

**Before the Kansas Department of Agriculture  
Division of Water Resources**

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, Sherman, Thomas, )  
and Wallace Counties in Kansas )  
\_\_\_\_\_ )

Case No. 002-DWR-LEMA-2017

**Answer to Petition for Review By the Secretary of Agriculture**

The Northwest Kansas Ground Water Management District No. 4 (GMD 4), by its attorney, Adam C. Dees, Hays, Kansas, objects to the intervenor’s request that the Secretary of Agriculture review the Order on Initial Requirements of the Ground Water Management District No. 4 District-Wide Local Enhanced Management Area (LEMA) and intervenor’s request that the Secretary of Agriculture review the Chief Engineer’s refusal to consider and rule on the intervenor’s motion for continuance.

In opposition, GMD 4:

1. Admits the allegations contained in paragraph 1 of the Petition for Review by the Secretary of Agriculture.
2. Denies the allegations contained in paragraph 2 as it is highly summarized.
3. Denies the allegations contained in paragraph 3 as the proposed LEMA allows water users to still bring impairment complaints to the Chief Engineer and request adjudication of those complaints. See Request for a District-Wide LEMA submitted to the

Chief Engineer, Kansas Department of Agriculture, Division of Water Resources, paragraph 12 (June 8, 2017) (Proposal).

4. Denies the allegations contained in paragraph 4, in that the Chief Engineer has not erroneously determined that the proposed plan complies with State law.

5. Denies the allegations contained in paragraph 5 in that the proposed plan does not violate the Kansas Water Appropriations Act (KWAA).

6. Admits the allegations contained in paragraph 6.

7. Admits the allegations contained in paragraph 7, and supplements the allegation in that Ms. Owens signed and dated order of September 23, 2017 (filed by Kansas Department of Agriculture, Division of Water Resources (KDA DWR) on September 25, 2017) was circulated to the parties represented by counsel at the Initial Hearing and as of the date of this answer, a signed and dated copy was posted to KDA's website.

8. Denies the allegations contained in paragraph 8 as a signed copy was circulated and has been provided to the intervenors and their counsel at the time of this answer. The signed and dated order is identical to the unsigned and undated order placed on the KDA's website and the GMD's website.

9. Denies the allegations contained in paragraph 9.

10. Admits the allegations contained in paragraph 10, but denies that any continuance is required because the Kansas legislature set the time frames for Notice for

Initial Hearing and Final Hearing in K.S.A. 82a-1041(b)(3). The LEMA statute also states that at every hearing, documentary and oral evidence shall be taken and a complete record of the same shall be kept at the Initial Hearing and the Final hearing, which happened in this matter.

11. Denies that the Chief Engineer has not ruled on the motion for continuance as asserted in paragraph 11 of the Petition for Review. Rather, the Chief Engineer denied that motion for continuance and made an initial determination that cross examination may not occur as these are non-adversarial, informational proceedings. Further, the Chief Engineer held a Pre-Final Hearing Conference on October 31, 2017 where intervenors orally moved for a continuance and further moved for the ability to cross-examine witnesses; the Chief Engineer took both motions under advisement. Previous Local Enhanced Management Area hearings held in the SD-6 LEMA matter, were non-adversarial, informational proceedings. And, the Initial Hearing in this matter was a non-adversarial, informational proceeding. Until this point, the Chief Engineer has not been requested to deviate from that practice and the Secretary should not weigh-in until if and when the Chief Engineer makes a Final Designation of the proposed LEMA under K.S.A. 82a-1041.

12. Is without sufficient information to affirm or deny the allegations in paragraph 12, and therefore denies the same. Additionally, the SD-6 LEMA Hearings

followed a similar timeline and hearing dates as this LEMA proceeding. Further denies that this is relevant to the issues at hand.

13. Is without sufficient information to affirm or deny the allegations contained in paragraph 13 and therefore denies the same. Further denies that this is relevant to the issues at hand.

14. Denies the allegations contained in paragraph 14. Also, the intervenors, like others, have the opportunity to present written testimony in lieu of attending the Final Hearing. In the SD-6 LEMA hearings and in the Initial Hearing in this LEMA that written testimony has been weighed by the hearing officers. The intervenors may argue that the written testimony is a gesture without meaning and yet the previous records and orders are replete with references to the written testimony.

15. Denies the allegations contained in paragraph 15. The Secretary should deny this petition for review because K.S.A. 82a-1041 only contemplates a review of the Order of Designation that is specifically referenced when granting the Secretary the opportunity to review actions taken by the chief engineer.

16. Denies the allegations contained in paragraph 16, because Ms. Owens merely made findings of fact on the initial threshold requirements to have a final hearing on the proposed LEMA. The Kansas Administrative Procedures Act (KAPA) defines an order as a “state agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interest of one or more specific persons.” K.S.A. 77-

502(d). Ms. Owens specifically found that the ground water levels in question have declined excessively and the rate of withdrawals within the area in question exceeds the rate of recharge in the area; the public interest requires one or more corrective control provisions be adopted; and the geographic boundaries are reasonable. See K.S.A. 82a-1041(b)(3). She did not change any behavior of the irrigators. She did not require that anyone stop engaging in an activity of which he or she is engaged in. She made findings of facts. The question of whether the proposed LEMA will be implemented and the manner in which that LEMA will be implemented are still questions for the Final Hearing. Until the Chief Engineer hears the remaining testimony and makes a decision on these questions, the Secretary of the Department of Agriculture would have nothing to review. Rather, this Petition for Review is the intervenors' attempt to have a new hearing findings of fact that were made and that that they disagree with.

17. Denies the allegations contained in paragraph 17 in that no Final Order has been issued in this matter that would allow for review.

18. Denies the allegations contained in paragraph number 18.

19. Denies the allegations contained in paragraph 19.

20. Denies the allegations contained in paragraph 20 in that the intervenors did not have an attorney of record until after the Order on Initial Requirements was entered; and, the Order on Initial Requirements found facts and did not order a change in behavior. Once the initial public hearing resolved the findings of fact under K.S.A. 82a-1041(b)(3),

then the Chief Engineer must set a subsequent hearing and issue notice 30 days before that hearing to every person holding a water right of record in the area in question and by one publication in any newspaper of general circulation within the area of question. It is that notice that alerts the public that the order on the initial requirements or findings of fact necessarily made were made. In this case, that notice was issued in accordance with K.S.A. 82a-1041 on about October 2, 2017, before counsel for the intervenors entered his appearance. Additionally, the intervenors filed their petition for review by the Secretary of Agriculture on or about October 27, 2017, which was more than 15 days after the Notice of Hearing for the Final Hearing indicating that the findings of fact made by Ms. Owens had been completed. See Notice of Final Hearing.

Therefore, the Secretary of Agriculture should deny the intervenor's Petition for Review because it is not ripe for hearing under K.S.A. 82a-1014(b)(3) and will not be ripe for review if, and until, the Chief Engineer issues an Order of Decision, and any subsequent Order of Designation under K.S.A. 82a-1041.

Respectfully Submitted,

CLINKSCALES ELDER LAW PRACTICE, PA

By:  \_\_\_\_\_

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**Certificate of Service**

On this 6 day of November 2017, I hereby certify that the original of the foregoing was sent by electronic mail and by U.S. First Class Mail, postage prepaid to:

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and true and correct copies were sent by the same methods to:

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