to discontinue the plan and make it a reversible process.  
This will create a 10% net decrease in economics.  
I want to see the scatter plots to determine the % reduction needed in the decline areas.  
The longer we extend the aquifer, the longer we benefit.  
You need to include a possible drought contingency plan.  
Bigger government is not good.  
Blue areas should have restrictions if truly a groundwater management district.  
Thank you for your efforts.  
There should be a 10% reduction in five years for areas that still have a decline. That 10% reduction should continue every five years until no decline.  
Thank you to the board for listening to our comments at the last public meetings. The map is proof that you listened to us.

PLEASE SIGN IN <sup>Goodland</sup> 80

Craig Boggs

Royce Kehlback

Steve Ewert

Chantel Bell

HD House

David Leonard

David Schelling

Kerr Bellamy

Nan Tansley

Sam King

Shauna Johnson

Mary Volk

Lace Mosbarger

Jan Muehlen

Barry Guyer

James Fritze

David Dora

Greg Sedler

Jane McCary

Bob & Norma Stramager

Kelly Stewart

Theresa Armstrong

Pat Smith

Leonard Kaskela

24

PLEASE SIGN IN <sup>Goodland</sup>

Brent Cook

DICK PETTIBONE

Zach Goyell

Nate Emig

John Rade

Chris Soehner

Keith Snethen

1

PLEASE SIGN IN <sup>Goodlans</sup>

David Pedersen

Watie Harness

John Deeds

Darla Deeds

Scott Briney

Frank Van Laays

KIRK RICE

Elmer & Joyce Purvis

Ken Palmgren

Zach Zwiggert

Ron Robinson

Brady Okill

Konnie Whiteker

GERALD FRANKLIN

LINDA FRANKLIN

Thad Hahn

Neal Thornburg

Joey Snelten

Scott Houtter

DENNIS SHANK

~~Stanley~~

Norman ~~Abuse~~

Kim Dale

Evan Dale

Stam ~~Abuse~~

Gregory & Cure

24

PLEASE SIGN IN <sup>Goodman</sup>  
Ross Janssen  
Mike Rogers  
Rick Illinger  
Tyson Davis

4

)

PLEASE SIGN IN <sup>Goodland</sup>

Ron & Marsha Schilling

Kevin Schmidt

Jay de Waal

Frank Lindeman

Curtis Dofan

Stephen R. Bernick

Conno Sijp

Jeff Younger

TIA FANKLER

Dan Stephens

Dud Stephens

Chuck Thomas

Allen Quansen

Steve Duell

Rich Simon

Dillon Truesel

Jayce Oglin

John Ramsey

Kurt Milline

Mike Scott

Glenn Falkner

Ronald Owens

Robin Peeds

Dennis Goryell

Darrel Cloyd

Lou Hines

Tom Livingson

**ST FRANCIS (49 signed in)**

**Questions:**

How are acres determined?

What happens to water rights still in their perfection period?

What does "encourage" mean in relation to municipalities?

What is depth to water in these areas?

Will it be a reduction in the water right or only what is allowed to be pumped?

If you change tenants in the middle of the five year period, what happens to your remaining allocation?

How much water does this save?

What are the ramifications for going over?

How much is allowed in SD 6?

Can you bank the water if you don't use it?

What are the economic ramifications?

How have the other meetings gone?

Is there any provisions on contiguous acres?

Why is there no flexibility in this plan?

**Comments:**

I pump 21" per year but was hailed out one year so my average is skewed. That may not trigger the no more than 25% reduction.

St. Francis

PLEASE SIGN ~~#~~ IN

(49)

Jeff Younger  
Martin Hays  
Tom Hays  
Craig Busse  
Mike Rooney Bird City  
Kermit Benz Bird City  
Michael Koch

Lonnie Willis  
Willie Lottal  
Don Stephens  
Alex Ewert

Dennis Wright  
Wm Wright  
Clayton Janicke  
Adam Deeds  
John Deeds  
David Hendricks  
Kate Yankee  
Brooks Brown

## HOXIE (60 signed in)

### Questions:

- If SD 6 re-ups will they keep their flexibility?
- What about restricting the well at the Sheridan Lake?
- How many AF do they have?
- Who came up with the 12 g/h/d?
- Why did you go on a township level instead of individual wells?
- How many acres does each observation well cover?
- How and when will you know it's working?
- How many wells in SD 6?
- How do the declines compare to outside of SD 6?
- What happens when SD 6 re-ups?
- How many townships in SD 6?
- Does 5 years give you enough time to readjust if it's not working?
- Are you going to get tougher if there is still a decline?
- There's not much irrigation in my red township, but there is a huge feedlot and ethanol plant.
- Have you taken this into account?
- How many other hot spots (HPA) are there in the district?
- Can you buy water rights like you can in SD 6?
- After 5 years what's the plan?
- Does the amount I've historically pumped affect me?
- If we don't do something now, will the state come in later?

### Comments:

- The data is inaccurate.
- If SD 6 can do it then it should be district-wide.
- I want out of the district.
- I have issues with tax payers paying for the building and supplying money to the Foundation.
- We need to educate the people in town on the water problem.
- You can't wait another 20 years to solve this problem.
- I testify the LEMA is working. The farm management improves.
- The probes, and other technology work.

Please Sign in <sup>HERE</sup>

John Lindenman

Shawn Lindenman

Mark Hill

Greg Pugh MD/DF

Kelly Stewart

Ken Waffey

Nick Hixson

Paul Brennan

Walt Patmanis

Edward DeLoe

Paul Beaman

Randall Youke

Ken Sliker

Bob Spusta

Walter Lee

Harold Mungley

Tom Bell

Jerry McKenna

Kevin Lager

Ed King

Tom Lohr

Wade Tremblay

Shane Beckner

Randy Ochs

Paul Bangs

Paul Williams

Lenny Peters

60

Pat Herl	Horie
Rick Mason	Hoxie
Don Mason	Hoxie
Herald Roeder	"
Rick Dellazi	Grantfield
Mike McHenry	

Please sign in

- Stew Askeith
- David Engelhaupt KDA-DWR
- Alex Heeger
- Ron Ruppman
- Greg Haffner
- Kel & Tyler Goetz
- Ron Neff
- Gene Sharp
- Scott Struff
- Clint Milliman
- Valley Wigginton
- Jane Burt
- Van Preuning
- Dan Weyand
- Jim Wilkin
- Kyle Trembley
- Scott Younger
- Grant Beckman
- Bill Nasty
- Galen Beckman
- Larry Chrysler
- Wally [unclear]
- Yang Gordon?
- Larry Alstrom
- Brandon Mader
- Roger Johnson
- Don Oltz



**NORTHWEST KANSAS  
GROUNDWATER MANAGEMENT  
DISTRICT NO. 4**

1290 West 4th Street  
P.O. Box 905  
Colby, Kansas 67701-0905

Wayne Carpenter  
2257 County Road 2  
Brewster, KS 67732

RE: Water Right File Numbers 12019 D1, 12019 D2, 12019 D3, 12019 D4,  
26022 D1, 26022 D2, 26022 D3, 26022 D4

Wayne,

This is to inform you that the Board of Directors of GMD 4 took action late in the meeting on Thursday. They have voted unanimously to turn down your appeal of LEMA acreage. Your LEMA quantity will remain at 1372 AF (annual average of 274.4 AF based on 183 LEMA acres).

If you need added flexibility you are encouraged to contact Steven Walters at the DWR office in Stockton in regard to a WCA for several of your rights. Steven's phone number is 785-425-6787.

Please call me if you have questions.

Sincerely,

Ray P. Luhman  
Manager  
GMD #4



**BEFORE THE DIVISION OF WATER RESOURCES  
KANSAS DEPARTMENT OF AGRICULTURE  
AND  
BEFORE THE NORTHWEST KANSAS GROUNDWATER  
MANAGEMENT DISTRICT NO. 4**

**In the Matter of the Designation of the )  
Groundwater Management District No. 4 District-Wide )  
Local Enhanced Management Area in Cheyenne, )  
Decatur, Gove, Graham, Logan, Rawlins, Sheridan, ) 002-DWR-LEMA-2017  
Sherman, Thomas, and Wallace Counties, Kansas. )  
)  
)  
Pursuant to K.S.A. § 82a-1041. )  
\_\_\_\_\_ )**

**REQUEST FOR ADMINISTRATIVE REVIEW OF ALLOCATION DECIDED BY THE  
DIVISION OF WATER RESOURCES AND BY NORTHWEST KANSAS  
GROUNDWATER MANAGEMENT DISTRICT NO. 4**

COME NOW the Petitioners, Woofter Farms LLC, Mr. Wayne Carpenter, and Carpenter Farms, GP, by and through their attorney, Ronald S. Shalz, and pursuant to K.S.A. §§ 82a-1901 and 77-501 *et seq.*, request the Secretary of Agriculture and the Northwest Kansas Groundwater Management District No. 4 (“GMD4”) to conduct administrative review of GMD4’s May 3, 2018 decision that impermissibly reduces Petitioner’s water rights pursuant to the Order of Designation of April 13, 2018.

**1. FACTUAL BACKGROUND**

1. The Petitioners are Woofter Farms LLC, 1665 W. 5<sup>th</sup> St., Colby Kansas, 67701, Mr. Wayne Carpenter, 2257 County Road 2, Brewster, Kansas, 67732, and Carpenter Farms, GP, 2257 County Road 2, Brewster, Kansas, 67732.

2. Petitioners own or lease six water rights: File Nos. 12,019 D1, D2, and D3, and File Nos. 26,022 D1, D2, and D3 respectively (collectively, “the Water Rights”).

3. The Water Rights are established pursuant to the Kansas Water Appropriation Act, K.S.A. § 82a-701 *et seq.*, (“KWAA”) and are in good standing.

4. The relevant attributes of the Water Rights are as follows:

a. File No. 12,019 D1:

- i. Authorized annual quantity: 125.5 acre-feet;
- ii. Authorized rate of diversion: 1,300 gallons/minute (“gpm”) (limited in conjunction with File No. 12,019 D2 and D3);
- iii. Point of diversion: 1,440 feet North X 40 feet West of the Southeast Corner of Section 17, Township 7 South, Range 36 West, in Thomas County, Kansas;
- iv. Place of use: 160 acres in the Southeast Quarter of Section 17, Township 7 South, Range 36 West, in Thomas County, Kansas;
- v. Type of use: Irrigation.

b. File No. 12,019 D2:

- i. Authorized annual quantity: 125.5 acre-feet;
- ii. Authorized rate of diversion: 1,300 gpm (limited in conjunction with File No. 12,019 D1 and D3);
- iii. Point of diversion: same as File No. 12,019 D1;
- iv. Place of use: 160 acres in the Northeast Quarter of Section 16, Township 7 South, Range 36 West, in Thomas County, Kansas;
- v. Type of use: Irrigation.

c. File No. 12,019 D3:

- i. Authorized annual quantity: 125.5 acre-feet;

- 
- ii. Authorized rate of diversion: 1,300 gpm (limited in conjunction with File No. 12,019 D1 and D2);
  - iii. Point of diversion: same as File No. 12,019 D1;
  - iv. Place of use: 160 acres in the Northwest Quarter of Section 16, Township 7 South, Range 36 West, in Thomas County, Kansas;
  - v. Type of Use: Irrigation.
- d. The total quantities for File Nos. 12,019 D1, D2, and D3 are thus as follows:
- i. An authorized annual quantity of 376.5 acre-feet;
  - ii. An authorized rate of diversion of 1,300 gpm; and
  - iii. An authorized place of use of 480 acres.
- e. File No. 26,022 D1:
- i. Authorized annual quantity: 80 acre-feet;
  - ii. Authorized rate of diversion: 1,300 gpm (limited in conjunction with File No. 26,022 D2 and D3);
  - iii. Point of diversion: same as File No. 12,019 D1;
  - iv. Place of use: 160 acres in the Southeast Quarter of Section 17, Township 7 South, Range 36 West, in Thomas County, Kansas;
  - v. Type of use: Irrigation.
- f. File No. 26,022 D2:
- i. Authorized annual quantity: 80 acre-feet;
  - ii. Authorized rate of diversion: 1,300 gpm (limited in conjunction with File No. 26,022 D1 and D3);
  - iii. Point of diversion: same as File No. 12,019 D1;

- 
- iv. Place of use: 160 acres in the Northeast Quarter of Section 16,  
Township 7 South, Range 36 West, in Thomas County, Kansas;
  - v. Type of use: Irrigation.
- g. File No. 26,022 D3:
- i. Authorized annual quantity: 80 acre-feet;
  - ii. Authorized rate of diversion: 1,300 gpm (limited in conjunction with  
File No. 26,022 D1 and D2);
  - iii. Point of diversion: same as File No. 12,019 D1;
  - iv. Place of use: 160 acres in the Northwest Quarter of Section 16,  
Township 7 South, Range 36 West, in Thomas County, Kansas;
  - v. Type of use: Irrigation.
- h. The total quantities for File Nos. 26,022 D1, D2 and D3 are thus as follows:
- i. An authorized annual quantity of 240 acre-feet;
  - ii. An authorized rate of diversion of 1,300 gpm; and
  - iii. An authorized place of use of 480 acres.
- i. Because File Nos. 12,019 D1, D2, and D3 and File Nos. 26,022 D1, D2, and  
D3 share the same place of use, the total quantities for the Water Rights are  
thus as follows:
- i. An authorized total annual quantity of 376.5 acre-feet (for File Nos.  
12,019 D1, D2, and D3) plus 240 acre-feet (for File Nos. 26,022 D1,  
D2, and D3), or 616.5 acre-feet;
  - ii. An authorized rate of diversion of 1,300 gpm; and
  - iii. An authorized place of use of 480 acres.

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5. The Water Rights are located within the boundaries of GMD4, in an area (Township 7 South, Range 36 West, in Thomas County, Kansas) that has since been closed to new appropriations of water. K.A.R. § 5-24-2.

6. Between 1967 and 2016, water rights File Nos. 12,019 and 26,022 collectively and legally irrigated as much as 496 acres annually.

7. Between 1967 and 2016, water rights File Nos. 12,019 and 26,022 collectively and legally diverted as much as 911.46 acre-feet of water annually.

8. Between 2009 and 2016, water rights File Nos. 12,019 and 26,022 were owned by Mr. Rex Mayer, who struggled to farm and to irrigate; during that period, these rights collectively irrigated between 65 and 114 acres, and collectively diverted between 120 and 183 acre-feet of water annually. This is a substantially lower amount of diversion and a substantially lower amount of acreage irrigated than the historic and legal use under File Nos. 12,019 and 26,022.

9. In 2017, the Division of Water Resources (“DWR”) divided File Nos. 12,019 and 26,022 into 4 water rights each: File No. 12,019 was divided into File Nos. 12,019 D1, 12,019 D2, 12,019 D3, and 12,019 D4, while File No. 26,022 was also divided into File Nos. 26,022 D1, 26,022 D2, 26,022 D3, and 26,022 D4.

10. Mr. Mayer retains ownership of File Nos. 12,019 D4 and 26,022 D4.

11. On April 13, 2018, the Chief Engineer of DWR issued an Order of Designation Regarding the Groundwater Management District No. 4 District Wide Local Enhanced Management Plan (“Order”).

12. The Water Rights are within the geographical boundaries of the Local Enhanced Management Area (“LEMA”) established by the Order. Order, p. 41.

13. The Order does not alter the water rights' attributes as described in Paragraph 4 *supra*. Order, p. 43.

14. The Order, issued pursuant to K.S.A. § 82a-1041, seeks to reduce the use of water within GMD4 between 2018 and 2022 chiefly by reducing the allowable use of water for irrigation within GMD4 during that five-year period ("LEMA Period"). Order, pp. 42-43.

15. The Order establishes a standard method for determining the allowable use of water for irrigation water rights during the LEMA Period. Order, pp. 43-45. That method is as follows:

- a. "DWR and GMD4 used the maximum reported authorized irrigated acres from 2009-2015 that could be verified as legally irrigated." Order, p. 45.
- b. However, if the authorized place of use for a water right "was not irrigated" between 2009 and 2015, "then earlier years that the water user irrigated the acres may be considered." Order, p. 45.
- c. Having so determined the appropriate acreage for each right, DWR and GMD4 compute an allocation for a "five-year acre-feet total." Order, p. 45.
- d. DWR will provide every water right owner within 60 days of the issuance of the Order the acreage total and the water right's five-year allocation of water. Order, p. 45.
- e. "No water right shall be reduced by more than 25% of their [sic] average historical pumping based on years pumped 2009-2015 unless it would allow a quantity over 18 inches per acre to be pumped." Order, p. 44.
- f. The Order does not provide a method for the reduction of acreage that was irrigated at anomalously low levels during the years 2009-2015.

- g. Water rights owners may appeal the acreage and allocation quantities for their water rights to the GMD4 Board of Directors, whose decision is final. Any appeal must be filed by March 1, 2019. Order, pp. 45-46.
- h. In considering the appeal, the GMD4 Board of Directors (“GMD4 Board”) and DWR “may review any and all aspects of the water right, use, place of use, point of diversion, or any other factors the reviewer determines appropriate to determine eligible acres and allocated water.” Order, p. 46.

16. On May 3, 2018, the GMD4 Board took up the matter of the Water Rights in executive session and decided as follows:

- a. Despite the historically minimal and anomalous acreage and water use levels for the Water Rights during 2009-2016 as described in Paragraph 8, the GMD4 Board concluded that the appropriate acreage amount for the Water Rights during the LEMA Period was 183 acres. Letter from GMD4 to Wayne Carpenter, undated, attached as Attachment 1, at p. 1 (“GMD4 Decision”).
- b. Apparently, based on the 18 inches per acre standard set forth in the Order, the GMD Board concluded that the Water Rights would be allocated 274.4 acre-feet per year, which can be used flexibly over the LEMA Period. GMD4 Decision, p. 1.
- c. The Board did not give any weight to the circumstances mentioned to be considered in the Order. Order, p. 45.

17. Based on the allocation methods set forth in the Order, as summarized in Paragraph 14 *supra*, the appropriate starting point for evaluating the Water Rights would be as follows, as summarized in Paragraph 4.i *supra*:

- 
- a. Authorized acres: 480 acres;
  - b. At a maximum quantity of 616.5 acre-feet.

18. Based upon to the GMD4 Decision as described in Paragraph 16 *supra*, the Water Rights have suffered an approximately 45% reduction in the authorized annual quantity of the Water Rights, which vastly exceeds the 25% maximum reductions established by the Order. Order, p. 44.

### **3. GROUNDS FOR REVIEW**

Without limiting the general basis of this Petition for Administrative Review, Petitioner challenges the Order and the GMD4 Decision based on the following:

#### **A. TIMELINESS AND SCOPE OF REVIEW**

19. The GMD4 Decision took place on May 3, 2018. The time limit for seeking Administrative Review pursuant to K.S.A. § 82a-1901 is 15 days for “initial orders.” K.S.A. § 77-527(b). The Order establishes a 30-day period for administrative review. Order, p. 52. The Order establishes a March 1, 2019 deadline for appeals of water rights allocations under the LEMA. Order, pp. 45-46. This Petition is timely if served on or before May 18, 2018.

20. Because of the ambiguous and conflicting deadlines for appeal contained in the Order, and because DWR has yet to issue rules and regulations pursuant to K.S.A. § 82a-1041, as required by *Id.*, § 82a-1041(k), the proper time for appeal of the Order and the GMD4 Decision are difficult if not impossible to discern; out of an abundance of caution, Petitioners have chosen to file this Petition at the earliest possible date. The failure to issue such rules and regulations is unreasonable, arbitrary, and capricious.

21. Because the GMD4 Decision reduces the Water Rights pursuant to the Order, but the Order does not, Petitioners retain and reserve the right to challenge the Order both facially and as applied to the Water Rights.

22. Petitioners reserve their rights to pursue a direct court challenge to the Order and the GMD4 Decision pursuant to K.S.A. §§ 82a-716 and 82a-721a.

#### **B. SUBSTANTIVE DEFECTS OF ORDER AND GMD4 DECISION**

23. Water rights are real property rights under Kansas law. K.S.A. § 82a-701(g).

24. Water rights affected by the Order shall be reduced either according to irrigation records for 2009-2015—a rule apparently based on an unfounded presumption of full or maximally beneficial irrigation for those years without regard for conservation of water—or not irrigated at all. Order, p. 45. No such provision exists for the situation affecting the Water Rights—namely, an historically low level of irrigation for years 2009-2015. The lack of such a provision in the Order is unreasonable, arbitrary, and capricious.

25. While the appeals process allows for the GMD Board to evaluate irrigation years other than 2009-2015, Order, p. 45, the GMD Board did not take any other years into account in the GMD4 Decision, despite Mr. Carpenter's explanation of why irrigation levels were unusually low during 2009-2015. This decision is unreasonable, arbitrary, and capricious.

26. For the purposes of determining the allocations under the LEMA, both the Order and the GMD Decision dismiss the water usage reported under the Water Rights prior to 2009. These dismissals constitute an illegal and partial forfeiture of Petitioners' property rights. As summarized below in Paragraphs 27-34, the respective defects of the Order and the GMD Decision thus violate federal and Kansas law, and are unreasonable, arbitrary, and capricious.

27. K.S.A. § 82a-718, which covers the abandonment of water rights under the KWAA, is a forfeiture statute; the statutory phrase in subsection (a) of that statute, “shall be deemed abandoned,” means “shall be forfeited.” *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 621-28 (2006).

28. Groundwater rights in areas closed to new appropriations are exempt from forfeiture, including partial forfeiture. K.S.A. § 82a-718(e). Because the Water Rights are located in a closed area, they are exempt from forfeiture.

29. The partial—including temporary—forfeiture of a water right violates the plain language of K.S.A. § 82a-718 and is thus prohibited. *Wheatland Elec. Co-Op., Inc. v. Polansky*, 46 Kan.App.2d 746, 761-63 (2011).

30. The partial forfeiture of the Water Rights violates the clear statutory provisions of the KWAA and its attendant regulations, which specifically protect the full authorized quantities of water rights from forfeiture when there is due and sufficient cause for non-use of water, as there is here for the Water Rights according to the facts set forth in Paragraph 8 *supra*, facts confirmed by DWR’s acceptance of the water use reports for all of the water rights described in this Petition. K.S.A. §82a-718(a); K.A.R. § 5-7-1.

31. The partial forfeiture of the Water Rights is an uncompensated taking, in violation of the 5<sup>th</sup> Amendment of the United States Constitution and the Kansas Constitution, a taking that gives rise to an inverse condemnation claim against the Department of Agriculture, DWR, and GMD4.

32. The Chief Engineer lacks the authority to reduce the quantity of a water right once the approval of the application is issued. *Clawson v. Div. of Water Res.*, 49 Kan.App.2d 789 (2013).

33. The reduction of the Water Rights pursuant to the Order and the GMD4 Decision violates the prior appropriation doctrine, which has governed all Kansas water rights since the passage of the KWAA in 1945. K.S.A. § 82a-706.

34. At the GMD4 Board Meeting, the Board told Mr. Carpenter that he should have known in 2017 that the GMD4 District Wide LEMA would be established in 2018, and that he thus should have known that the Water Rights would be subject to the categorical reductions using the years 2009-15. There is no factual or legal basis for reducing an owner's water rights based upon speculation that restrictions may or may not be imposed in the future. The GMD4 Board's reasoning is thus illegal, unreasonable, arbitrary, and capricious.

#### **B. PROCEDURAL DEFECTS OF ORDER AND GMD4 DECISION**

35. The GMD4 Board Meeting and the GMD4 Decision are procedurally defective because they did not include the owner of the Water Rights. Carpenter Farms, GP and Mr. Carpenter are collectively the tenant which leases the Water Rights and their appurtenant land. Woofter Farms, LLC is the owner of record of the Water Rights. Neither Carpenter Farms, GP nor Mr. Carpenter are in the chain of title of the Water Rights. Thus, the GMD4 Board Meeting and the GMD4 Decision deprived Woofter Farms, LLC and Carpenter Farms, GP, of their due process rights to contest the forfeiture of the Water Rights. (Nor was Mr. Mayer present at the GMD4 Board Meeting; the GMD Decision includes his water rights as described above in Paragraph 10.) GMD4 Decision, at p. 1.

36. There is little or no evidence from the GMD Decision that Mr. Carpenter was afforded his due process rights at the GMD4 Board Meeting. GMD4 Decision, at p. 1.

37. The Order requires DWR to provide the acreage and allocation amounts for each water right in the LEMA. Order, p. 45. DWR failed to provide those amounts in advance of the

GMD4 Board Meeting. Both DWR and GMD4 thus violated the procedural requirements of the Order.

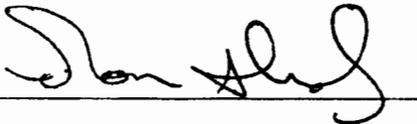
38. The procedural defects set forth above deprived Petitioners of their due process rights. Owners of Kansas water rights, including lessees, are entitled to due process protections in matters concerning the forfeiture of their water rights. K.S.A. § 82a-718. These protections include the right to a hearing. *Id.*; K.A.R. § 5-14-13(a)(3). DWR's and GMD4's neglect of these protections is thus illegal, unreasonable, arbitrary, and capricious.

#### 4. CONCLUSION

For the reasons set forth above, the Order, as applied to the Water Rights, and the GMD4 Decision should both be reversed by the Secretary of Agriculture and the GMD4 Board.

Respectfully submitted,

SHALZ LAW OFFICE

By: 

Ronald S. Shalz, #8803  
1675 West Fourth, Suite A  
P. O. Box 509  
Colby, Kansas 67701  
[rshalz@st-tel.net](mailto:rshalz@st-tel.net)  
*Attorney for Petitioners*

Attachments:

Attachment 1: Letter from GMD4 to Mr. Wayne Carpenter, undated.

**CERTIFICATE OF SERVICE**

On this 18<sup>th</sup> Day of May, I hereby certify that this Petition for Administrative Review

was sent by electronic mail and first class U. S. Mail to:

Mr. Kenneth Titus, Chief Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, KS 66502  
[Kenneth.titus@ks.gov](mailto:Kenneth.titus@ks.gov)  
*Attorney for the Secretary of Agriculture*

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*Attorney for GMD4*

Ray Luhman, District Manager  
Northwest Kansas Groundwater Management District No. 4  
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[rluhman@gmd4.org](mailto:rluhman@gmd4.org)



**NORTHWEST KANSAS  
GROUNDWATER MANAGEMENT  
DISTRICT NO. 4**

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1290 West 4th Street  
P.O. Box 905  
Colby, Kansas 67701-0905

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Wayne Carpenter  
2257 County Road 2  
Brewster, KS 67732

RE: Water Right File Numbers 12019 D1, 12019 D2, 12019 D3, 12019 D4,  
26022 D1, 26022 D2, 26022 D3, 26022 D4

Wayne,

This is to inform you that the Board of Directors of GMD 4 took action late in the meeting on Thursday. They have voted unanimously to turn down your appeal of LEMA acreage. Your LEMA quantity will remain at 1372 AF (annual average of 274.4 AF based on 183 LEMA acres).

If you need added flexibility you are encouraged to contact Steven Walters at the DWR office in Stockton in regard to a WCA for several of your rights. Steven's phone number is 785-425-6787.

Please call me if you have questions.

Sincerely,

Ray P. Luhman  
Manager  
GMD #4

**BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE**  
1320 Research Park Drive  
Manhattan, Kansas 66502

**In the Matter of the**

Designation of the Groundwater Management District No. 4 District Wide  
Local Enhanced Management area in Cheyenne, Decatur, Gove, Graham, Logan, Rawlins,  
Sheridan, Sherman, Thomas, and Wallace Counties, Kansas.

Regarding the Appeal of Local Enhanced Management Area (“LEMA”) Acreage to the  
Northwest Kansas Groundwater Management District No. 4 (“GMD4”) Board of Directors by  
Woofter Farms, LLC, Wayne Carpenter, and Carpenter Farms, GP.

**Pursuant to K.S.A. 82a-1041, K.S.A. 82a-1901, and K.S.A. 77-527;  
Case No. 002-DWR-LEMA-2017**

**Water Right Nos. 12,019 (D1, D2, and D3); 26,022 (D1, D2, and D3).**

**ORDER DECLINING PETITION FOR ADMINISTRATIVE REVIEW OF  
THE APPEAL OF LEMA ACREAGE TO THE GMD4 BOARD OF DIRECTORS**

COMES NOW, Jackie McClaskey, Secretary, Kansas Department of Agriculture  
 (“Secretary”) and finds that on May 3, 2018, the GMD4 Board of Directors issued a denial letter  
 to Wayne Carpenter (“Petitioner”), denying Petitioner’s appeal of acreage eligible for a LEMA  
 allocation under the GMD4 District Wide LEMA.

That on May 18, 2018 the Secretary received a request for administrative review of  
 GMD4’s denial.

That on April 13, 2018, the Chief Engineer, pursuant to K.S.A. 82a-1041 issued the  
 Order of Designation Regarding the Groundwater Management District No. 4 District Wide  
 Local Enhanced Management Plan (“Order”), which implemented a LEMA and authorized the  
 procedures contained in the District Wide LEMA Management Plan (“Management Plan”).

The Management Plan does not authorize the Division of Water Resources, the Chief  
 Engineer, nor the Secretary of Agriculture (collectively “KDA”), to determine the acres that are  
 eligible for a LEMA. The Management Plan requires that all eligible acres be determined by  
 GMD4 staff or the GMD4 Board of Directors. Further, all decisions made by the GMD4 Board  
 of Directors are considered final.

The Secretary does have authority to review the Order of Designation because the Order  
 was issued by the Chief Engineer, under the authority granted in K.S.A. 82a-1041 and

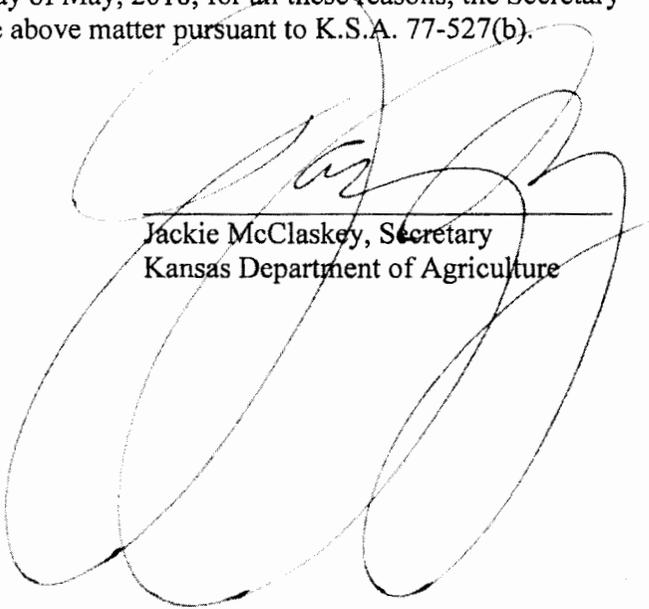


reviewable pursuant to K.S.A. 82a-1901. However, this action by the GMD4 Board of Directors is not an action taken by KDA nor is it one that is contemplated as KDA action in K.S.A. 82a-1041. The GMD4 Board of Directors is an independent agency and as such, GMD4's actions are not subject to oversight or review of the Secretary in this factual situation.

Although there may be other avenues of review available to Petitioner, neither the Order nor the Management Plan authorize KDA to determine the eligible acres for any individual property subject to the LEMA. Therefore, the Secretary does not have jurisdiction to review this determination by the GMD4 Board of Directors because the decision regarding eligible acreage was not made by KDA and as such, the order at issue in the request for review was not issued pursuant to K.S.A. 82a-1041, and it is not subject to administrative review by KDA pursuant to K.S.A. 82a-1901.

**THEREFORE**, on this 31<sup>st</sup> day of May, 2018, for all these reasons, the Secretary hereby declines to exercise review in the above matter pursuant to K.S.A. 77-527(b).

**IT IS SO ORDERED.**



Jackie McClaskey, Secretary  
Kansas Department of Agriculture

PREPARED BY:



Kenneth B. Titus #26401  
Chief Legal Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502  
Phone: (785) 564-6715  
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**Final Order**

This is a final order of the Secretary which shall become effective upon service pursuant to K.S.A. 77-530.

**Judicial Review**

Review of this order may be had pursuant to the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* Any petition for such judicial review must be filed within thirty (30) days after service of this order in a Kansas court of competent jurisdiction. The agency officer designated to receive service of a petition for judicial review on behalf of the Kansas Department of Agriculture is:

Kenneth B. Titus  
Chief Legal Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Petition for Administrative Review of the Appeal of LEMA Acreage to the GMD4 Board of Directors* was deposited in the U.S. mail on the 31<sup>st</sup> day of May, 2018, first class postage prepaid, addressed to the following:

Wayne Carpenter  
Carpenter Farms, GP  
2257 County Road 2  
Brewster, Kansas 67732

Woofter Farms, LLC  
1665 W. 5<sup>th</sup> Street  
Colby, Kansas 67701

Ronald S. Shalz  
1675 West Fourth, Suite A  
P.O. Box 509  
Colby, Kansas 67701  
[rshalz@st-tel.net](mailto:rshalz@st-tel.net)  
*Attorney for Petitioners*

And sent via electronic mail to:

David W. Barfield  
Chief Engineer, Division of Water Resources  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, Kansas 66502  
[david.barfield@ks.gov](mailto:david.barfield@ks.gov)

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\_\_\_\_\_  
Kansas Department of Agriculture Staff

**Shalz Law**

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**From:** Adam Dees <adam@clinkscaleslaw.com>  
**Sent:** Friday, June 08, 2018 12:33 PM  
**To:** Shalz Law  
**Cc:** burke.griggs@washburn.edu; Titus, Kenneth [KDA]; Oleen, Aaron [KDA]; Ray Luhman  
**Subject:** NW KS GMD No. 4 - Carpenter Request

Ron,

This is just to let you know that the GMD 4 Board denied Mr. Carpenter's request to reconsider his appeal of his LEMA allocation. There was a formal motion, second, and voice vote, which will be published in the minutes of the June 2018 NWKS GMD No. 4 monthly board meeting.

Please feel free to call with questions. Thank you.

Very truly yours,

Adam C. Dees

**Adam C. Dees**  
*Attorney*

[adam@clinkscaleslaw.com](mailto:adam@clinkscaleslaw.com)  
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By Appointment Only:

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**Overland Park**  
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Overland Park, KS 66210

**Great Bend**  
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Great Bend, Kansas 67530-4043

**McPherson**  
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**Wichita**  
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