

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

JON and ANN FRIESEN; FRIESEN FARMS, LLC;)
DOYLE SADDLER; 1885 ENTERPRISES, LLC; JUSTIN)
SLOAN; TOM SLOAN; BERT STRAMEL; STRAMEL)
FARMS, INC.; FRED ALBERS; MARVIN ALBERS; FRANK)
BOUITS; DENISE J. BURROWS, TRUSTEE OF THE)
CHARLES SCHROEDER FAMILY TRUST; GARY E.)
COOPER; ELFRIEDE U. COOPER; GARY E. COOPER,)
TRUSTEE OF THE GARY E. COOPER AND MARY)
PAWLUS TRUSTS; COOPER GRAIN, INC.; CAMERON)
EPARD; F. DOYLE FAIR, TRUSTEE OF THE A.L.)
ABERCROMBIE MARITAL TRUST; LOIS L. FERGUSON;)
BRYAN FRAHM; MEADOW LAKE FARMS, INC.; LON)
FRAHM; FRAHM FARMLAND, INC.; LON FRAHM,)
TRUSTEE OF THE PEGGY FRAHM EVANS TRUST;)
SHEILA FRAHM; JAMES FRITZ; VINCENT V. GLAD and)
TENLEY S. GLAD, doing business as GLAD FARMS; PAT J.)
HAFFNER; WILBURN HOLLOWAY; DAVID HOUSTON;)
DOUGLAS IRVIN; IRVIN FARMS, INC.; SHARON K.)
MANN; JOHN P. McKENNA; BRENT MERANDA;)
BERWYN PETERSEN; S.Q.I. FARMS, INC.; PAUL STEELE;)
RICHARD A. STEFAN; JOSEPH G. WALDMAN; DENNIS)
WALKER; WALKER TESTING CO., INC.; KEVIN W.)
WARK; WARK PROPERTIES, LLC; PRAIRIE DOG)
PROPERTIES, LLC; KEVIN W. WARK, TRUSTEE OF THE)
BERRIE FAMILY TRUST; KEVIN W. WARK, TRUSTEE OF)
THE FLIPSE LIVING TRUST; DARREL E. WARK; DANIEL)
WAYAND; WENDY WEISHAAR; and DONALD RALL;)

Plaintiffs,)

vs.)

Case No.)

DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE)

THE STATE OF KANSAS, DEPARTMENT OF)
AGRICULTURE, DIVISION OF WATER)
RESOURCES, in his official capacity,)
)
Defendant.)
)

PURSUANT TO K.S.A. CHAPTER 77

PETITION FOR JUDICIAL REVIEW

Come now the Plaintiffs, by and through their attorney, David M. Traster of Foulston Siefkin LLP, Wichita, Kansas, and for their cause of action against the Defendant, allege and state as follows:

The Parties

1. Plaintiffs, Jon and Ann Friesen, are residents of Thomas County, Kansas, residing at 2267 County Road K, Colby, Kansas 67701 and own or hold an interest in agricultural land and water rights in Thomas County.

2. Plaintiff, Friesen Farms, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 2267 County Road K, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

3. Plaintiff, Doyle Saddler, is a resident of Thomas County, Kansas, residing at 1375 County Road 25, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

4. Plaintiff, 1885 Enterprises, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 1375 County Road 26, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

5. Plaintiff, Justin Sloan, is a resident of Thomas County, Kansas, residing at 1925 County Road 23, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

6. Plaintiff, Tom Sloan, is a resident of Thomas County, Kansas, residing at 545 Woofter Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

7. Plaintiff, Bert Stramel, is a resident of Thomas County, Kansas, residing at 1267 Highway K25, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

8. Plaintiff, Stramel Farms, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at Rt. 1, Box 22, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

9. Plaintiff, Fred Albers, is a resident of Thomas County, Kansas, residing at 2091 Rd. 34, Rexford, Kansas 67753 and owns or holds an interest in agricultural land and water rights in Thomas and Sheridan Counties.

10. Plaintiff, Marvin Albers, is a resident of Thomas County, Kansas, residing at 744 County Road 31, Oakley, Kansas 67748 and owns or holds an interest in agricultural land and water rights in Thomas County.

11. Plaintiff, Frank Bouts, is a resident of Sheridan County, Kansas, residing at 210 West Main Street, Selden, Kansas 67757 and owns or holds an interest in agricultural land and water rights in Sheridan County.

12. Plaintiff, Denise J. Burrows, Trustee of the Charles W. Schroeder Family Trust, is a resident of Arapahoe County, Colorado, residing at 20606 E. Ida Circle, Centennial, Colorado 80015 and owns or holds an interest in agricultural land and water rights in Thomas County.

13. Plaintiff, Gary E. Cooper, is a resident of Thomas County, Kansas, residing at 730 Woofter Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

14. Plaintiff, Elfriede U. Cooper, is a resident of Thomas County, Kansas, residing at 730 Woofter Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

15. Plaintiff, Gary E. Cooper, Trustee of the Gary E. Cooper and Mary Pawlus Trusts, is a resident of Thomas County, Kansas, residing at 730 Woofter Ave., Colby, Kansas and owns or holds an interest in agricultural land and water rights in Thomas and Sherman Counties.

16. Plaintiff, Cooper Grain, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 465 E. 8th, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

17. Plaintiff, Cameron Epard, is a resident of Maricopa County, Arizona, residing at 18171 N. 99th St., Scottsdale, Arizona 85255 and owns or holds an interest in agricultural land and water rights in Thomas County.

18. Plaintiff, F. Doyle Fair, Trustee of the A.L. Abercrombie Marital Trust, is a resident of Sedgwick County, Kansas, residing at 7309 E. 21st N. #140, Wichita, Kansas 67206 and owns or holds an interest in agricultural land and water rights in Sheridan County.

19. Plaintiff, Lois L. Ferguson, is a resident of Denver County, Colorado, residing at 760 York Street, Denver, Colorado 80206 and owns or holds an interest in agricultural land and water rights in Thomas County.

20. Plaintiff, Bryan Frahm, is a resident of Thomas County, Kansas, residing at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

21. Plaintiff, Meadow Lake Farms, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 375

S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

22. Plaintiff, Lon Frahm, is a resident of Thomas County, Kansas, residing at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Logan, Sherman, and Thomas Counties.

23. Plaintiff, Frahm Farmland, is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 135 West 6th, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Sherman County.

24. Plaintiff, Lon Frahm, Trustee of the Peggy Frahm Evans Trust, is a resident of Thomas County, Kansas, residing at 375 S. Range Ave., Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

25. Plaintiff, Sheila Frahm, is a resident of Pima County, Arizona, residing at 2149 W. Escondido Canyon Drive, Green Valley, Arizona 85622 and owns or holds an interest in agricultural land and water rights in Thomas County.

26. Plaintiff, James Fritz, is a resident of Sherman County, Kansas, residing at 7102 Road 8, Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

27. Plaintiffs, Vincent V. Glad and Tenley S. Glad, doing business as Glad Farms, are residents of Thomas County, Kansas, residing at 935 South Range Ave.,

Colby, Kansas 67701 and own or hold an interest in agricultural land and water rights in Thomas County.

28. Plaintiff, Pat J. Haffner, is a resident of Sheridan County, Kansas, residing at 7380 E. Road 105, Hoxie, Kansas 67740 and owns or holds an interest in agricultural land and water rights in Sheridan County.

29. Plaintiff, Wilburn Holloway, is a resident of Thomas County, Kansas, residing at 2266 County Road 12, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

30. Plaintiff, David Houston, is a resident of Lyon County, Kansas, residing at 1821 Road 330, Reading, Kansas 66868 and owns or holds an interest in agricultural land and water rights in Thomas County.

31. Plaintiff, Douglas Irvin, is a resident of Thomas County, Kansas, residing at 915 Fountainview Ct., Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

32. Plaintiff, Irvin Farms, Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 923 Arcade, Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

33. Plaintiff, Sharon K. Mann, is a resident of Sherman County, Kansas, residing at 1411 Arcade Ave., Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Sherman County.

34. Plaintiff, John P. McKenna, is a resident of Decatur County, Kansas, residing at #11-2500th Rd., Jennings, Kansas 67643 and owns or holds an interest in agricultural land and water rights in Sheridan County.

35. Plaintiff, Brent Meranda, is a resident of Gove County, Kansas, residing at 8020 County Road BB, Quinter, Kansas 67752 and owns or holds an interest in agricultural land and water rights in Gove County.

36. Plaintiff, Berwyn Petersen, is a resident of Thayer County, Nebraska, residing at 235 N. 6th Street, Hebron, Nebraska 68370 and owns or holds an interest in agricultural land and water rights in Thomas County.

37. Plaintiff, S.Q.I. Farms, Inc., is a foreign for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 214 E. 10th Street, Goodland, Kansas 67735 and owns or holds an interest in agricultural land and water rights in Thomas County.

38. Plaintiff, Paul Steele, is a resident of Thomas County, Kansas, residing at 965 Prairie View, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

39. Plaintiff, Richard A. Stefan, is a resident of Thomas County, Kansas, residing at 615 North Chickamauga, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Sherman County.

40. Plaintiff, Joseph G. Waldman, is a resident of Gove County, Kansas, residing at 5853 County Road Y, Park, Kansas 67751 and owns or holds an interest in agricultural land and water rights in Gove County.

41. Plaintiff, Dennis Walker, is a resident of Sheridan County, Kansas, residing at 501 13th St., Hoxie, Kansas 66740 and owns or holds an interest in agricultural land and water rights in Sheridan County.

42. Plaintiff, Walker Testing Co., Inc., is a Kansas for-profit corporation, active and in good standing in the State of Kansas, with a registered office located at 501 13th, Hoxie, Kansas 67740 and owns or holds an interest in agricultural land and water rights in and Sheridan County.

43. Plaintiff, Kevin W. Wark, is a resident of Thomas County, Kansas, residing at 2477 US Highway 24, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

44. Plaintiff, Wark Properties, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 1124 SE 35th Terrace, Topeka, Kansas 66605 and owns or holds an interest in agricultural land and water rights in Thomas County.

45. Plaintiff, Prairie Dog Properties, LLC, is a Kansas limited liability company, active and in good standing in the State of Kansas, with a registered office located at 1124 SE 35th Terrace, Topeka, Kansas 66605 and owns or holds an interest in agricultural land and water rights in Thomas County.

46. Plaintiff, Kevin W. Wark, Trustee of the Berrie Family Trust, is a resident of Thomas County, Kansas, residing at 2477 US Highway 24, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

47. Plaintiff, Kevin W. Wark, Trustee of the Flipse Living Trust, is a resident of Thomas County, Kansas, residing at 2477 US Highway 24, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

48. Plaintiff, Darrel E. Wark, is a resident of Thomas County, Kansas, residing at 1635 Sewell Ave., Apt. 4, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

49. Plaintiff, Daniel Wayand, is a resident of Gove County, Kansas, residing at 519 West 6th Street, Quinter, Kansas 66552 and owns or holds an interest in agricultural land and water rights in Gove County.

50. Plaintiff, Wendy Weishaar, is a resident of Thomas County, Kansas, residing at 375 S. Range, Colby, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Sherman and Thomas Counties.

51. Plaintiff, Donald Rall, is a resident of Thomas County, Kansas, residing at 130 Kansas Ave., Rexford, Kansas 67701 and owns or holds an interest in agricultural land and water rights in Thomas County.

52. The Defendant, David Barfield, P.E., is the Chief Engineer of the Division of Water Resources of the Kansas Department of Agriculture. He may be served at his official office located at 1320 Research Park Drive, Manhattan, Kansas 66502-5000.

53. Plaintiffs are owners of agricultural land within the boundaries of the Northwest Kansas Groundwater Management District No. 4 ("GMD4") and within the boundaries of the recently created Local Enhanced Management District ("LEMA").

54. The Plaintiffs own water appropriation rights that authorize the diversion of groundwater for irrigation use within GMD4 and within the proposed LEMA.

55. Plaintiffs seek judicial review of the Chief Engineer's February 23, 2018, and February 26, 2018, orders establishing a LEMA in GMD4 for the reasons set out in the Petition for Administrative Review. The February 23, 2018 Order, the February 26, 2018 Order, and the Petition for Administrative Review are attached as Exhibits A, B, and C.

56. Plaintiffs also seek judicial review of the Chief Engineer's failure to enact regulations as specifically directed by the Legislature in K.S.A. 82a-1041(k) for the reasons set out in the Petition for Judicial Review filed in Stafford County District Court attached as Exhibit D.

57. Pursuant to K.S.A. 77-527, on April 29, 2018, Plaintiffs filed a Petition for Administrative Review, Exhibit C, of the Orders attached as Exhibits A and B.

58. On May 18, 2018, the Secretary of Agriculture declined review of the Chief Engineer's orders. Exhibit E.

59. Venue in Gove County is proper because the Chief Engineer's Orders are Order is effective in Gove County and the Chief Engineer's failure to promulgate regulations is effective in Gove County, Kansas. K.S.A. 77-609(b).

Relief Requested

The Plaintiffs request that the Court set aside the February 23, 2018, and the February 26, 2018, orders establishing the LEMA for the reasons set out in the Petition for Administrative Review.

The Plaintiffs further request that the Court enter declaratory judgment interpreting provisions of the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*; the Kansas Groundwater Management District Act, K.S.A. 82a-1020, *et seq.*, including K.S.A. 82a-1041; and the United States and Kansas Constitutions holding:

a. that K.S.A. 82a-1041(k) requires the Chief Engineer to adopt rules and regulations to effectuate and administer the provisions of the LEMA statute;

b. that the LEMA statute does not permit the Chief Engineer to ignore the prior appropriation doctrine in crafting rules and regulations for LEMA Plans;

c. that the United States and Kansas Constitutions require the Chief Engineer to provide persons whose property rights may be affected by a LEMA Plan with equal protection and due process of law; and

d. for such other relief as the Court, in its discretion, deems appropriate, just, and equitable.

Respectfully submitted,

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By s/ David M. Traster
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

On this 13th day of June, 2018, I certify that the original Petition for Judicial Review was filed electronically with:

Teresa Lewis
Clerk of the District Court
P.O. Box 97
Gove, Kansas 67736

With copies by U.S. Mail and electronic mail to the following:

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With a copy by U.S. Mail to the following:

Derek Schmidt
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120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

By s/ David M. Traster
David M. Traster, #11062

**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,)
Rawlins, Gove, Graham, Logan Sheridan, Thomas, and) **002 – DWR-LEMA – 2017**
Wallace Counties, Kansas.)
)
Pursuant to K.S.A. 82a-1041.)
_____)

**ORDER OF DECISION RETURNING THE LOCAL ENHANCED MANAGEMENT
PLAN WITH PROPOSED MODIFICATIONS**

The above captioned matter came before the Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”), for a second and final public hearing regarding the acceptance of the District Wide Local Enhanced Management Area (“District Wide LEMA”) proposed by the Northwest Kansas Groundwater Management District No. 4 (“GMD4”) on November 14, 2017 at the City Limits Convention Center, 2227 South Range Avenue, Colby, Kansas commencing at approximately 9:05 a.m. Such proceedings were held pursuant to K.S.A. 82a-1041(b) and (c). Pursuant to K.S.A. 82a-1041(d) and for the reasons set forth below, the Chief Engineer hereby returns the District Wide LEMA Management Plan to the GMD4 Board of Directors for consideration of proposed modifications to the management plan. Therefore, a subsequent Order of Designation shall only be issued upon approval of the modified management plan by the GMD4 Board of Directors and acceptance of such by the Chief Engineer.

I. Procedural Background

1. On June 8, 2017, 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).

**EXHIBIT
A**

2. On June 27, 2017, the Chief Engineer found that the proposed management plan for the District Wide LEMA 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 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). 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 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 Intervenors 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 Intervenors. A summary and discussion of the procedural challenges brought forth by the Intervenors' Submittal are presented below in Section III.

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 within 120 days:

1. Accepting the local enhanced management plan as sufficient to address any of the conditions set forth in K.S.A. 8a-1036(a)-(d);
 2. Rejecting the local enhanced management plan as insufficient to address any of the conditions set forth in K.S.A. 8a-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 Decision and Procedural Adequacy

1. Prior to recounting the testimony provided, it is useful to examine the purpose of the order of decision and how it fits into the LEMA process. First, an order of decision is an intermediate step in the LEMA process and does not constitute a final order because a LEMA does not come into existence or become effective until a subsequent order of

designation is issued. K.S.A. 82a-1041(d)-(h). An order of decision is intended to provide a close examination of the proposed management plan and provide a process for any changes deemed necessary based on the testimony received at public hearing. K.S.A. 82a-1041(c).

2. K.S.A. 82a-1041 does not require that detailed circumstances and findings be outlined in the order of decision as it is an intermediate order or step in the process. Such circumstances and findings upon which the LEMA decision is ultimately based are properly set forth in the order of designation, which serves as the final order. Therefore, it is important to note that while this order of decision contains a summary of the testimony provided, it only contains such testimony as is necessary to support the issuance of an intermediate order.
3. Since this order of decision does not accept the District Wide LEMA Management Plan but instead returns it to the GMD4 Board of Directors with specific recommendations for changing such plan, this order is primarily focused on the evidence submitted at public hearing that supports changes to the management plan.
4. In addition to the testimony supporting modification of the District Wide LEMA Management Plan, 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. However, it is important to establish the adequacy of these proceedings before issuing any further orders.
5. The following procedural challenges, summarized, were brought forth in the *Intervenor's Submittal in Opposition to the Proposed District Wide LEMA* ("*Intervenor's 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*, but such issues will only be addressed in this order of decision insofar as is necessary at this intermediate stage, and will be fully addressed in a subsequent order of designation, if any is issued.

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 initial order. (This issue of reviewing an initial 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 review 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 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 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. 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"), which are created in a somewhat similar process to LEMAs. Similar to LEMAs, IGUCAs only require that public hearings be held. 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 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 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 considerable experience dealing with water and water law matters and was deemed to be competent to conduct such a hearing by the Chief Engineer.

13. Upon review of the arguments presented in the *Intervenors' Submittal* regarding the hearing process to date, no substantial 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 fatal flaws in process that require or justify the termination of these proceedings.

IV. 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. 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 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 established as a basis from which water would be allocated 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 have 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 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%, even if that is greater than the net irrigation standard in the plan for that township and county.
6. Aaron Popelka, Kansas Livestock Association ("KLA") – Mr. Popelka submitted written testimony and testified that his organization was opposed to the restrictions originally

proposed on stock water rights in the proposed management plan. *Id.* at 127. Specifically, they opposed the stock water restrictions because they were based on the size of the animal feeding operation as of December 15, 2015, which restricts plans for growth or growth that may have already occurred, and because reducing the amount water required by animals is not viable if the operation is near its capacity and using its full allotment of water. *Id.* at 127-128. The proposed management plan was also not clear on whether it referred to a Kansas Department of Agriculture permit or Kansas Department of Health and Environment permit, each having different permitted numbers, to establish the gallons per head allotment. *Id.* at 130. KLA would prefer that the proposed management plan encourage best management practices, rather than any specific reduction in use. *Id.* at 130. KLA also is concerned that the consumptive use standard applied to changes in use made of water under the proposed management plan would permanently change the water right, and that their proposed change was to simply follow existing regulations. *Id.* at 132-133.

7. 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*.
8. 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 218-222, 234-235.

9. 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. *Id.* at 245-246. DWR also submitted written testimony into the record.

10. 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. *Id.* at 249-250.

11. Concerns were expressed in testimony regarding the sufficiency of the appeals process in the proposed management plan. Specific concerns were raised regarding the determination of historical acres used as the basis for allocations and how to properly consider past conservation when setting allocations as required by K.S.A. 82a-1041(a)(4) if such conservation reductions were done voluntarily. In written testimony, Justin Sloan cited an example of a pair of water rights (File Nos. 49,205 and 49,206) that were not used for irrigation during 2009-2015 and were thus allocated no water according to the LEMA management plan methodology. These water rights are still within their perfection period. In another case, Bert Stramel cited water right File No. 31,073-00 which is authorized to irrigate 320 acres. However, the proposed management plan methodology determined the irrigated acres during 2009-2015 to be 125 acres based on water use reported during this period. Mr. Stramel acquired the property in 2015 and has invested in equipment to resume irrigation on authorized land that was not provided an allocation in Attachment 2. Mr. Sloan also raised a concern about three of his water rights which are authorized to irrigate lands in two different allocation zones and where Attachment 2 has assigned an allocation for all acres based on the lower allocation. *See written testimony*

dated December 20, 2017 from Justin Sloan and written testimony dated December 21, 2017 from Bert Stramel.

12. Concerns were expressed in testimony regarding the sufficiency of the water level data that was relied upon to develop the management plan and whether additional data could or should have been used to develop it. For example, Scott Ross, in oral and written testimony, questioned whether the distribution of the water well measurement points was “sufficient to determine with any uniform degree of accuracy declines in the Ogallala aquifer.” He and others noted DWR requirements to install water level measurement tubes with new well construction and whether this data could be used to improve the water level network. *See written testimony dated November 14, 2017 from Scott E. Ross L.G.*

V. Discussion

1. Besides the issues related to the testimony recounted in this order, there are other issues that were raised in both the oral and written testimony received as a part of the second hearing process. These issues should, and will ultimately be addressed when and if an order of designation is issued. However, since the District Wide LEMA Management Plan is being sent back to the GMD4 Board of Directors with suggested modifications, this order of decision is not the appropriate place to engage in such discussions as there is no formally approved management plan at this time.
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.
3. Besides the procedural concerns, 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. 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 between two water rights 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. For these same reasons, and as will be set forth later in this order, it is also reasonable to exclude non-irrigation rights from specific allocations under the proposed management plan. For all these reasons, the proposed management plan is consistent with the Kansas Water Appropriation Act.

4. Based upon all written and oral testimony submitted as a part of the second public hearing, and upon a review of the testimony and findings from the initial public hearing,

the Chief Engineer has decided to return the proposed management plan, pursuant to K.S.A. 82a-1041(d)(4) with modifications. The modifications shall include: 1) changes to requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) changes to the boundaries of the District Wide LEMA Management Plan; 3) adjustments to allocations where the lands authorized for irrigation are in two or more allocation zones; 4) removing any LEMA management plan quantity restrictions on water rights in their perfection period; 5) changes to 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) requiring the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarification of the Board's intent for allocations in the areas indicated as "18 inch max restriction."

5. In addition, it will improve the administration and evaluation of the district-wide LEMA to establish a database to track changes in allocations from appeals allowed pursuant to the plan and during the LEMA period. Such database will be maintained by GMD4 in cooperation with DWR, and used by the review committee when evaluating the final LEMA goal.
6. First, GMD4 proposes that, summarized, Part (2)(a) of the District Wide LEMA Management Plan be amended to only "encourage" livestock and poultry operations to use 90% of the amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the numbers of animals authorized by a current facility permit. It was also recommended that Part (2)(b) be amended to allow a change in use from irrigation to non-irrigation and that the amount of water available for non-irrigation use will be based on K.A.R. 5-5-9 and K.A.R. 5-5-10, and not the irrigation allocation under the management plan. *GMD 4 Written Testimony*, p. 10. Testimony presented by KLA suggested that the same or very similar modifications be made by the Chief Engineer. *KLA Written Testimony*, pp. 3, 7.

7. Upon review of these proposed modifications and the evidence in record, the proposed management plan should be amended as suggested by GMD4, along with clarifying the intent that the permit referenced is issued by Kansas Department of Health and Environment. It is necessary to provide clarification on this issue, because many, but not all, livestock facilities also receive a license from the Kansas Department of Agriculture, Division of Animal Health. Each license is based on a different head count, and for the sake of clarity, the KDHE license shall be the point of reference for water conservation goals which are based on a permitted number.

8. Second, the boundaries of the proposed management plan should be modified. The initial findings established after the initial public hearing found that the proposed boundaries which encompassed the entirety of GMD4 were reasonable. *Order on Initial Requirements* at p. 20. The presiding officer in that matter offered a detailed and well-reasoned decision, including the conclusion that had smaller boundaries excluding the townships that are experiencing less than one-half percent decline been proposed, such boundaries would also likely have been reasonable. *Id.* at 19. The Chief Engineer is in full agreement and adopts the findings regarding reasonable boundaries, however, he may also propose less restrictive changes based on testimony given at the second public hearing if such changes will improve the administration of the plan. K.S.A. 82a-1041(d)(4). The rationale put forth by GMD4 is reasonable and makes sense, specifically that inclusion of all townships would encourage conservation of water. Further, the increased monitoring requirements would result in improved management, and inclusion within the boundaries would provide motivation to avoid increasing declines because reductions would be automatically applied if such declines increased without restarting the LEMA process. *Id.* at 16-17. A LEMA is intended to address the problems set forth in K.S.A. 82a-1036(a) through (d). The existence of the GMD4 boundaries confirms there is a communal hydrological relationship within GMD4, but at this time, the administration of the plan will be improved by focusing resources on those areas that present the greatest decline rates pursuant to K.S.A. 82a-1036. In addition, the removal of areas with little or no decline allows those water right owners the opportunity to use and conserve water

without unnecessary government intervention. There will be no, or a minimal impact, on the overall LEMA if these townships are removed because no reduction of the numeric goals, allocations or substantive actions set forth in the management plan is required.

9. If an order of designation eventually establishes this LEMA, and should the rate of decline increase in the future in areas of GMD4 excluded from this decision, there likely will be ample evidence to justify an expansion of the District Wide LEMA boundaries and cause to expand the resources dedicated to administering the plan. Although this path is more cumbersome and time consuming than including the less-than-one-half percent annual decline townships in the initial LEMA, it will provide those water right owners with the opportunity to separately examine their positions apart from their neighbors who are suffering greater rates of decline. Further, the restrictions put in place in areas of decline within GMD4 should serve as a constant reminder that prudent water management activities and conservation are vital and that a failure to adopt and take these things into consideration could ultimately result in the need to apply corrective controls to their townships. Finally, by not requiring the administrative and monitoring tasks associated with the management plan in those low or no declines areas, local and state resources can be focused on assisting the high decline areas in solving their problem.

10. At the hearing, there appeared to be some confusion about how the 18-inch per acre cap would be applied. Such procedure is set forth in the District Wide LEMA Management Plan, but for the sake of clarity, Section 1.b states that: *“All irrigation water rights, excluding vested rights, shall be limited to the allocation for the water right location on the accompanying map over the five-year period beginning January 1, 2018 and ending December 31, 2022.”* Attachment 1 to the District Wide Management Plan describes the allocation in townships with one-half percent to one percent average annual decline in saturated thickness as an *“18 inch max restriction.”* Testimony by Ray Luhman at hearing stated the Board’s intent was a five-year allocation of five times 18 inches. *Id.* at 206. This is consistent with the allocations provided in the District Wide LEMA Management Plan for townships with declines greater than one-percent per year as well

as the preliminary allocations provided in Attachment 2.

11. Two corrections to the allocations provided in Attachment 2 to the Plan are necessary to provide an equitable allotment. First, Mr. Sloan provided, in his written testimony, an example where the places of use of a group of water rights receiving a single allocation spanned two different allocation zones, and the total allocation provided in Attachment 2 was based on the more restrictive allocation zone. The allocation should be based instead on a weighted average of allocations based on authorized acres in each zone. Second, Mr. Sloan provided an example of a water right where no use was reported for 2009-2015 but whose perfection period has not yet expired. It is inappropriate to restrict the opportunity to develop this water right under temporary controls.
12. With the adjustments required pursuant to this order, 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. It was asserted in testimony that the appeal provisions do not protect those who have conserved in the past. However, 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. 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”.
13. Based on the testimony provided at hearing, the following improvements to the appeal process are necessary to ensure the process is sufficient to assign proper allocations and give due consideration to past voluntary conservation: 1) the GMD and DWR should cooperate to provide fuller explanation of the basis and calculations that determine the allocations assigned; and 2) the appeals process must insure that when evidence is brought to demonstrate that a water right owner has lawfully expanded the place of use

from that of 2009-2015, the appropriate allocation for such additional lands will be provided.

14. 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. 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. 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.

VI. Findings of Fact

1. The *Order on Initial Requirements* and the *Decision Regarding Motion for Expanded Due Process* are hereby adopted by reference and made a part of this record.
2. The proposed geographical boundaries of the GMD4 District Wide LEMA contain the entire area incorporated into GMD4.
3. Groundwater levels in much of 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.
4. However, the following townships have suffered declines of less than one-half percent per year in saturated thickness between 2004-2015:

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
Township 7 South, Range 22 West
Township 7 South, Range 23 West
Township 7 South, Range 24 West
Township 7 South, Range 25 West
Township 8 South, Range 25 West
Township 9 South, Range 24 West
Township 9 South, Range 25 West

Logan County

Township 11 South, Range 32 West
Township 11 South, Range 33 West
Township 11 South, Range 34 West
Township 11 South, Range 35 West
Township 11 South, Range 37 West

Rawlins County

Township 2 South, Range 35 West
Township 2 South, Range 36 West
Township 3 South, Range 35 West
Township 4 South, Range 31 West

Township 4 South, Range 33 West
Township 4 South, Range 34 West
Township 4 South, Range 35 West
Township 5 South, Range 32 West
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

5. The boundaries as proposed are clear and reasonable, however, the administration of the plan can be improved by reducing the boundaries as proposed herein by removing from the LEMA the townships listed in Paragraph No. 4 of this Findings section. The boundary change will not require a change to the District Wide LEMA Management Plan's principal numeric goal or its allocations.

6. Modifying the management plan to require: 1) changes to requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) changes to the boundaries of the District Wide LEMA Management Plan; 3) adjustments to allocations where the lands authorized for irrigation are in two allocation zones; 4) removing any LEMA management plan quantity restrictions on water rights in their perfection period; 5) changes to the appeal process to ensure every water right holder understands the basis of the allocations provided by the LEMA 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) requiring the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarification of the Board's intent for allocations in the areas indicated as "18 inch max restriction," will improve administration of the plan.

7. The District Wide LEMA Management Plan, as modified herein, would give due consideration to prior voluntary reductions in water use by providing allocations not based on historical reported water use but by instead basing allocations on inches per acre multiplied by the maximum reported acres and by providing an adequate appeal process to consider factors related to past conservation, including government-sanctioned conservation programs, and the unique complexities of certain water rights.
8. The goal of the proposed management plan is to restrict groundwater pumping to no more than 1.7 million acre-feet over a five-year period.
9. The corrective control provisions of the proposed management plan are sufficient to meet this goal.
10. The irrigators within the proposed LEMA 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.

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 during the initial public hearing.

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 Management Plan.
5. Corrective controls are required within the GMD4 District Wide LEMA in order to address excessive declines in the groundwater level and to address rates of withdrawal that exceed the rate of recharge as stated by 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.
8. Such proposed modifications do not impose reductions in groundwater withdrawals that exceed those contained in the plan and improve the administration of the plan by focusing reductions in areas expressing the greatest amounts of decline.
9. The proposed District Wide Management Plan is consistent with the Kansas Water Appropriations Act and other Kansas law.

VIII. Order of Decision

COMES NOW, the Chief Engineer, who, 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, finds that the District Wide LEMA Management Plan should be modified as recommended by the Chief Engineer herein.

THEREFORE, the Chief Engineer, pursuant to K.S.A. 82a-1041(d)(4), orders the proposed District Wide LEMA Management Plan to be returned to the GMD4 Board of

Directors for consideration and approval of the modifications proposed by the Chief Engineer, and that such approval or rejection by the GMD4 Board of Directors be transmitted to the Chief Engineer within 90 days of receipt of the proposed modifications.

The following modifications should be made to the District Wide Management Plan:

1. Section 2) Allocation – Non-irrigation, Subsection a) should be replaced with the following language:

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.

2. Section 2) Allocation – Non-irrigation, Subsection d) should be replaced with the following language:

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.

3. The following townships with less than a one-half percent per year decline in saturated thickness shall be removed from the boundaries of the District Wide Management Plan:

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
Township 7 South, Range 22 West
Township 7 South, Range 23 West
Township 7 South, Range 24 West
Township 7 South, Range 25 West
Township 8 South, Range 25 West
Township 9 South, Range 24 West
Township 9 South, Range 25 West

Logan County

Township 11 South, Range 32 West
Township 11 South, Range 33 West
Township 11 South, Range 34 West
Township 11 South, Range 35 West
Township 11 South, Range 37 West

Rawlins County

Township 2 South, Range 35 West
Township 2 South, Range 36 West
Township 3 South, Range 35 West
Township 4 South, Range 31 West
Township 4 South, Range 33 West
Township 4 South, Range 34 West
Township 4 South, Range 35 West
Township 5 South, Range 32 West
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

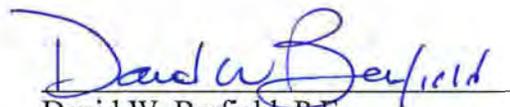
Township 10 South, Range 35 West

4. Section 1) Allocations – Irrigation, shall include the following language: *“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.”*
5. Section 1) Allocation – Irrigation, shall include the following language: *“Water rights which are still in their perfection period shall not be restricted by this LEMA.”*
6. Section 6) Appeals Process, shall include the following new sub-section: *“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. Section 6) Appeals Process, Section a) shall be amended to add the following paragraph as a new number (1) and renumbering the remaining sections: *“(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.

8. Section 10) Advisory Committee, shall add the following section: *“The advisory committee shall keep an accounting of any changes to allocations approved through the appeal 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 MAF should the GMD request a new LEMA beyond the first five-year period.”*
9. Section 10) Advisory Committee, will add the following section: *“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.”*
10. The legend on Attachment 1 shall be revised by replacing the text *“(18 inch max restriction)”* with *“(18 inch allocation; 5 years = 90 inches)”*.
11. In accordance with this order, GMD4 shall amend and update the management plan, all necessary attachments, and any other related documents necessary for the administration of the LEMA management plan. This shall include but not be limited to the:
 - a. Management Plan;
 - b. Attachment 1;
 - c. Attachment 2 (irrigation); and
 - d. Attachment 2 (stock water insofar as still required by the proposed modifications).

ENTERED THIS 23rd DAY OF FEBRUARY 2018.



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

PREPARED BY:



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CERTIFICATE OF SERVICE

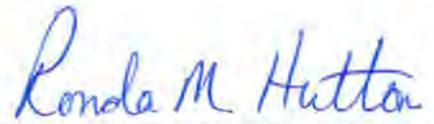
On this 23rd Day of February 2018, I hereby certify that the original of the foregoing Decision was sent by U.S. Mail and a true and correct copy by electronic mail to:

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KDA Staff Person

**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,)
Thomas, and Wallace Counties, Kansas.)
)
Pursuant to K.S.A. 82a-1041.)
)

002 – DWR-LEMA – 2017

**ORDER OF DECISION RETURNING THE LOCAL ENHANCED MANAGEMENT
PLAN WITH PROPOSED MODIFICATIONS**

The above captioned matter came before the Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”), for a second and final public hearing regarding the acceptance of the District Wide Local Enhanced Management Area (“District Wide LEMA”) proposed by the Northwest Kansas Groundwater Management District No. 4 (“GMD4”) on November 14, 2017 at the City Limits Convention Center, 2227 South Range Avenue, Colby, Kansas commencing at approximately 9:05 a.m. Such proceedings were held pursuant to K.S.A. 82a-1041(b) and (c). Pursuant to K.S.A. 82a-1041(d) and for the reasons set forth below, the Chief Engineer hereby returns the District Wide LEMA Management Plan to the GMD4 Board of Directors for consideration of proposed modifications to the management plan. Therefore, a subsequent Order of Designation shall only be issued upon approval of the modified management plan by the GMD4 Board of Directors and acceptance of such by the Chief Engineer.

I. Procedural Background

1. On June 8, 2017, 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).

**EXHIBIT
B**

2. On June 27, 2017, the Chief Engineer found that the proposed management plan for the District Wide LEMA 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 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). 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 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 Intervenors 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 Intervenors. A summary and discussion of the procedural challenges brought forth by the Intervenors' Submittal are presented below in Section III.
8. On February 26, 2018, the Chief Engineer issued a corrected Order of Decision to correct several clerical errors in the original order.

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 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 Decision and Procedural Adequacy

1. Prior to recounting the testimony provided, it is useful to examine the purpose of the order of decision and how it fits into the LEMA process. First, an order of decision is an intermediate step in the LEMA process and does not constitute a final order because a LEMA does not come into existence or become effective until a subsequent order of designation is issued. K.S.A. 82a-1041(d)-(h). An order of decision is intended to provide a close examination of the proposed management plan and provide a process for any changes deemed necessary based on the testimony received at public hearing. K.S.A. 82a-1041(c).
2. K.S.A. 82a-1041 does not require that detailed circumstances and findings be outlined in the order of decision as it is an intermediate order or step in the process. Such circumstances and findings upon which the LEMA decision is ultimately based are properly set forth in the order of designation, which serves as the final order. Therefore, it is important to note that while this order of decision contains a summary of the testimony provided, it only contains such testimony as is necessary to support the issuance of an intermediate order.
3. Since this order of decision does not accept the District Wide LEMA Management Plan but instead returns it to the GMD4 Board of Directors with specific recommendations for changing such plan, this order is primarily focused on the evidence submitted at public hearing that supports changes to the management plan.
4. In addition to the testimony supporting modification of the District Wide LEMA Management Plan, the adequacy of the entire LEMA process was raised by the Intervenors. 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. However, it is important to establish the adequacy of these proceedings before issuing any further orders.

5. 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*, but such issues will only be addressed in this order of decision insofar as is necessary at this intermediate stage, and will be fully addressed in a subsequent order of designation, if any is issued.

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 initial order. (This issue of reviewing an initial 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 review 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 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 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. 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"), which are created in a somewhat similar process to LEMAs. Similar to LEMAs, IGUCAs only require that public hearings be held. 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 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 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 considerable experience dealing with water and water law matters and was deemed to be competent to conduct such a hearing by the Chief Engineer.

13. Upon review of the arguments presented in the *Intervenors' Submittal* regarding the hearing process to date, no substantial 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 fatal flaws in process that require or justify the termination of these proceedings.

IV. 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. 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 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 established as a basis from which water would be allocated 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 have 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 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%, even if that is greater than the net irrigation standard in the plan for that township and county.

6. Aaron Popelka, Kansas Livestock Association (“KLA”) – Mr. Popelka submitted written testimony and testified that his organization was opposed to the restrictions originally proposed on stock water rights in the proposed management plan. *Id.* at 127. Specifically, they opposed the stock water restrictions because they were based on the size of the animal feeding operation as of December 15, 2015, which restricts plans for growth or growth that may have already occurred, and because reducing the amount water required by animals is not viable if the operation is near its capacity and using its full allotment of water. *Id.* at 127-128. The proposed management plan was also not clear on whether it referred to a Kansas Department of Agriculture permit or Kansas Department of Health and Environment permit, each having different permitted numbers, to establish the gallons per head allotment. *Id.* at 130. KLA would prefer that the proposed management plan encourage best management practices, rather than any specific reduction in use. *Id.* at 130. KLA also is concerned that the consumptive use standard applied to changes in use made of water under the proposed management plan would permanently change the water right, and that their proposed change was to simply follow existing regulations. *Id.* at 132-133.
7. 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*.
8. 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 218-222, 234-235.

9. 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. *Id.* at 245-246. DWR also submitted written testimony into the record.

10. 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. *Id.* at 249-250.

11. Concerns were expressed in testimony regarding the sufficiency of the appeals process in the proposed management plan. Specific concerns were raised regarding the determination of historical acres used as the basis for allocations and how to properly consider past conservation when setting allocations as required by K.S.A. 82a-1041(a)(4) if such conservation reductions were done voluntarily. In written testimony, Justin Sloan cited an example of a pair of water rights (File Nos. 49,205 and 49,206) that were not used for irrigation during 2009-2015 and were thus allocated no water according to the LEMA management plan methodology. These water rights are still within their perfection period. In another case, Bert Stramel cited water right File No. 31,073-00 which is authorized to irrigate 320 acres. However, the proposed management plan methodology determined the irrigated acres during 2009-2015 to be 125 acres based on water use reported during this period. Mr. Stramel acquired the property in 2015 and has invested in equipment to resume irrigation on authorized land that was not provided an allocation in Attachment 2. Mr. Sloan also raised a concern about three of his water rights which are

authorized to irrigate lands in two different allocation zones and where Attachment 2 has assigned an allocation for all acres based on the lower allocation. *See written testimony dated December 20, 2017 from Justin Sloan and written testimony dated December 21, 2017 from Bert Stramel.*

12. Concerns were expressed in testimony regarding the sufficiency of the water level data that was relied upon to develop the management plan and whether additional data could or should have been used to develop it. For example, Scott Ross, in oral and written testimony, questioned whether the distribution of the water well measurement points was “sufficient to determine with any uniform degree of accuracy declines in the Ogallala aquifer.” He and others noted DWR requirements to install water level measurement tubes with new well construction and whether this data could be used to improve the water level network. *See written testimony dated November 14, 2017 from Scott E. Ross L.G.*

V. Discussion

1. Besides the issues related to the testimony recounted in this order, there are other issues that were raised in both the oral and written testimony received as a part of the second hearing process. These issues should, and will ultimately be addressed when and if an order of designation is issued. However, since the District Wide LEMA Management Plan is being sent back to the GMD4 Board of Directors with suggested modifications, this order of decision is not the appropriate place to engage in such discussions as there is no formally approved management plan at this time.
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.

3. Besides the procedural concerns, 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. 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 between two water rights 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. For these same reasons, and as will be set forth later in this order, it is also reasonable to exclude non-irrigation rights from specific allocations under the proposed management plan. For all these reasons, the proposed management plan is consistent with the Kansas Water Appropriation Act.

4. Based upon all written and oral testimony submitted as a part of the second public hearing, and upon a review of the testimony and findings from the initial public hearing, the Chief Engineer has decided to return the proposed management plan, pursuant to K.S.A. 82a-1041(d)(4) with modifications. The modifications shall include: 1) changes to requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) changes to the boundaries of the District Wide LEMA Management Plan; 3) adjustments to allocations where the lands authorized for irrigation are in two or more allocation zones; 4) removing any LEMA management plan quantity restrictions on water rights in their perfection period; 5) changes to 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) requiring the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarification of the Board's intent for allocations in the areas indicated as "18 inch max restriction."
5. In addition, it will improve the administration and evaluation of the district-wide LEMA to establish a database to track changes in allocations from appeals allowed pursuant to the plan and during the LEMA period. Such database will be maintained by GMD4 in cooperation with DWR, and used by the review committee when evaluating the final LEMA goal.
6. First, GMD4 proposes that, summarized, Part (2)(a) of the District Wide LEMA Management Plan be amended to only "encourage" livestock and poultry operations to use 90% of the amount provided by K.A.R. 5-3-22 based on the maximum amount supportable by the numbers of animals authorized by a current facility permit. It was also recommended that Part (2)(b) be amended to allow a change in use from irrigation to non-irrigation and that the amount of water available for non-irrigation use will be based on K.A.R. 5-5-9 and K.A.R. 5-5-10, and not the irrigation allocation under the

management plan. *GMD 4 Written Testimony*, p. 10. Testimony presented by KLA suggested that the same or very similar modifications be made by the Chief Engineer. *KLA Written Testimony*, pp. 3, 7.

7. Upon review of these proposed modifications and the evidence in record, the proposed management plan should be amended as suggested by GMD4, along with clarifying the intent that the permit referenced is issued by Kansas Department of Health and Environment. It is necessary to provide clarification on this issue, because many, but not all, livestock facilities also receive a license from the Kansas Department of Agriculture, Division of Animal Health. Each license is based on a different head count, and for the sake of clarity, the KDHE license shall be the point of reference for water conservation goals which are based on a permitted number.

8. Second, the boundaries of the proposed management plan should be modified. The initial findings established after the initial public hearing found that the proposed boundaries which encompassed the entirety of GMD4 were reasonable. *Order on Initial Requirements* at p. 20. The presiding officer in that matter offered a detailed and well-reasoned decision, including the conclusion that had smaller boundaries excluding the townships that are experiencing less than one-half percent decline been proposed, such boundaries would also likely have been reasonable. *Id.* at 19. The Chief Engineer is in full agreement and adopts the findings regarding reasonable boundaries, however, he may also propose less restrictive changes based on testimony given at the second public hearing if such changes will improve the administration of the plan. K.S.A. 82a-1041(d)(4). The rationale put forth by GMD4 is reasonable and makes sense, specifically that inclusion of all townships would encourage conservation of water. Further, the increased monitoring requirements would result in improved management, and inclusion within the boundaries would provide motivation to avoid increasing declines because reductions would be automatically applied if such declines increased without restarting the LEMA process. *Id.* at 16-17. A LEMA is intended to address the problems set forth in K.S.A. 82a-1036(a) through (d). The existence of the GMD4 boundaries confirms there is a communal hydrological relationship within GMD4, but at this time, the administration

of the plan will be improved by focusing resources on those areas that present the greatest decline rates pursuant to K.S.A. 82a-1036. In addition, the removal of areas with little or no decline allows those water right owners the opportunity to use and conserve water without unnecessary government intervention. There will be no, or a minimal impact, on the overall LEMA if these townships are removed because no reduction of the numeric goals, allocations or substantive actions set forth in the management plan is required.

9. If an order of designation eventually establishes this LEMA, and should the rate of decline increase in the future in areas of GMD4 excluded from this decision, there likely will be ample evidence to justify an expansion of the District Wide LEMA boundaries and cause to expand the resources dedicated to administering the plan. Although this path is more cumbersome and time consuming than including the less-than-one-half percent annual decline townships in the initial LEMA, it will provide those water right owners with the opportunity to separately examine their positions apart from their neighbors who are suffering greater rates of decline. Further, the restrictions put in place in areas of decline within GMD4 should serve as a constant reminder that prudent water management activities and conservation are vital and that a failure to adopt and take these things into consideration could ultimately result in the need to apply corrective controls to their townships. Finally, by not requiring the administrative and monitoring tasks associated with the management plan in those low or no declines areas, local and state resources can be focused on assisting the high decline areas in solving their problem.

10. At the hearing, there appeared to be some confusion about how the 18-inch per acre cap would be applied. Such procedure is set forth in the District Wide LEMA Management Plan, but for the sake of clarity, Section 1.b states that: *“All irrigation water rights, excluding vested rights, shall be limited to the allocation for the water right location on the accompanying map over the five-year period beginning January 1, 2018 and ending December 31, 2022.”* Attachment 1 to the District Wide Management Plan describes the allocation in townships with one-half percent to one percent average annual decline in saturated thickness as an *“18 inch max restriction.”* Testimony by Ray Luhman at hearing stated the Board’s intent was a five-year allocation of five times 18 inches. *Id.* at

206. This is consistent with the allocations provided in the District Wide LEMA Management Plan for townships with declines greater than one-percent per year as well as the preliminary allocations provided in Attachment 2.

11. Two corrections to the allocations provided in Attachment 2 to the Plan are necessary to provide an equitable allotment. First, Mr. Sloan provided, in his written testimony, an example where the places of use of a group of water rights receiving a single allocation spanned two different allocation zones, and the total allocation provided in Attachment 2 was based on the more restrictive allocation zone. The allocation should be based instead on a weighted average of allocations based on authorized acres in each zone. Second, Mr. Sloan provided an example of a water right where no use was reported for 2009-2015 but whose perfection period has not yet expired. It is inappropriate to restrict the opportunity to develop this water right under temporary controls.
12. With the adjustments required pursuant to this order, 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. It was asserted in testimony that the appeal provisions do not protect those who have conserved in the past. However, 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. 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”.
13. Based on the testimony provided at hearing, the following improvements to the appeal process are necessary to ensure the process is sufficient to assign proper allocations and give due consideration to past voluntary conservation: 1) the GMD and DWR should cooperate to provide fuller explanation of the basis and calculations that determine the

allocations assigned; and 2) the appeals process must insure that when evidence is brought to demonstrate that a water right owner has lawfully expanded the place of use from that of 2009-2015, the appropriate allocation for such additional lands will be provided.

14. 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. 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. 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.

VI. Findings of Fact

1. The *Order on Initial Requirements* and the *Decision Regarding Motion for Expanded Due Process* are hereby adopted by reference and made a part of this record.
2. The proposed geographical boundaries of the GMD4 District Wide LEMA contain the entire area incorporated into GMD4.
3. Groundwater levels in much of 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.
4. However, the following townships have suffered declines of less than one-half percent per year in saturated thickness between 2004-2015:

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
Township 7 South, Range 22 West
Township 7 South, Range 23 West
Township 7 South, Range 24 West
Township 7 South, Range 25 West
Township 8 South, Range 25 West
Township 9 South, Range 24 West
Township 9 South, Range 25 West

Logan County

Township 11 South, Range 32 West
Township 11 South, Range 33 West
Township 11 South, Range 34 West
Township 11 South, Range 35 West
Township 11 South, Range 37 West

Rawlins County

Township 2 South, Range 35 West
Township 2 South, Range 36 West

Township 3 South, Range 35 West
Township 4 South, Range 33 West
Township 4 South, Range 34 West
Township 4 South, Range 35 West
Township 5 South, Range 31 West
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

5. The boundaries as proposed are clear and reasonable, however, the administration of the plan can be improved by reducing the boundaries as proposed herein by removing from the LEMA the townships listed in Paragraph No. 4 of this Findings section. The boundary change will not require a change to the District Wide LEMA Management Plan's principal numeric goal or its allocations.

6. Modifying the management plan to require: 1) changes to requirements of non-irrigation rights as proposed by GMD4 at the second public hearing; 2) changes to the boundaries of the District Wide LEMA Management Plan; 3) adjustments to allocations where the lands authorized for irrigation are in two allocation zones; 4) removing any LEMA management plan quantity restrictions on water rights in their perfection period; 5) changes to the appeal process to ensure every water right holder understands the basis of

the allocations provided by the LEMA 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) requiring the advisory committee to review the availability and usefulness of adding data to the water level network for future decision-making; and 7) clarification of the Board's intent for allocations in the areas indicated as "18 inch max restriction," will improve administration of the plan.

7. The District Wide LEMA Management Plan, as modified herein, would give due consideration to prior voluntary reductions in water use by providing allocations not based on historical reported water use but by instead basing allocations on inches per acre multiplied by the maximum reported acres and by providing an adequate appeal process to consider factors related to past conservation, including government-sanctioned conservation programs, and the unique complexities of certain water rights.
8. The goal of the proposed management plan is to restrict groundwater pumping to no more than 1.7 million acre-feet over a five-year period.
9. The corrective control provisions of the proposed management plan are sufficient to meet this goal.
10. The irrigators within the proposed LEMA 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.
11. This corrected order was issued to correct the omission of Sherman County from the title of the order, to fix the citations to K.S.A. 82a-1036 in Section II, paragraph 6.1., page 5 of the original order, and to correct the reference to Rawlins County Township 4 South, Range 31 West to Township 5 South, Range 31 West at pages 23 and 28 of the original order. No other changes or corrections have been made to the original order.

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 during the initial public hearing.
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 Management Plan.
5. Corrective controls are required within the GMD4 District Wide LEMA in order to address excessive declines in the groundwater level and to address rates of withdrawal that exceed the rate of recharge as stated by 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.
8. Such proposed modifications do not impose reductions in groundwater withdrawals that exceed those contained in the plan and improve the administration of the plan by focusing reductions in areas expressing the greatest amounts of decline.
9. The proposed District Wide Management Plan is consistent with the Kansas Water Appropriations Act and other Kansas law.

VIII. Order of Decision

COMES NOW, the Chief Engineer, who, 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, finds that the District Wide LEMA Management Plan should be modified as recommended by the Chief Engineer herein.

THEREFORE, the Chief Engineer, pursuant to K.S.A. 82a-1041(d)(4), orders the proposed District Wide LEMA Management Plan to be returned to the GMD4 Board of Directors for consideration and approval of the modifications proposed by the Chief Engineer, and that such approval or rejection by the GMD4 Board of Directors be transmitted to the Chief Engineer within 90 days of receipt of the proposed modifications.

The following modifications should be made to the District Wide Management Plan:

1. Section 2) Allocation – Non-irrigation, Subsection a) should be replaced with the following language:

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.

2. Section 2) Allocation – Non-irrigation, Subsection d) should be replaced with the following language:

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.

3. The following townships with less than a one-half percent per year decline in saturated thickness shall be removed from the boundaries of the District Wide Management Plan:

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
Township 7 South, Range 22 West
Township 7 South, Range 23 West
Township 7 South, Range 24 West
Township 7 South, Range 25 West
Township 8 South, Range 25 West
Township 9 South, Range 24 West
Township 9 South, Range 25 West

Logan County

Township 11 South, Range 32 West
Township 11 South, Range 33 West
Township 11 South, Range 34 West
Township 11 South, Range 35 West
Township 11 South, Range 37 West

Rawlins County

Township 2 South, Range 35 West
Township 2 South, Range 36 West
Township 3 South, Range 35 West
Township 4 South, Range 33 West
Township 4 South, Range 34 West
Township 4 South, Range 35 West
Township 5 South, Range 31 West
Township 5 South, Range 32 West
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

4. Section 1) Allocations – Irrigation, shall include the following language: *“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.”*
5. Section 1) Allocation – Irrigation, shall include the following language: *“Water rights which are still in their perfection period shall not be restricted by this LEMA.”*

6. Section 6) Appeals Process, shall include the following new sub-section: “*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. Section 6) Appeals Process, Section a) shall be amended to add the following paragraph as a new number (1) and renumbering the remaining sections: “*(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.*”
8. Section 10) Advisory Committee, shall add the following section: “*The advisory committee shall keep an accounting of any changes to allocations approved through the appeal 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 MAF should the GMD request a new LEMA beyond the first five-year period.*”
9. Section 10) Advisory Committee, will add the following section: “*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.*”
10. The legend on Attachment 1 shall be revised by replacing the text “*(18 inch max restriction)*” with “*(18 inch allocation; 5 years = 90 inches)*”.
11. In accordance with this order, GMD4 shall amend and update the management plan, all necessary attachments, and any other related documents necessary for the administration of the LEMA management plan. This shall include but not be limited to the:
 - a. Management Plan;
 - b. Attachment 1;
 - c. Attachment 2 (irrigation); and
 - d. Attachment 2 (stock water insofar as still required by the proposed modifications).

ENTERED THIS 26th DAY OF FEBRUARY, 2018.



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

PREPARED BY:



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CERTIFICATE OF SERVICE

On this 26th Day of February 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:

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KDA Staff Person

BEFORE THE 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, Rawlins, Gove, Graham,) Case No. 002-DWR-LEMA-2017
Logan, Sheridan, Sherman, Thomas, and)
Wallace Counties in Kansas.)
_____)

**PETITION FOR ADMINISTRATIVE REVIEW OF THE
CHIEF ENGINEER’S ORDER ESTABLISHING A
LOCAL ENHANCED MANAGEMENT AREA IN THE
NORTHWEST KANSAS GROUNDWATER MANAGEMENT DISTRICT NO. 4**

COME NOW, the Petitioners, by and through their attorney, David M. Traster, Foulston Siefkin, Wichita, Kansas, and pursuant K.S.A. 2016 Supp. 82a-1901 and K.S.A. 77-501, *et seq.*, request that the Secretary of Agriculture conduct administrative review of the Chief Engineer’s April 13, 2018, Order that establishes a Local Enhanced Management Area (“LEMA”) within the boundaries of the Northwest Kansas Groundwater Management District No. 4 (“GMD4,” the “GMD,” or the “District”).

The Petitioners:

1. Jon and Ann Friesen, Friesen Farms, P.O. Box 763, Colby, KS 67701
2. Doyle Saddler, 1375 County Road 25, Colby, KS 67701
3. Justin Sloan, 1925 County Road 23, Colby, KS 67701
4. Tom Sloan, 545 Woofter Ave, Colby, KS 67701
5. Bert Stramel, 1267 Highway K25, Colby, KS 67701
6. Fred Albers, 2091 Rd. 34, Rexford, KS 67753



7. Marvin Albers, 744 County Road 31, Oakley, KS 67748
8. Frank Bouts, Box 166, Selden, KS 67757
9. Denise J. Burrows, Trustee of the Charles W. Schroeder Family Trust,
20606 E. Ida Circle, Centennial, CO 80015
10. Gary E. Cooper, P.O. Box 609, Colby, KS 67701
11. Elfriede U. Cooper, P.O. Box 609, Colby, KS 67701
12. Cameron Epard, 18171 N. 99th St., Scottsdale, AZ 85255
13. F. Doyle Fair, Trustee of the A.L. Abercrombie Marital Trust, 7309 E. 21st
N. #140, Wichita, KS 67206
14. Lois L. Ferguson, 760 York Street, Denver, CO 80206
15. Bryan Frahm, 375 S. Range Ave, Colby, KS 67701
16. Bryan Frahm, Meadow Lake Farms, 375 S. Range Ave, Colby, KS 67701
17. Lon Frahm, 375 S. Range Ave, Colby, KS 67701
18. Lon Frahm, Frahm Farmland, 375 S. Range Ave, Colby, KS 67701
19. Lon Frahm, Trustee of the Peggy Frahm Evans Trust, 375 S. Range Ave,
Colby, KS 67701
20. Sheila Frahm, 2149 W. Escondido Canyon Drive, Green Valley, AZ 85622
21. James Fritz, 7102 Road 8, Goodland, KS 67735
22. Vincent V. Glad & Tenley S. Glad, Glad Farms, 935 South Range Ave,
Colby, KS 67701

23. Pat J. Haffner, 7380 E. Road 105, Hoxie, KS 67740
24. Wilburn Holloway, 2266 County Road 12, Colby, KS 67701
25. David Houston, 1821 Road 330, Reading, KS 66868
26. Douglas Irvin, Irvin Farms, Inc., 915 Fountainview Ct., Goodland, KS

67735

27. Sharon K. Mann, 1411 Arcade Ave, Goodland, KS 67735,
28. John P. McKenna, #11-2500th Rd, Jennings, KS 67643
29. Brent Meranda, 8020 County Road BB, Quinter, KS 67752
30. Berwyn Petersen, c/o Jon Friesen, P. O. Box 763, Colby, KS 67701
31. Berwyn Petersen, SQI Farms, c/o Jon Friesen, P. O. Box 763, Colby, KS

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32. Paul Steele, 965 Prairie View, Colby, KS 67701
33. Richard A. Stefan, 615 North Chickanqua, Colby, KS 67701
34. Bert Stramel, Stramel Farms, 1267 Highway K25, Colby, KS 67701
35. Joseph G. Waldman, 5853 County Road Y, Park, KS 67751
36. Denise Walker, Walker Testing Co, Inc., 501 13th St., Hoxie, KS 66740
37. Kevin W. Wark, Box 384, Colby, KS 67701
38. Kevin W. Wark, Wark Properties LLC, Box 384, Colby, KS 67701
39. Kevin W. Wark, Prairie Dog Properties, Box 384, Colby, KS 67701

40. Kevin W. Wark, Trustee of the Berrie Family Trust, Box 384, Colby, KS
67701

41. Kevin W. Wark, Trustee of the Flipse Living Trust, Box 384, Colby, KS
67701

42. Darrel E. Wark, P.O. Box 384, Colby, KS 67701

43. Daniel Wayand, 519 West 6th Street, Quinter, KS 66552

44. Wendy Weishaar, 375 S. Range, Colby, KS 67701

There are numerous problems with the LEMA statute, the procedure that resulted in the April 13, 2018, Order, and with the Order itself. The Chief Engineer's decisions throughout the LEMA proceeding have been based on a statute that is unconstitutional on its face and as applied; the Chief Engineer has acted beyond the jurisdiction conferred by the LEMA statute, the Groundwater Management District Act, and the Water Appropriation Act; has erroneously interpreted and applied the law; engaged in an unlawful procedure; has failed to follow prescribed procedures; the Chief Engineer's actions were based on determinations of fact that are not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole; and have been unreasonable, arbitrary, and capricious.

Without limiting the general basis of this Petition for Administrative Review, the Petitioners advise the Secretary as follows:

1. The Chief Engineer issued an Order establishing a Local Enhanced Management Area on April 13, 2018. The Order was provided to counsel for the Intervenor that day. The time limit for seeking Administrative Review pursuant to K.S.A. 2016 Supp. 82a-1901, is 15 days. K.S.A. 82a-527(b). This Petition for Administrative Review is timely if served on or before April 30, 2018.

2. Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available for all appropriators.

3. The prior appropriation doctrine permeates the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*, and is fundamental Kansas public policy that is binding on all water users and government agencies, including the Chief Engineer, the Division of Water Resources (“DWR”) and GMD4. K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; 82a-745; 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a-1039; and the April 13, 2018, Order, pp. 4-5, ¶ 4.

4. The Groundwater Management District Act, K.S.A. 82a-1020, *et seq.*, is subject to, controlled by, and does not amend the Kansas Water Appropriation Act making all of the GMD Act’s provisions subject to the prior appropriation doctrine. K.S.A. 82a-1020; 82a-1028(n) and (o); 82a-1029; 82a-1039; and the April 13, 2018, Order, p. 4-5, ¶ 4.

5. For example, the 1978 Legislature approved the corrective-control provisions set out in the 1978 Intensive Groundwater Use Control Area (“IGUCA”) legislation, K.S.A. 82a-1038. But not before the Legislature amended DWR’s proposed legislation to make it clear that the control provisions are limited by and subject to the prior appropriation doctrine by specifically stating that the duties and powers granted to the Chief Engineer in the Water Appropriation Act trump the IGUCA provisions. K.S.A. 82a-1039.

6. In fact, the application and enforcement of the prior appropriation doctrine is arguably the most important “duty or power of the chief engineer granted pursuant to the Kansas water appropriation act.” *Id.*

7. The April 13, 2018, Order ignores the prior appropriation doctrine making across-the-board reductions in the quantities of water that can be diverted.

8. The April 13, 2018, Order violates also K.S.A. 82a-707, which mandates allocation of water based on priority and not the purpose of use. In addition to violating the Water Appropriation Act, the Order denies irrigators equal protection of the law.

9. Reducing the quantity of water that can be diverted based on the acres actually irrigated during recent years, ignoring the right to irrigate all of the authorized acres, is a violation of the Water Appropriation Act in all of the same ways that reducing the quantities violates the Act.

10. The Chief Engineer does not have the authority to reduce the quantity of a water right, even if the reduction is limited in time. The Court in *Clawson v. DWR*, 49 Kan.App.2d 789, syl. 15, 315 P.3d 896 (2013), held that the Chief Engineer does not have the statutory power to reduce the authorized quantity of a water right after he has issued a Permit.

11. When the Chief Engineer issued each of the Permits affected by the April 13, 2018, Order, he made a finding of fact that the permitted quantity is reasonable.

12. Each Permit, when issued, is an administrative order and the time to challenge those orders has long since passed. The April 13, 2018, Order, is an unlawful collateral attack on the Chief Engineer's previous findings and administrative orders.

13. The LEMA corrective-control provisions violate the prior appropriation doctrine whether impairment is direct or regional.

14. Kansas public policy specifically permits groundwater mining in areas where there is little or no recharge even though it reduces the quantity of water available to senior users, the public, and future users. K.S.A. 82a-711 and 82a-711a. *See, e.g., Report on the Laws of Kansas Pertaining to the Beneficial Use of Water, Bulletin No. 3, November 1956, pp. 51, 85-91.*

15. DWR and GMD4 have implemented Kansas public policy that permits mining of groundwater in Northwest Kansas.

16. All of the water rights in GMD4 with a priority date before August 19, 1991, were created under the DWR approved GMD4 planned-depletion policy specifically authorized by K.S.A. 82a-711(c), K.S.A. 82a-711a, and the rules and regulations adopted by previous Chief Engineers applicable within GMD4.

17. Water Rights are real property. K.S.A. 82a-701(g). While the Legislature can always amend or repeal its own laws it cannot unring a bell. "The past cannot be recalled by the most absolute power." *United States v. Winstar*, 518 U.S. 839, 873 (1996) quoting *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810).

18. Thus, in *Fletcher v. Peck*, the court held that the Legislature cannot undo a conveyance of real estate, divesting the owner of rights that the state has lawfully conveyed. *Id.* It can however, reacquire the property by condemning it. See *Young Partners, LLC v. Bd. of Educ., Unified Sch. Dist. No. 214, Grant Cnty.*, 284 Kan. 397, 403–405, 160 P.3d 830 (2007).

19. Reduction of the available quantity of water under water rights that the Chief Engineer has permitted and irrigators have perfected with significant investments of capital and hard work and upon which irrigators and their creditors have relied, is an unconstitutional taking of private property for public use giving rise to inverse condemnation claims against the Department of Agriculture.

20. The LEMA statute is not retroactive so even if the corrective-control provisions of the LEMA statute authorize reductions, only water rights created with

notice of those corrective-control provisions, i.e. water rights with priority dates after July 1, 2012, the effective date of the statute, could be reduced. Nevertheless, the Order exempts water rights that are still in their perfection periods. Order, p. 44, ¶ 1.(o).

21. The LEMA plan is unreasonable, arbitrary, and capricious for many reasons including:

a. it establishes reductions based on average depletion using sparse and unevenly spaced data; and

b. it establishes reductions based on average depletion across entire Townships solely for the ease, convenience, and exclusive benefit of GMD4 and DWR with no regard for the significant and unlawful impact on irrigators or the actual depletion experienced at individual well sites.

22. Brownie Wilson, M.A., with the Kansas Geological Survey testified:

GMD4 was provided a Microsoft Excel spreadsheet and GIS files of the PLSS sections within the District, each coded with their average land surface, bedrock, and 2004, 2009, and 2015 water table elevations. Because the water table elevations are based on interpolated surfaces from wells measured during each time period, the change in the water table between those years and the saturated thickness can be readily computed at the PLSS-section level.

23. The data provided by the KGS estimated depletion in 4,981 Sections in the District based on annual well measurements. The water-level measurements themselves are reliable. But only 307 water-level estimates were based on measurements that were “0.00” miles from the measurement wells. Only 745 estimates were based on

measurements within one-half mile and 3,082 estimates were based on measurements that were one mile or more away.

24. Even though the GMD had data that allowed it to “readily” compute depletion at the Section level, the GMD chose to average depletion across entire Townships breaking each Township into the following categories: average depletion of less than 0.5% between 2004 and 2015; between 0.5% and 1.0%; between 1.0% and 2.0%; and greater than 2.0%.

25. The Section-level data shows that average depletion in some Townships in the District is uniform but the majority have varying degrees of depletion. See Intervenor Ex. D.

26. For example, Intervenor’s Ex. I shows the calculated depletion, Section by Section, in Township 8 South, Range 33 West, which, according to the GMD had an average annual decline of between 1.0% and 2.0% between 2004 and 2015. However every irrigation right in the Township is treated the same even though 12 Sections have less than 1.0% calculated annual depletion and 6 Sections have greater than 2.0%. Fewer than half of the Sections in the Township, 17 Sections, have depletion levels between 1.0% and 2.0%.

27. The method used is also unreasonable, arbitrary, and capricious because it uses wholly artificial boundaries. For example, all water rights in Sections 1, 2, 3, 4, 5, and 6 along the North side of Township 7 South-Range 34 West, water rights in Sections

12, 13, 24, 25, and 36 along the East side and Sections 7, 18, 19, 30, and 31 along the West side of Township 7 South-Range 34 West are reduced to 15.6 inches per year. Adjacent Sections to the North, East, and West are reduced to just 18 inches per year giving them a significant economic advantage.

36-T6S- R35W	31-T6S- R34W	32-T6S- R34W	33-T6S- R34W	34-T6S- R34W	35-T6S- R34W	36-T6S- R34W	31-T6S- R33W
1-T7S- R35W	6-T7S- R34W	5-T7S- R34W	4-T7S- R34W	3-T7S- R34W	2-T7S- R34W	1-T7S- R34W	6-T7S- R33W
12-T7S- R35W	7-T7S- R34W					12-T7S- R34W	7-T7S- R33W
13-T7S- R35W	18-T7S- R34W					13-T7S- R34W	18-T7S- R33W
24-T7S- R35W	19-T7S- R34W					24-T7S- R34W	19-T7S- R33W
25-T7S- R35W	30-T7S- R34W					25-T7S- R34W	30-T7S- R33W
36-T7S- R35W	31-T7S- R34W					36-T7S- R34W	31-T7S- R33W

28. The Chief Engineer failed to address the applicable cannons of statutory construction to justify his clearly erroneous interpretation of the LEMA corrective-control provisions indicating that the April 13, 2018, Order was not the “proper place” to do so even though his interpretation of the statute was called directly and squarely into question. April 13, 2018, Order, p. 33, ¶ 14.

29. The Chief Engineer failed to indicate when and where he should or would explain how the cannons justify his erroneous interpretation.

30. It is unreasonable, arbitrary, and capricious to require the parties to speculate about how the Chief Engineer might attempt to justify his interpretation which has and will continue to increase the time, effort, and expense of this review and, if necessary, subsequent judicial review. The Chief Engineer's failure to explain how the cannons apply violates the requirement that Orders include conclusions of law that support agency action. K.S.A. 77-526(c).

31. The LEMA statute is unconstitutional on its face because it makes the April 13, 2018, Order designating a LEMA effective when it is entered into the Chief Engineer's records making no requirement that it be served on the parties who are subject to its provisions. K.S.A. 82a-1041(h); April 13, 2018, Order, p. 6, ¶ 1. In fact, the Order has not yet been served on all of the Petitioners.

32. The April 13, 2018, Order includes an erroneous finding of fact stating that "the appeals procedure . . . provides due consideration to water users who have already implemented reductions in water use resulting in voluntary conservation measures." Order, p. 38, ¶ 9.

33. The LEMA statute must be read to include Due Process protections to avoid constitutional problems. The Due Process Clause applies to LEMA proceedings because any orders issued are state action that adversely affect property rights.

34. The Chief Engineer refused to rule on the Intervenors' Motion for Continuance asserting that the statute does not require "adversarial hearings." The fact that the LEMA, as proposed and as designated in the April 13 Order, alters property rights on which many Kansas families rely for their livelihood is a clear indication that the proceedings are "adversarial."

35. Owners of water rights are entitled to representation by counsel, to review and understand the LEMA plan, to conduct discovery, and to otherwise prepare for the required hearings.

36. The Chief Engineer granted the Intervenors an opportunity to cross-examine witnesses at the second hearing but denied their request for time to gather and analyze the evidence and to adequately prepare for the November 4, 2017, hearing. For example, GMD5 produced numerous documents to counsel shortly before 5:00 p.m. on November 13, 2017, the day before the second hearing began.

37. The procedures to appeal the GMD's determination of the acreage and quantities allocated to each owner is a violation of basic due process. There are no provisions for hearings before a fair and impartial tribunal and no provisions for review of erroneous decisions.

38. While there is no good time of the year for this proceeding, the timing of this proceeding could not have been worse and precluded adequate preparation. The GMD sent its proposed LEMA Plan to the Chief Engineer in June. The first hearing was

held on August 23, 2017, at or near the end of the irrigation season making preparation and even participation in the first hearing problematic.

39. Nevertheless, the Chief Engineer was critical of the Intervenors for waiting “until just a month prior to the second hearing to hire an attorney.” Order, p. 9, ¶ 9.

40. The second hearing was held on November 14, 2018, in the middle of corn harvest, again making preparation and participation in the hearing problematic.

41. Moreover, the Order of designation was issued in mid-April well after 2018 planting decisions should have been made or were made. In a previous pleading, the Intervenors stated:

Planning for 2018 cropping is already underway and it would be grossly unfair to implement the LEMA for 2018 even if the Chief Engineer were to issue an order approving the plan shortly after the comment period closes. Since it is likely that a plan will not be implemented until 2019, no one will be prejudiced by a delay of a few months.

Memorandum in Support of Intervenors' Motion to Provide Due Process Protections for Irrigators, October 27, 2018, p. 14. The matter was further addressed in subsequent briefing but the Chief Engineer gave this significant concern no consideration.

42. The procedures carried a significant risk of, and have resulted in the erroneous deprivation of property interests and additional procedural safeguards would have dramatically increased the Intervenors' ability to safeguard their property interests.

43. Any additional burden caused by providing the Intervenors with their basic due process rights would have been minimal and, in fact, illumination of all of the facts, which is best accomplished in an adjudicative hearing, would have been to DWR's and GMD4's advantage.

44. Nevertheless, the Chief Engineer rushed through the procedure running rough-shod over significant property rights.

45. The April 13, 2018, Order contains multiple assertions that there was little or no evidence to support various objections. *See, e.g.,* April 13, 2018, Order, p. 8, ¶ 8; p. 9, ¶¶ 9 and 10; p. 10, ¶¶ 10 and 11; pp. 10-11, ¶ 12; p. 11, ¶ 13; p. 23, ¶ 2; p. 29, ¶ 7; p. 30, ¶ 8; p. 33, ¶ 13; and p. 34, ¶ 16.

46. It is unreasonable, arbitrary, and capricious to deny the parties an opportunity to gather and analyze the evidence and to adequately prepare for a hearing and then rely on a lack of evidence to support their objections.

47. The April 13, 2018, Order states that a Petition for Administrative Review by the Secretary must be filed within 30 days after service of the Order (p. 52) but the time limit to seek Administrative Review is 15 days. The LEMA proceeding commenced prior to July 1, 2017. April 13, 2018, Order, pp. 1-2, ¶¶ 1-3. The 2017 amendments to K.S.A. 82a-1901 were not effective until July 1, 2017, and are not retroactive. K.S.A. 82a-1901(e).

48. The Chief Engineer has failed to adopt rules and regulations as required by the statute. K.S.A. 82a-1041(k). His failure to comply with this directive placed the parties at a substantial disadvantage causing them to incur substantial attorney fees to prepare multiple motions and extensive briefing to figure out how this proceeding was to be conducted. Had the Chief Engineer complied with the legislative mandate to adopt rules and regulations, review of proposed rules by the Attorney General and public comments could have avoided this ad hoc, unreasonable, arbitrary, and capricious procedural nightmare. The Chief Engineer's refusal to follow the Legislature's mandate is now before the Stafford County District Court.

49. The Chief Engineer improperly delegated his responsibility to conduct the first public hearing. The statute specifically states that the "chief engineer shall conduct an initial public hearing" on the question of designating a proposed LEMA. K.S.A. 82a-1041(b). *See also*, April 13, 2018, Order p. 4, ¶ 3. There is no authority to delegate this statutory responsibility.

50. While Limited Irrigation Crop Insurance may be available from the Risk Management Agency, some producers are unable to find agents who will sell it because it has numerous problems and unknowns. With high input costs and low crop prices some bankers are unwilling to renew operating loans on uninsured crops.

51. The GMD's allegations and the Chief Engineer's statements in this and other Orders to the contrary, the process was less than open during the development of

the LEMA. The GMD Board was inaccessible and failed to consider comments unless staff approved. The plan was poorly explained to the public and was not made available for review before it was issued. Note especially the testimony of Bert Stramel:

This has probably been the most informational meeting we have had on this whole process the whole time. I don't know if that is because you are in charge or what the case is.

But as a farmer, we start everything with a process and we try and know everything we can about that process going forward when we pick out hybrids, when we pick out machinery that we use. We try and get as much knowledge and as much data about everything and we try and max it out to the absolute max that we can in order to be profitable and efficient.

And in this case, many of the things we asked for at the very beginning, like increased measuring points or increased data points so that we can actually find out where we can do the most good and do the most good, and to back up some of these maps have been ignored from the from the beginning.

Transcript pp. 267, line 20, 268, line 12.

It is like today, this was the first time the 25 -- no more than 25 percent reduction was actually explained to an extent that it could be understood.

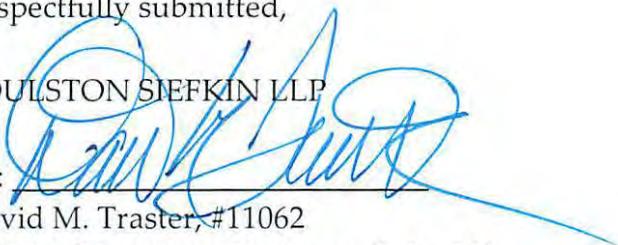
We have never had a full explanation of how this appeals process is going to work. I have several of my personal water rights that I know are going to need to go through this appeal, and I am not sure how well I am going to be served by it without knowing the process, without knowing who is going to be in charge of it, if it is going to be this current board, if it is going to be the current staff. I mean, who knows what future staff or future boards are going to look like. And to just walk into this without having some of these questions answered is reckless. We wouldn't go into our fields and plant something without having some idea of what to expect.

Transcript, p. 269, lines 1-18.

52. The Intervenor's previous briefing in this matter is incorporated by reference, including: the October 27, 2017, Memorandum in Support of Motion for Due Process; the October 27, 2017, Memorandum in Support of Motion for Reconsideration; the November 2, 2017, Reply Memo in Support of Due Process; and the December 22, 2017, Intervenor's Submittal in Opposition to the proposed District-Wide LEMA.

Respectfully submitted,

FOULSTON SIEFKIN LLP

By: 

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CERTIFICATE OF SERVICE

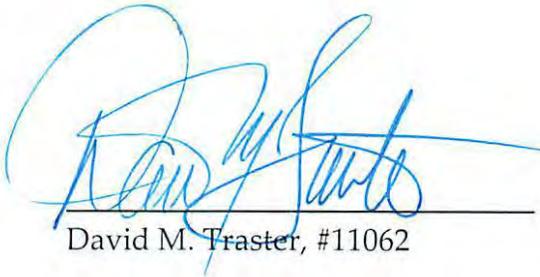
On this 29th day of April, 2018, I hereby certify that foregoing Petition for Administrative Review was sent by electronic mail to:

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Kansas Department of Agriculture,
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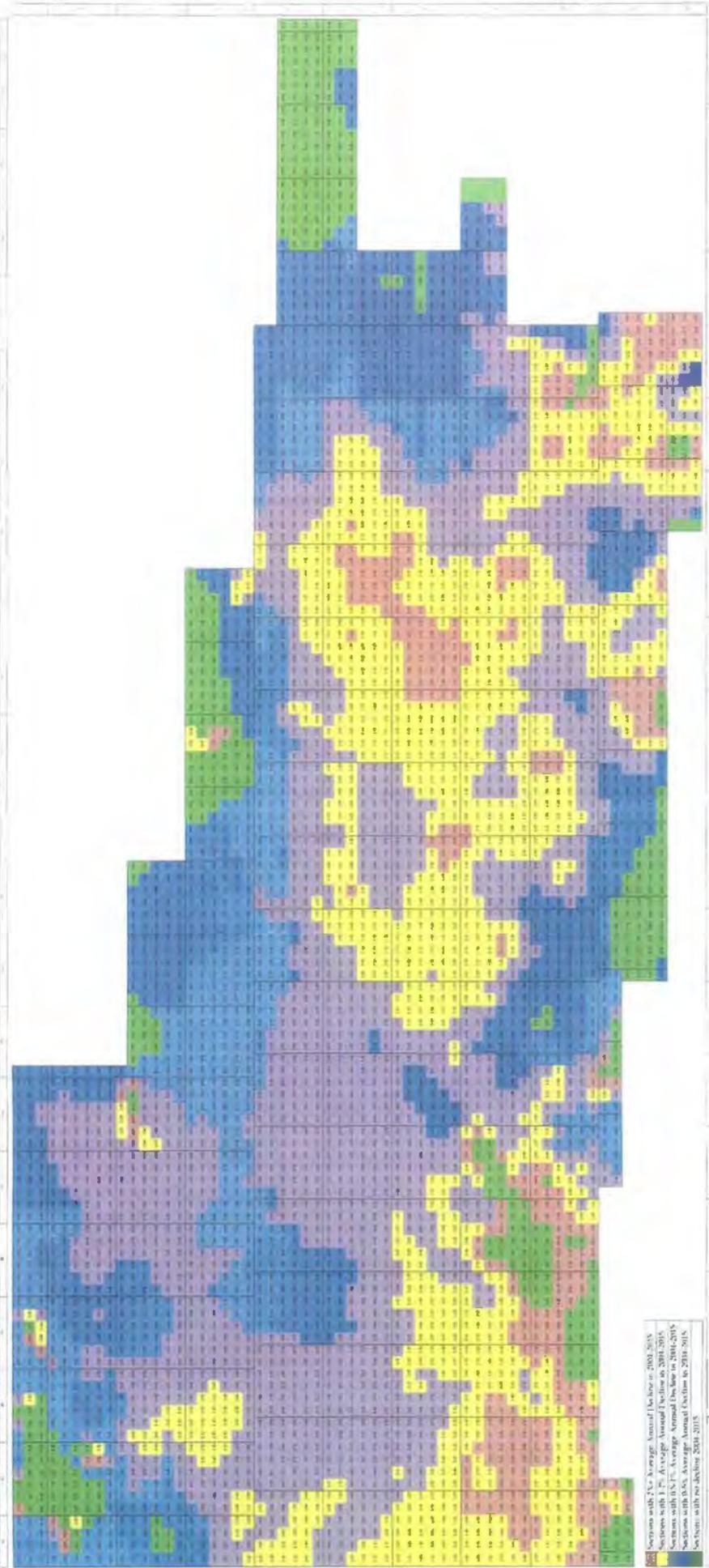
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David M. Traster, #11062

Average Annual Percent Decline 2004-2015



Sections with 1.0% Average Annual Decline in 2004-2015
Sections with 0.5% Average Annual Decline in 2004-2015
Sections with 0.0% Average Annual Decline in 2004-2015
Sections with less than 0.0% Average Annual Decline in 2004-2015



Township 8 South-Range 33 West

Section	Township	Range	Bedrock Elevation	2004 AVE.	2015 AVE.	2004 Sat. Thkness	2015 Sat. Thknes	2004-2015 change (feet)	2004-2015 change (percent)	
				Winter Table Elev. v3	Winter Table Elev. v3					
1	8	33	2848.40	2975.87	2966.51	127.47	118.11	-9.36	-0.69	Purple
2	8	33	2855.86	2987.00	2977.74	131.14	121.88	-9.26	-0.66	Purple
3	8	33	2873.63	2997.82	2988.48	124.19	114.85	-9.34	-0.71	Purple
4	8	33	2891.93	3008.53	2998.96	116.60	107.03	-9.56	-0.78	Purple
5	8	33	2911.08	3019.33	3009.46	108.25	98.38	-9.87	-0.86	Purple
6	8	33	2904.86	3028.70	3018.58	123.84	113.72	-10.12	-0.77	Purple
7	8	33	2946.62	3026.33	3016.07	79.71	69.45	-10.27	-1.25	Yellow
8	8	33	2942.95	3016.51	3006.61	73.56	63.66	-9.89	-1.30	Yellow
9	8	33	2904.55	3006.36	2996.80	101.81	92.25	-9.56	-0.89	Purple
10	8	33	2879.95	2996.30	2986.95	116.35	107.00	-9.35	-0.76	Purple
11	8	33	2857.87	2986.13	2976.83	128.26	118.96	-9.30	-0.68	Purple
12	8	33	2847.77	2975.63	2966.21	127.86	118.44	-9.42	-0.69	Purple
13	8	33	2867.93	2976.06	2966.89	108.13	98.96	-9.17	-0.80	Purple
14	8	33	2882.11	2985.93	2976.83	103.82	94.72	-9.10	-0.83	Purple
15	8	33	2901.63	2995.79	2986.60	94.16	84.97	-9.19	-0.93	Purple
16	8	33	2921.92	3005.66	2996.18	83.74	74.26	-9.48	-1.09	Yellow
17	8	33	2944.37	3014.69	3004.78	70.32	60.41	-9.91	-1.37	Yellow
18	8	33	2955.17	3024.21	3013.73	69.04	58.56	-10.48	-1.49	Yellow
19	8	33	2951.86	3022.00	3011.44	70.14	59.58	-10.56	-1.47	Yellow
20	8	33	2947.75	3013.16	3003.37	65.41	55.62	-9.79	-1.46	Yellow
21	8	33	2941.06	3004.17	2995.00	63.11	53.94	-9.17	-1.42	Yellow
22	8	33	2936.73	2995.11	2986.28	58.38	49.55	-8.82	-1.48	Yellow
23	8	33	2938.44	2985.63	2976.89	47.19	38.45	-8.74	-1.85	Yellow
24	8	33	2938.93	2976.53	2967.74	37.60	28.81	-8.79	-2.39	Red
25	8	33	2965.89	2976.88	2968.51	10.99	2.62	-8.37	-12.23	Red
26	8	33	2961.34	2985.78	2977.46	24.44	16.12	-8.32	-3.71	Red
27	8	33	2956.02	2995.08	2986.79	39.06	30.77	-8.29	-2.14	Red
28	8	33	2953.26	3003.63	2994.95	50.37	41.69	-8.67	-1.70	Yellow
29	8	33	2950.34	3011.67	3002.15	61.33	51.81	-9.53	-1.52	Yellow
30	8	33	2949.75	3019.91	3009.52	70.16	59.77	-10.39	-1.45	Yellow
31	8	33	2950.19	3018.18	3008.02	67.99	57.83	-10.16	-1.46	Yellow
32	8	33	2954.23	3010.75	3001.36	56.52	47.13	-9.38	-1.64	Yellow
33	8	33	2958.21	3002.94	2994.58	44.73	36.37	-8.36	-1.86	Yellow
34	8	33	2954.30	2994.38	2986.45	40.08	32.15	-7.93	-1.98	Yellow
35	8	33	2955.53	2985.09	2977.02	29.56	21.49	-8.07	-2.86	Red
36	8	33	2959.76	2976.23	2968.15	16.47	8.39	-8.08	-5.95	Red
								AVERAGE	-1.81	



FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
316-267-6371

IN THE DISTRICT COURT OF STAFFORD COUNTY, KANSAS,
TWENTETH JUDICIAL DISTRICT

ALAN B. CRANE, LEAH R. CHADD,)
and HELEN CARR WEWERS,)
)
Plaintiffs,)
)
vs.) Case No.
)
DAVID BARFIELD, P.E., THE CHIEF)
ENGINEER OF THE STATE OF KANSAS,)
DEPARTMENT OF AGRICULTURE,)
DIVISION OF WATER RESOURCES,)
in his official capacity,)
)
Defendant.)
_____)

PURSUANT TO K.S.A. CHAPTER 77

PETITION FOR JUDICIAL REVIEW

Come now the Plaintiffs, by and through their attorney, David M. Traster of Foulston Siefkin LLP, Wichita, Kansas, and for their cause of action against the Defendant, allege and state as follows:

The Parties

1. Plaintiff Alan B. Crane is a resident of Pawnee County, Kansas, residing at 1191 30th Ave., Larned, KS, 67550 and owns agricultural land and associated water rights in Pawnee and Stafford Counties.

**EXHIBIT
D**

2. Plaintiff Leah R. Chadd is a resident of Stafford County, Kansas, residing at 850 SW 70th Street, St. John, KS, 67576, and owns agricultural land and associated water rights in Stafford County.

3. Plaintiff Helen Carr Wewers is a resident of Johnson County, Kansas, residing at 8576 Caenen Lake Ct., Lenexa, KS 66215 and owns agricultural land and associated water rights in Stafford, Pratt, and Pawnee Counties.

4. The Defendant, David Barfield, P.E., is the Chief Engineer of the Division of Water Resources of the Kansas Department of Agriculture. He may be served at his official office located at 1320 Research Park Drive, Manhattan, Kansas 66502-5000.

5. Plaintiffs are owners of agricultural land within the boundaries of the Big Bend Groundwater Management District No. 5 ("GMD5") and within the boundaries of a proposed Local Enhanced Management District ("LEMA").

6. The Plaintiffs own water appropriation rights that authorize the diversion of groundwater for irrigation use within GMD5 and within the proposed LEMA.

Jurisdiction

7. Plaintiffs seek judicial review of the Chief Engineer's failure to enact regulations as specifically directed by the Legislature in K.S.A. 82a-1041(k).

8. The 2012 Kansas Legislature enacted K.S.A. 82a-1041. L. 2012, Ch. 62. The full text of the statute is provided in Exhibit A.

9. Its provisions are part of and supplemental to the Kansas Groundwater Management District Act, K.S.A. 82a-1020, *et seq.* K.S.A. 82a-1041(l).

10. The 2012 statute permits Groundwater Management Districts to propose Plans that would impose enhanced groundwater management requirements including “corrective controls” in specified geographical areas within a GMD’s boundaries.

11. The statute requires the Chief Engineer to “adopt rules and regulations to effectuate and administer the provisions of this section.” K.S.A. 82a-1041(k).

12. The Chief Engineer has failed to adopt rules and regulations as directed by the Legislature.

13. In a February 23, 2018, Order issued in a Northwest Kansas Groundwater Management District No. 4 (“NW KS GMD4”) LEMA proceeding, the Chief Engineer stated that the plain text of the statute does not require that he adopt rules and regulations for LEMA proceedings.

14. The Kansas Judicial Review Act, K.S.A. 77-601, *et seq.*, (“KJRA”) defines “agency action” to include each of the following:

- (1) the whole or a part of a rule and regulation or an order;
- (2) the failure to issue a rule and regulation or an order; or
- (3) an agency’s performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise.

K.S.A. 77-602(b).

15. The Plaintiffs are entitled to seek judicial review, pursuant to K.S.A. 77-607, of the Chief Engineer's failure to adopt regulations as required by K.S.A. 82a-1041 because failure to adopt regulations is final agency action and to the extent it is not, non-final agency action is reviewable pursuant to K.S.A. 77-608, 77-611(c), and 77-631(a).

Venue

16. The challenged "agency action" is the failure to comply with the Legislative mandate to promulgate regulations to "effectuate and administer" the LEMA statute.

17. While this "agency action" could be "effective" in any County within any Groundwater Management District, GMD5 is actively working on a proposed LEMA that would impact water rights in Edwards, Kiowa, Pawnee, Pratt, Reno, Rice, and Stafford Counties. *See* map of proposed LEMA attached as Exhibit B.

18. Moreover, DWR is actively and aggressively involved in the development of the proposed LEMA.

19. Venue in Stafford County is proper because the Chief Engineer's failure to promulgate regulations is, in fact, effective in Stafford County, Kansas. K.S.A. 77-609(b).

Facts

20. In the first five and one-half years since the enactment of the LEMA statute, the Chief Engineer has not adopted rules and regulations as directed by the Legislature in K.S.A. 77-609(b).

21. At the GMD5's Annual Meeting held in St. John, Kansas on February 15, 2018, the GMD presented a draft LEMA plan.

22. The Chief Engineer and several of his staff were present at the meeting and the Chief Engineer followed the GMD's presentation with a presentation of his own.

23. The essence of the presentation was that the GMD is working on the text of a proposed LEMA that is being driven by the Chief Engineer's finding that a senior water appropriation right has been impaired. The GMD has proposed implementing an augmentation program that would address all or most of the impairment concerns.

24. Nevertheless, the Chief Engineer has insisted on reductions in water use with GMD5 even though GMD5's augmentation plan would likely resolve the alleged impairment of a senior water appropriation right.

25. Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available to meet the needs of all appropriators.

26. The prior appropriation doctrine permeates the Kansas Water Appropriation Act and is fundamental Kansas public policy that is binding on all water users and government agencies, including the Division of Water Resources and the Groundwater Management District. *See, e.g.*, K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710, 82a-711(b)(3), 82a-711a, 82a-712, 82a-716; 82a-717a; 82a-742; and 82a-745.

27. The application and enforcement of the prior appropriation doctrine is arguably the most important “duty or power of the chief engineer granted pursuant to the Kansas water appropriation act.” *See* K.S.A. 82a-1039.

28. Kansas public policy specifically permits groundwater mining in areas where there is little or no recharge even though it reduces the quantity of water available to senior users, the public, and future users. K.S.A. 82a-711 and 82a-711a.

29. The Groundwater Management District Act, K.S.A. 82a-1020, *et seq.*, is subject to, controlled by, and does not amend the Kansas Water Appropriation Act—making all of the GMD Act’s provisions subject to the prior appropriation doctrine. *See, e.g.*, K.S.A. 82a-1020, 82a-1028(n) and (o), 82a-1029, and 82a-1039.

30. In a provision related to the LEMA statute, the Legislature mandated that IGUCAs follow the prior appropriation doctrine by specifically stating that the duties and powers granted to the Chief Engineer in the Water Appropriation Act trump the IGUCA provisions. K.S.A. 82a-1039.

31. DWR has entered a finding of fact for every Kansas water appropriation right holding that the permitted quantity is reasonable and that finding cannot be collaterally attacked by the permittee, other water users, or governmental agencies, including the Division of Water Resources.

32. In direct violation of the prior appropriation doctrine, the proposed LEMA Plan treats irrigation, stockwatering, and other users differently in violation of K.S.A. 82a-707(b), which specifically states that the “date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights.”

33. The Chief Engineer has failed to use other methods to address impairment concerns including administration of minimum desirable streamflow requirements and administration of the priority system that is at the heart of Kansas water law.

34. In the NW KS GMD4 LEMA proceeding, a group of water right owners filed a *Notice of Intervention* and a *Motion for Continuance* on October 10, 2017. On October 27, 2017, they filed a *Motion to Provide Due Process Protections for Irrigators* and a *Motion For Reconsideration* asking the Chief Engineer to reconsider his initial finding that the proposed LEMA plan complied with Kansas law.

35. The Chief Engineer denied the *Motion For Reconsideration*, and only granted portions of the Intervenor’s *Motion to Provide Due Process Protections*. In his February 23, 2018, Order, the Chief Engineer explained that he did not rule on the

Intervenor's initial *Motion for Continuance*, stating that the LEMA statute "does not mandate that the public hearings be conducted as adversarial hearings."

36. Kansas water rights are property rights; their owners are entitled to due process and equal protection.

37. Based on his rulings in the NW KS GMD4 LEMA proceeding, Plaintiffs believe any rules and regulations adopted by the Chief Engineer would not address the fundamental constitutional due process and equal protection requirements and would not be consistent with Kansas water law.

Scope of Review and Authorized Remedies

38. The Court is authorized by the KJRA to grant relief under any of the following circumstances:

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

* * *

- (8) the agency action is otherwise unreasonable, arbitrary or capricious.

K.S.A. 77-621(c).

39. Moreover, the KJRA gives this Court broad authority to grant “appropriate relief” including injunctive, declaratory, and other forms of relief. K.S.A. 77-622(b), (c) and (d).

Relief Requested

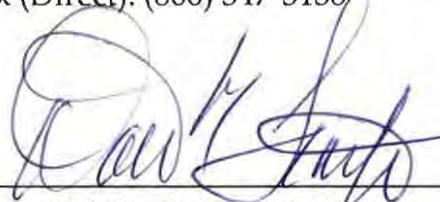
The Plaintiffs request that the Court enter declaratory judgment interpreting provisions of the Kansas Water Appropriation Act, K.S.A. 82a-701, *et seq.*; the Kansas Groundwater Management District Act, K.S.A. 82a-1020, *et seq.*, including K.S.A. 82a-1041; and the United States and Kansas Constitutions holding:

- a. that K.S.A. 82a-1041(k) requires the Chief Engineer to adopt rules and regulations to effectuate and administer the provisions of the LEMA statute;
- b. that the LEMA statute does not permit the Chief Engineer to ignore the prior appropriation doctrine in crafting rules and regulations for LEMA Plans;
- c. that the United States and Kansas Constitutions require the Chief Engineer to provide persons whose property rights may be affected by a LEMA Plan with equal protection and due process of law; and
- d. for such other relief as the Court, in its discretion, deems appropriate, just, and equitable.

Respectfully submitted,

FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466
Tel (Direct): 316-291-9725
Fax (Direct): (866) 347-3138

By

A handwritten signature in blue ink, appearing to read "David M. Traster", written over a horizontal line.

David M. Traster, #11062

dtraster@foulston.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

On this 4th day of April, 2018, I certify that the original Petition for Judicial Review was filed electronically with:

Renee C. Salem
Clerk of the District Court
P.O. Box 365
209 North Broadway
St. John, Kansas 67576

With copies by U.S. Mail and electronic mail to the following:

Jackie McCaskey, Secretary
Kansas Dept. of Agriculture
1320 Research Drive
Manhattan, KS 66502
Jackie. McCaskey@ks.gov

David W. Barfield, Chief Engineer
Division of Water Resources
Kansas Dept. of Agriculture
1320 Research Drive
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Aaron.Oleen@ks.gov

By



David M. Traster, #11062

Exhibit A
The LEMA Statute

K.S.A. 82a-1041. Local enhanced management areas; establishment procedures; duties of chief engineer; hearing; notice; orders; review

(a) Whenever a groundwater management district recommends the approval of a local enhanced management plan within the district to address any of the conditions set forth in K.S.A. 82a-1036(a) through (d), and amendments thereto, the chief engineer shall review the local enhanced management plan submitted by the groundwater management district. The chief engineer's review shall be limited to whether the plan:

- (1) Proposes clear geographic boundaries;
- (2) pertains to an area wholly within the groundwater management district;
- (3) proposes goals and corrective control provisions as provided in subsection (f) adequate to meet the stated goals;
- (4) gives due consideration to water users who already have implemented reductions in water use resulting in voluntary conservation measures;
- (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.

(b) In any case where proceedings to designate a local enhanced management area are initiated, the chief engineer shall conduct an initial public hearing on the question of designating such an area as a local enhanced management area according to the local enhanced management plan. The initial public hearing shall resolve the following findings of fact:

- (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.

The chief engineer shall conduct a subsequent hearing or hearings only if the initial public hearing is favorable on all three issues of fact and the expansion of geographic boundaries is not recommended. At least 30 days prior to the date set for any hearing, written notice of such hearing shall be given to every person holding a water right of

record within the area in question and by one publication in any newspaper of general circulation within the area in question. The notice shall state the question and shall denote the time and place of the hearing. At every such hearing, documentary and oral evidence shall be taken and a complete record of the same shall be kept.

(c) The subject matter of the hearing or hearings set forth in subsection (b) shall be limited to the local enhanced management plan that the chief engineer previously reviewed pursuant to subsection (a) and set for hearing.

(d) Within 120 days of the conclusion of the final public hearing set forth in subsections (b) and (c), the chief engineer shall issue an order of decision:

(1) Accepting the local enhanced management plan as sufficient to address any of the conditions set forth in K.S.A. 82a-1036(a) through (d), and amendments thereto;

(2) rejecting the local enhanced management plan as insufficient to address any of the conditions set forth in K.S.A. 82a-1036(a) through (d), and amendments thereto;

(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.

(e) In any case where the chief engineer issues an order of decision accepting the local enhanced management plan pursuant to subsection (d), the chief engineer, within a reasonable time, shall issue an order of designation that designates the area in question as a local enhanced management area.

(f) The order of designation shall define the boundaries of the local enhanced management area and shall indicate the circumstances upon which the findings of the

chief engineer are made. The order of designation may include any of the following corrective control provisions set forth in the local enhanced management plan:

- (1) Closing the local enhanced management area to any further appropriation of groundwater. In which event, the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area;
- (2) determining the permissible total withdrawal of groundwater in the local enhanced management area each day, month or year, and, insofar as may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights;
- (3) reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the local enhanced management area;
- (4) requiring and specifying a system of rotation of groundwater use in the local enhanced management area; or
- (5) any other provisions making such additional requirements as are necessary to protect the public interest.

The chief engineer is hereby authorized to delegate the enforcement of any corrective control provisions ordered for a local enhanced management area to the groundwater management district in which that area is located, upon written request by the district.

(g) The order of designation shall follow, insofar as may be reasonably done, the geographical boundaries recommended by the local enhanced management plan.

(h) Except as provided in subsection (f), the order of designation of a local enhanced management area shall be in full force and effect from the date of its entry in the records of the chief engineer's office unless and until its operation shall be stayed by an appeal from an order entered on review of the chief engineer's order pursuant to K.S.A. 82a-1901, and amendments thereto, and in accordance with the provisions of the Kansas judicial review act. The chief engineer upon request shall deliver a copy of such order to any interested person who is affected by such order and shall file a copy of the same with the register of deeds of any county within which any part of the local enhanced management area lies.

(i) If the holder of a groundwater right within the local enhanced management area applies for review of the order of designation pursuant to K.S.A. 82a-1901, and amendments thereto, the provisions of the order with respect to the inclusion of the holder's water right within the area may be stayed in accordance with the Kansas administrative procedure act.

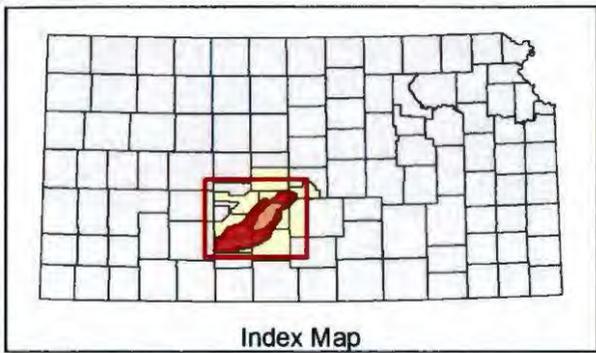
(j) Unless otherwise specified in the proposed enhanced management plan and included in the order of designation, a public hearing to review the designation of a local enhanced management area shall be conducted by the chief engineer within seven years after the order of designation is final. A subsequent review of the designation shall occur within 10 years after the previous public review hearing or more frequently as determined by the chief engineer. Upon the request of a petition signed by at least 10% of the affected water users in a local enhanced management area, a public review hearing to review the designation shall be conducted by the chief engineer. This requested public review hearing shall not be conducted more frequently than every four years.

(k) The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section.

(l) The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 82a-1020 through K.S.A. 82a-1040, and amendments thereto.

Laws 2012, ch. 62, § 1, eff. April 12, 2012; Laws 2015, ch. 60, § 4, eff. July 1, 2015.

PROPOSED LEMA BOUNDARY



Index Map

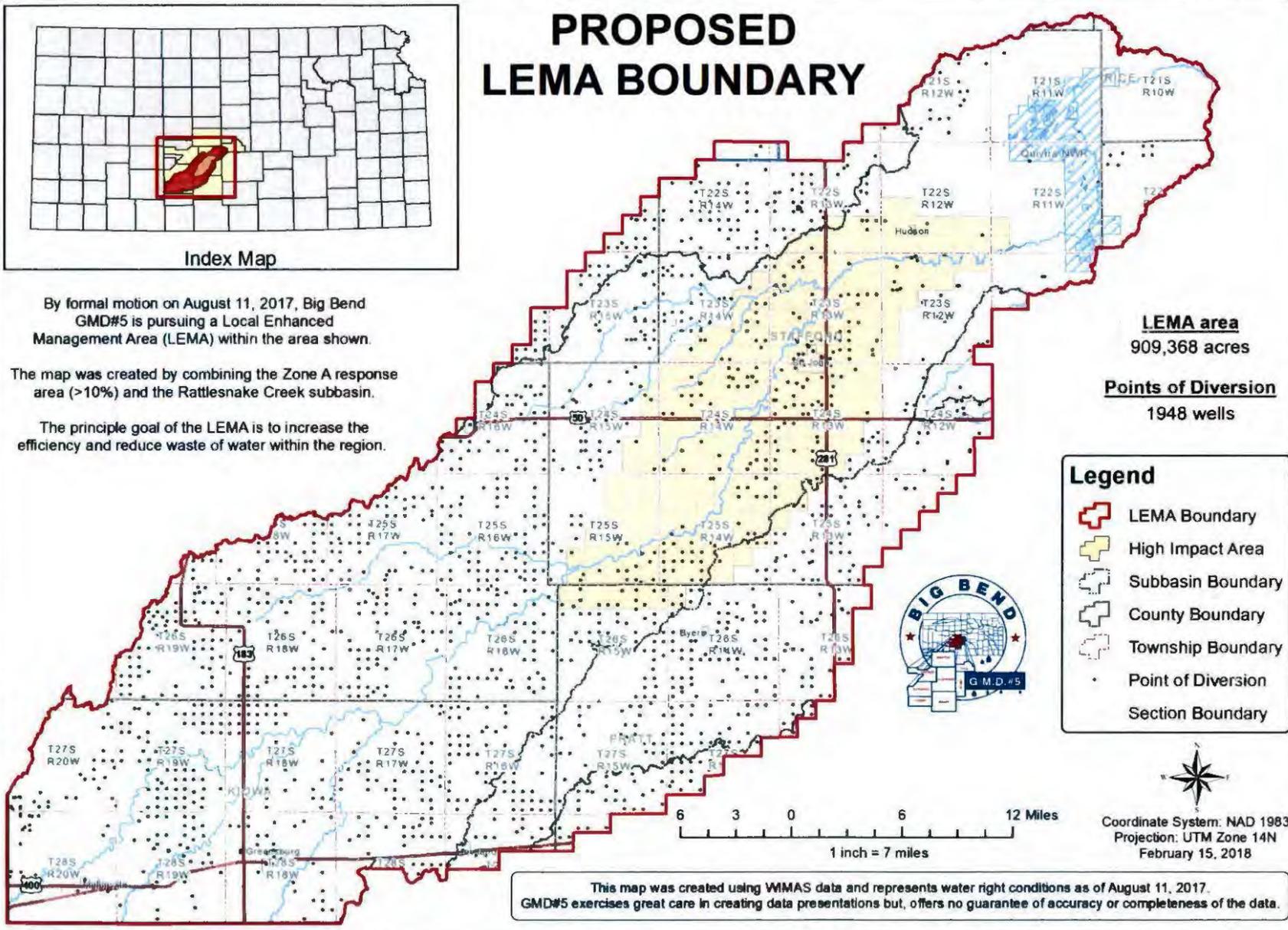
By formal motion on August 11, 2017, Big Bend GMD#5 is pursuing a Local Enhanced Management Area (LEMA) within the area shown.

The map was created by combining the Zone A response area (>10%) and the Rattlesnake Creek subbasin.

The principle goal of the LEMA is to increase the efficiency and reduce waste of water within the region.

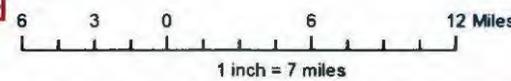
LEMA area
 909,368 acres

Points of Diversion
 1948 wells



Legend

- LEMA Boundary
- High Impact Area
- Subbasin Boundary
- County Boundary
- Township Boundary
- Point of Diversion
- Section Boundary



Coordinate System: NAD 1983
 Projection: UTM Zone 14N
 February 15, 2018

This map was created using WMAS data and represents water right conditions as of August 11, 2017. GMD#5 exercises great care in creating data presentations but, offers no guarantee of accuracy or completeness of the data.

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.)
_____)

002 – DWR-LEMA – 2017

ORDER DECLINING PETITION FOR ADMINISTRATIVE REVIEW

COMES NOW, Jackie McClaskey, Secretary, Kansas Department of Agriculture (“Secretary”) and finds as follows:

That on June 8, 2017, the Northwest Kansas Groundwater Management District No. 4 (“GMD 4”) submitted a formal request to the Chief Engineer to initiate proceedings to approve a local enhanced management area (“LEMA”).

That on June 27, 2017, the Chief Engineer, via letter, determined that the local enhanced management plan (“management plan”) proposed by GMD 4 was acceptable for consideration pursuant to K.S.A. 82a-1041(a). Accordingly, the Chief Engineer initiated proceedings to consider the designation of the proposed local enhanced management area.

That on August 23, 2017, the Chief Engineer’s designee, Constance C. Owen conducted the initial public hearing pursuant to K.S.A. 82a-1041(b). On September 23, 2017, Ms. Owen entered a summary of factual findings which resolved the three findings of fact set forth in K.S.A. 82a-1041(b)(1)-(3). Since the initial public hearing was favorable on all three findings of fact, the Chief Engineer scheduled the subsequent public hearing for November 14, 2017.

That on October 10, 2017, David M. Traster, attorney for Intervenors (“Intervenors”), filed with the Chief Engineer a Motion for Continuance requesting the public hearing scheduled for November 14, 2017 be continued and that a Prehearing Conference be scheduled. The Chief Engineer did not formally rule on the Intervenors’ Motion for Continuance but scheduled a Prehearing Conference for October 31, 2017.

That on October 27, 2017, the Intervenors filed with the Chief Engineer a Motion to Provide Due Process Protections. On November 6, 2017, the Chief Engineer issued his Decision to Expand Due Process Procedures which authorized cross-examination during the formal phase of the public hearing and extended the deadline to submit comments to December 12, 2017.

**EXHIBIT
E**

That also on October 27, 2017, the Intervenors filed a Petition for Review by the Secretary of Agriculture, requesting review of the findings of fact entered by Ms. Owen and the actions of the Chief Engineer regarding the Motion for Continuance. On November 13, 2017, the Secretary of Agriculture issued the Order Declining Petition for Administrative Review.

That on November 14, 2017, the Chief Engineer conducted the second public hearing.

That on December 11, 2017, the Intervenors filed with the Chief Engineer a Motion for Extension of Time requesting the Chief Engineer extend the deadline for persons to submit written comments. On December 12, 2017, the Chief Engineer issued an Order Granting an Extension of Time to File Comments which extended the deadline until December 22, 2017.

That on February 23, 2018, the Chief Engineer issued an Order of Decision Returning the Local Enhanced Management Plan with Proposed Modifications (“Order of Decision”). Due to clerical errors, said Order was corrected on February 26, 2018. The modified proposed management plan was returned to GMD 4 as required by K.S.A. 82a-1041(d)(4). On March 1, 2018, the Board of Directors for GMD 4 approved the modifications as proposed by the Chief Engineer and returned the modified proposed management plan to the Chief Engineer. On March 8, 2018, the Chief Engineer issued an order that accepted the modified proposed management plan.

That on April 13, 2018, the Chief Engineer issued an Order of Designation Regarding the Groundwater Management District No. 4 District Wide Local Enhanced Management Plan (“Order of Designation”) which approved the modified proposed management plan.

That on April 29, 2018, David M. Traster, attorney for Petitioners (“Petitioners”), filed a Petition for Review by the Secretary of Agriculture (“Petition for Review”) requesting review of the Order of Designation.

The Secretary finds that the Petitioners’ claims fail to provide a compelling basis to review the Order of Designation as requested.

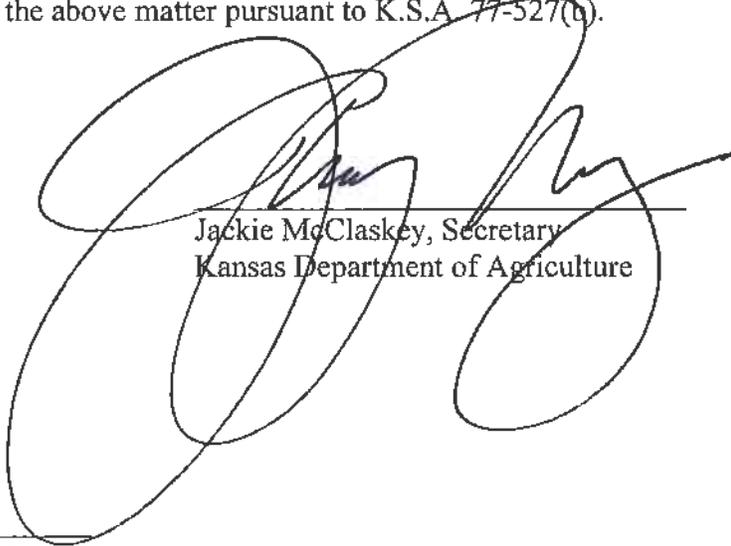
Conserving and enhancing management of water resources in Kansas is critical for agriculture, the state’s largest industry, and the entire Kansas economy. Water is a finite resource, and without proper planning and action, Kansas will not be able to sustain its current water needs or provide for future growth. Kansans have embraced a commitment to ensuring water resources are sufficient to support the state’s needs for current and future generations.

Conserving water is not a one-size-fits-all standard, and Kansas continues to provide flexible water management tools, including the LEMA, to encourage reduced water use and improved flexibility to manage water resources while maintaining productive agricultural output. A LEMA is a quality tool that provides Kansans with the opportunity to meet their current water needs while also ensuring a reliable water supply for the future. Through the LEMA process, local stakeholders are granted the means to act on their shared commitment to ensuring a reliable water supply able to meet current need while conserving the water supply for future generations.

GMD 4 submitted the proposed management plan with the goal of reducing decline rates and extending the usable life of the Ogallala Aquifer in northwest Kansas. The development of the management plan began in January 2015. Throughout the development process, stakeholders were provided opportunities to gather information and offer input regarding the development of the management plan. The management plan was then submitted to the Chief Engineer to initiate the LEMA proceedings, as set forth in Kansas law, specifically, K.S.A. 82a-1041. During the LEMA process, stakeholders were also granted opportunities to gain information and discuss the proposed management plan. Stakeholder input resulted in the Chief Engineer's proposed modifications that were ultimately adopted in the modified proposed management plan. The Chief Engineer complied with the statutory requirements in reviewing and approving the modified proposed management plan. The approved management plan provides for both flexibility to manage water resources and conservation of water supply, which are the foundational goals of a LEMA.

THEREFORE, on this 18th 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:


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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

On the 18th day of May, 2018, I hereby certify that a true and correct copy of the foregoing *Order* was deposited in the U.S. mail, first class postage prepaid, and a true and correct copy was sent by electronic mail, addressed to the following:

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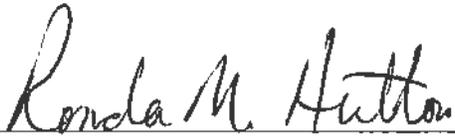
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