

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

JON and ANN FRIESEN; FRIESEN FARMS,)
LLC, et. al.,)
)
Plaintiffs,)
)
vs.)
)
DAVID BARFIELD, P.E., THE CHIEF)
ENGINEER OF THE STATE OF KANSAS,)
DEPARTMENT OF AGRICULTURE,)
DIVISION OF WATER RESOURCES,)
in his official capacity,)
)
Defendant.)
)

Case No. 2018-CV-000010

Pursuant to K.S.A. Chapter 77

**RESPONSE TO PLAINTIFFS’ MOTION TO ALTER OR AMEND
AND TO AMEND AND MAKE ADDITIONAL FINDINGS**

COMES NOW, the Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”), by and through counsel of record, who hereby responds to Plaintiffs’ Motion to Alter or Amend and To Amend and Make Additional Findings (“Motion”). Petitioners’ Motion should be denied because the Motion is premised on the erroneous contention that the Court did not fully consider the issues briefed and argued before the Court. In fact, the Court conducted extensive legal analysis, cited extensively to the record and to numerous authorities, and clearly held against the Petitioners in nearly all instances. Therefore, the District-Wide Local Enhanced Management Plan (“LEMA Plan”) should not be set aside for the reasons contained herein.

I. INTRODUCTION

Petitioners request that the Court alter or amend the rulings contained in the Memorandum Decision for five primary reasons as summarized by the Chief Engineer, including that:

1. The Court misinterpreted the intent of the Kansas Legislature when it passed the Local Enhanced Management Area statute, K.S.A. 82a-1041 (“LEMA Statute”); the Intensive Groundwater Use Control Area statute, K.S.A. 82a-1036 *et seq.* (“IGUCA Statute”); the entire Groundwater Management District Act, K.S.A. 82a-1020 *et seq.* (“GMD Act”); including that all these statutes must all be read *in pari materia* with the Kansas Water Appropriation Act, K.S.A. 82a-701 *et seq.* (“KWAA”); or more specifically, that all these statutes must be interpreted in such a way as to require the application of the prior appropriation doctrine in any use of the LEMA Statute that places limitations on the amount of groundwater that can be withdrawn by a subject water right. *Motion*, at 5-25.
2. The Court misinterpreted *Wheatland Elec. Co-op, Inc. v. Polanksy*, 46 Kan. App. 2d 746 (2011) and *Clawson v. Div. of Water Resources*, 49 Kan.App.2d 789 (2013), and erroneously found that the Chief Engineer may exercise the express authority granted in the LEMA Statute. *Id.* at 26-31.
3. The Court was incorrect in reading the terms of the LEMA Plan literally by concluding that the LEMA Plan might not be renewed in five-years or that the LEMA Plan might successfully result in an increase in groundwater levels and hence, greater supply for withdrawals, in some parts of the groundwater management district. *Id.* at 31-34.
4. The Court did not directly address whether the LEMA Plan violates K.S.A. 82a-707(b). *Id.* at 34-35.
5. The Court did not rule clearly on the issue of whether the Chief Engineer must adopt rules and regulations prior to initiating any proceedings pursuant to the

LEMA Statute and the Court further erred by determining any procedural errors were harmless. *Id.* at 35.

II. ALTERATION OR AMENDMENT OF THE COURT'S MEMORANDUM DECISION IS UNNECESSARY

The Court's Memorandum Decision included extensive legal analysis and clearly articulated positions on the issues raised repeatedly by Petitioners. If Petitioners wish to appeal the Memorandum Decision they may do so, but it is unnecessary for the Court to amend or alter the existing decision.

1. *Did the Court err by refusing to interpret the LEMA Statute to require the use of the prior appropriation doctrine in any application that reduces the amount of water that may be withdrawn by a water right?*

The parties exhaustively briefed and argued the issue of whether the prior appropriation doctrine must be applied to any management plan adopted under the LEMA Statute. Petitioners simply rehash the same arguments previously presented to the Court. The Court set forth a very clear standard regarding the proper method of interpretation and the meaning of the LEMA Statute. "It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs, if that intent can be ascertained. (citation omitted)" *Memorandum Decision* at 23. Regarding the Legislature's intent in allowing corrective controls and reductions in water use without strictly applying the prior appropriation doctrine, the Court found that "the Legislatures intent was rather clear. The Legislature passed the IGUCA statute in 1978 with the conservation as its goal. Years later they emulated the IGUCA statute when they enacted the LEMA Statute." *Id.* at 23. The Court goes on to discuss the practical difficulties involved in trying to make Petitioners' position fit within the plain intent of the Legislature, noting that Petitioners'

advocated position creates direct conflicts with the authority granted in the LEMA Statute. *Id.* at 24. It is therefore unnecessary for the Court to reconsider this issue.

2. *Did the Court err by misinterpreting the Wheatland and Clawson cases by determining that the Chief Engineer may exercise the express powers in the LEMA Statute?*

Petitioners simply restate the facts of each case and then insist that the LEMA Statute be read to require application of the prior appropriations doctrine. As stated above, this issue was exhaustively covered by the parties and the Court, including direct discussion of these two cases. *Id.* at 9-11. It is therefore unnecessary for the Court to reconsider this issue.

3. *Did the Court err by reading the express terms of the LEMA Plan as true?*

The LEMA Plan states that it shall be in effect for a five-year term. *Agency Record* at 2539. Petitioners suggest that the will of the elected GMD4 Board can be ignored and that it is a foregone conclusion that the LEMA Plan will be in place as it currently exists for all of eternity. Further, future climatic conditions combined with the proposed reductions may cause the amount of water available for withdrawal in each township to increase because the declines in the groundwater level lessen. The Court clearly considered the explicit provisions of the LEMA Plan and the elected nature of the GMD4 Board. There is no basis to make assumptions that the explicit terms of the LEMA Plan itself will be disregarded. *Memorandum Decision*, at 11 and 13. It is therefore unnecessary for the Court to reconsider this issue.

4. *Did the Court err in not directly addressing whether the LEMA Plan violates K.S.A. 82a-707(b)?*

Although the Court did not directly present this question as a separate section in its decision, the Court clearly addressed the validity of K.S.A. 82a-707(b) with respect to the LEMA Plan. In discussing the constitutional validity of the LEMA Plan, specifically regarding Plaintiffs' equal protection claims, the Court reiterated that K.S.A. 82a-707(b) only applies when there is a

shortage of water. *Memorandum Decision* at 15. It is therefore unnecessary for the Court to reconsider this issue.

5. *Did the Court err in not specifically ruling on whether the Chief Engineer must adopt rules and regulations to address additional procedural requirements and did the Court err in determining any procedural mistakes were harmless error?*

Petitioners' arguments, as stated in their Motion, are unclear on this point. However, based on Petitioners' previous arguments, the issue presented here appears to be the same issue already briefed by the parties and considered fully by the Court. Throughout this proceeding, Petitioners have insisted that the Chief Engineer must adopt rules and regulations before engaging in a LEMA process in order to ensure that the prior appropriation doctrine is strictly applied and that additional procedural requirements are put in place. *See e.g., Petitioners' Memorandum in Support of Petition for Judicial Review*, at 79-83. Even without directly stating that the Chief does or does not need to adopt regulations as envisioned by Petitioners, the Court did extensively examine the primary issues raised by Petitioners and ruled against their concerns.

As discussed above, the Court clearly stated that the prior appropriation doctrine need not be strictly applied in a LEMA management plan. Further, the Court went to great lengths to examine the procedures used by the Chief Engineer in determining that the due process rights of Petitioners were fully protected. *Memorandum Decision*, at 12-13, 19-20, and 25-27. Petitioners present no new claims that the process provided was inadequate and as the Court has extensively ruled on the concerns previously raised by the Petitioners, no further reconsideration is necessary. Again, as to the harmless error, the issue was fully briefed by the parties, considered by the Court, and already decided. *Id.* at 26-27.

III. CONCLUSION

Reconsideration of the Court's Memorandum Decision is unnecessary, and the Court should deny Petitioners' Motion. The Court based its Decision on extensive legal analysis.

