

IN THE DISTRICT COURT OF THOMAS COUNTY, KANSAS

**WOOFER FARMS LLC, WAYNE CARPENTER,
and CARPENTER FARMS, GP,
Plaintiffs,**

v.

2018-CV-19

**JACKIE McCLASKEY, SECRETARY,
KANSAS DEPARTMENT OF AGRICULTURE,
in her official capacity; DAVID BARFIELD, P.E.,
CHIEF ENGINEER, DIVISION OF WATER
RESOURCES, KANSAS DEPARTMENT OF
AGRICULTURE, DIVISION OF WATER
RESOURCES, in his official capacity; and
NORTHWEST KANSAS GROUNDWATER
MANAGEMENT DISTRICT NO. 4,
Defendants.**

Pursuant to K.S.A. Chapters 77 and 60

**ORDER GRANTING MOTION TO DISMISS
AND PARTIAL MOTION TO DISMISS**

This matter comes before the Court on the Defendant Northwest Kansas Groundwater Management District No. 4's Motion to Dismiss and Defendants Kansas Department of Agriculture and Chief Engineer of the Division of Water Resources, Partial Motion to Dismiss. The Court pursuant to Rule 133, takes this matter under consideration in chambers.

THEREUPON, the Court after considering the Motions, the Plaintiffs' Response and the Petition in this matter, the Court finds that the Motion to Dismiss

should be granted as to the request to review the actions of the Groundwater Management District No. 4 under the Kansas Judicial Review Act (KJRA), the claim to review under KJRA the Order of Designation issued by the Chief Engineer should be dismissed, and the agency action of the Secretary for the Department of Agriculture by its order of May 31, 2018 should be affirmed.

THEREUPON, the Court reviews Plaintiffs' request for declaratory relief under K.S.A. 60-1701 and finds that the Order of Designation is not unlawful delegation of the powers and duties of the Chief Engineer.

The Court's conclusions of fact and law are as follows:

1. In this case under K.S.A. 82a-1041, the Chief Engineer issued an Order of Designation on April 13, 2018 that established in the Groundwater Management District 4 (GMD4) a five-year Local Enhanced Management Area (LEMA).
2. Every designated LEMA is operated under a management plan.
3. The LEMA management plan in this case provides water right holders allocations of water for each water right was in the LEMA boundary. Each owner within the LEMA is entitled to use the allocation and manage the allocation over a five-year period.

4. The LEMA management plan administered by GMD4 provides for an appeal process regarding the assigned water allocation. All appeals are to be heard only by GMD4's staff and Board of Directors.

5. Plaintiffs own or lease water rights within the LEMA boundaries and Plaintiffs in this matter received a LEMA allocation for each of those water rights.

6. In April or May 2018, pursuant to the LEMA management plan, Wayne Carpenter requested that GMD4 staff review his LEMA allocation and consider his request to increase his LEMA allocation. GMD4 staff considered Mr. Carpenter's request and denied it.

7. Mr. Carpenter then requested that the GMD4 Board of Directors reviewed the GMD4 staff's denial.

8. On May 3, 2018, Mr. Carpenter and GMD4 staff submitted oral and written comments to the Board of Directors. The GMD4 Board of Directors denied Mr. Carpenter's request to increase his LEMA allocation.

9. On May 18, 2018, Plaintiffs filed a request for review of the GMD4 Board's decision with the Secretary of the Kansas Department of Agriculture, which was denied on May 31, 2018.

10. On June 26, 2018, Plaintiffs then filed a Petition for Judicial Review asking for review under the Kansas judicial review act and declaratory relief under K.S.A. 60-1701.

11. The Order of Designation entered by the Chief Engineer contains the follow provisions:

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

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

* * *

5. Eligible Acres Process

- a) GMD4 and DWR used the maximum reported authorized irrigated acres from 2009-2015 that could be verified as being legally irrigated.
- b) If the authorized place of use was not irrigated from January 1, 2009 to December 31, 2015 then earlier years that the water user irrigated the acres may be considered.
- c) DWR will provide every water right owner within 60 days of issuance of the Order of Designation, and others known to them as operators or interest holders in the water, the eligible acres and allocations assigned to their water right(s), informing them of their opportunity to appeal the assigned acres and allocations to GMD4 under the process described below. The GMD4 Board of Directors' decision is final and the eligible acres will be used to calculate and assign final allocations.

6. Appeals Process

- a) The following process shall govern appeals regarding eligible acres and allocations:
 - (1) GMD4 and DWR shall coordinate to ensure that no later than 60 days after the order of designation, the basis of the allocations provided shall be publicly available through the DWR and GMD4 websites.
 - (2) Any appeal of the eligible acres and allocated water must be filed before March 1, 2019. Failure to file an appeal of the eligible acres and allocated water by March 1, 2019 will cause the assigned eligible acres and allocated water to become final during the LEMA period.
 - (3) Only eligible acres and allocated water may be appealed through this appeal process. No other issues including, but not limited to, the LEMA boundaries,

violations, meter issues, etc., may be appealed through this process.

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

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

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

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

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

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

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

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

Conclusions of Law

The Plaintiffs first seek relief under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* The KJRA applies to judicial review of agency actions. K.S.A. 77-603(a). “Agency” is defined by the KJRA as a state agency. K.S.A. 77-602(a).

“State agency” means any officer, department, bureau, division, board, authority, agency, commission or institution of this state which is authorized by law to administer, enforce or interpret any law of this state **but does not include any political or taxing subdivision of the state, or any agency thereof, or the judicial or legislative branch of state government.**

K.S.A. 77-602(k)(emphasis added).

In this case, two of the named Defendants meet the definition of “state agency,” the Secretary of the Department of Agriculture and the Division of Water Resources of the Kansas Department of Agriculture. An issue presented is whether the GMD4 is a state agency or more specifically, whether the GMD4 is “a political or taxing subdivision of the state or any agency thereof.”

The Plaintiffs argue that “the comprehensive statutory and procedural dependence of groundwater management districts (“GMDs”) upon the Division of Water Resources (“DWR”)” make GMDs state agencies. The Plaintiffs argue “GMD’s [sic] are legally dependent upon the approval of the chief engineer of DWR

for their organization and their legal existence.” However, a review of the statutes governing groundwater management districts reveals they are special districts which interact with the DWR. Groundwater management districts are established to give control to “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”. *See* K.S.A. 82a-1020. Further, the legislature declared that “[e]very groundwater management district organized under this act shall be a body politic and corporate.” K.S.A. 82a-1028. As an entity, the GMD can sue or be sued, employ people, purchase property, sell property, convey property, acquire land, levy water use charges, levy land assessments, adopt administrative standards and policies, recommend rules and regulations to the chief engineer which benefit the district, recommend rules and regulations to other state agencies which relate to the GMD, enforce rules and regulations approved for the GMD, and many other powers. *See* K.S.A. 82a-1028(a)-(u). Additionally, any water use charges and assessments by a GMD are certified to the county clerks in the district and “collected the same as other taxes.” K.S.A. 82a-1030(c). GMDs can issue general bonds, special assessments and no fund warrants. K.S.A. 82a-1031. Either the Board of Directors or the eligible voters of the GMD determine whether to dissolve the GMD. K.S.A. 82a-1034.

The chief engineer has many duties in relation to a GMD. The chief engineer is to act as a consultant to the steering committee forming a GMD. *See* K.S.A. 82a-1022. The chief engineer is required to approve a petition for forming a GMD if sufficient findings are made. *See* K.S.A. 82a-1024(b). However, the Kansas Secretary of State must also approve a petition for forming a GMD. *See* K.S.A. 82a-1024(a). Once the Petition is approved, it is the eligible voters who determine whether a GMD should be formed as set forth in the Petition. *See* K.S.A. 82a-1025. The chief engineer must either approve or reject recommended rules and regulations for the district. K.S.A. 82a-1028(o). However, a similar duty is given to other agencies for any recommended rules and regulations from a GMD which may fall under that agency's authority. *See*, K.S.A. 82a-1028(p). The chief engineer powers and duties when the GMD takes certain actions such as the implementation and modification of a management plan for the district, (K.S.A. 82a-1029), the expansion or reduction of its territory (K.S.A. 82a-1033), designation of an intensive groundwater use control area (K.S.A. 82a-1038) and local enhanced management areas (K.S.A. 82a-1041).

Therefore, based upon a review of the statutes, the Court finds that GMD4 is a separate legal entity that works with the Chief Engineer, Division of Water Resources and the Department of Agriculture in the administration of water rights.

However, GMD4 is independently governed by voters and a board and has the power to levy taxes through assessments. Thus, the Defendant, GMD4, is “a political or taxing subdivision” and exempt from the KJRA.

The Plaintiffs argue that interdependence of the GMD and the Chief Engineer in the formation, operation and enforcement of LEMA warrant application of the KJRA. However, the Kansas Supreme Court addressed a similar argument in *Frick v. City of Salina*, 289 Kan. 1, 10-11 (2009). The *Frick* Court recognized its long-standing precedent that “the KJRA does not apply to actions of cities, counties or other political subdivisions of the State.” *Id.* at 10. In the *Frick* case, the City of Salina argued “the KJRA should apply” “because the displacement of [the person’s] businesses resulted from a joint improvement project between the City and [Kansas Department of Transportation], a state agency.” *Id.* at 11. The City also argued that it had stepped into the shoes of KDOT to administer benefits. The *Frick* Court looked to whom the principal actor was in matter, determined it to be the City and concluded that the KJRA does not apply. In this case, the allocation complained of by Plaintiffs was made by GMD4 and DWR but the initial appeal was denied by the GMD4 Staff and the final denial of the appeals made by the GMD4 Board. The Court finds that the GMD4 is the principal actor in this matter. Therefore, the KJRA

does not apply as to the actions in this matter of the GMD4. Thus, the Plaintiffs' request for review of the actions of the GMD4 under the KJRA should be denied.

The Plaintiffs request relief under KJRA for the Order of Designation Regarding the Groundwater District No. 4 District Wide Local Enhanced Management Plan. Under the applicable statute to establish a LEMA, the procedure for a review of the order of designation must follow K.S.A. 82a-1901. *See* K.S.A. 82a-1041(h). Under K.S.A. 82a-1901(c), a request for review of the order must be made within 30 days of the service of the Order of Designation. The request of review in this case was not filed within 30 days as required by the statute. Therefore, the Plaintiff could not have the Order reviewed under the KJRA either by the Department of Agriculture or this Court. Thus, the review of the Order of Designation under the KJRA should be denied because the Plaintiffs failed to exhaust their administrative remedies. "Under the KJRA, a prerequisite to filing a petition for judicial review is the exhaustion of "all administrative remedies available within the agency." *Friedman v. Kansas State Bd. of Healing Arts*, 287 Kan. 749, 752, 199 P.3d 781, 784 (2009)

The Plaintiffs' Petition seeks relief from the Secretary of Agriculture's Order in which the Secretary denied jurisdiction to review Order of Designation and the actions of the GMD4. As stated above, the KRJA does not apply to the actions of

the GMD4 in this case. Additionally, the Plaintiffs failed to follow the procedure for review set forth in K.S.A. 82a-1901(c), which requires the request for review be made within 30 days of service of the order, not within 30 days of when the order was applied to a party. Once the Order was in place without challenge, the Order governed the appeals process for allocations. Under the Order, all appeals are reviewed by the GMD4 Board and their decision is final. If a party is aggrieved by this process, then relief must be sought outside the KJRA. Therefore, the Department of Agriculture was correct in declining jurisdiction to review the Plaintiff' Petition for review of the Order and actions of GMD4. Thus, the agency action of the Department of Agriculture in denying review should be affirmed.

Finally, the Plaintiffs' Petition seeks declaratory judgment that the Order of Designation is an unlawful delegation of power from the chief engineer to the GMD4. While this issue was neither addressed in the Motions to Dismiss filed by the Defendants nor by the Plaintiffs' Response, the Court considers the interpretation of the Order of Designation and K.S.A. 82a-1041(f) to be questions of law. "The interpretation of a statute and the legal effect of written documents are both questions of law." *In re Estate of Somers*, 277 Kan. 761, 765, 89 P.3d 898, 902 (2004). Summary disposition of an action is appropriate when it conclusively appears "there remains no genuine issue as to a material fact and that one of the parties is entitled

to judgment as a matter of law.” *Green v. Kaesler-Allen Lumber Co.*, 197 Kan. 788, 790, 420 P.2d 1019, 1021 (1966). The Order of Designation was issued by the Chief Engineer under the authority granted in K.S.A. 82a-1041 (Supp. 2017). Subparagraph (2) of paragraph (f) of the same statute provides that the order of designation may include certain corrective control provisions, one of which is “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.” K.S.A. 82a-1041(f)(2) (Supp. 2017). Under the statute, “[t]he 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.” K.S.A. 82a-1041(f) (Supp. 2017). According to Black’s Law Dictionary, “enforcement” means “the act of putting something such as a law into effect.” Black’s Law Dictionary 6th Ed., p. 528. The Designation Order in this case uses this corrective control in that it limits the total withdraw of groundwater in the LEMA for the years 2018 to 2022 to 1.7 million acre-feet for irrigation use. *See* Plaintiffs’ Exhibit 1 to Petition, Order of Designation, p. 42. The corrective control

in the Order of Designation provides for the determination of allocations for each water right affected by the Order in which the GMD4 and Department of Water Resources assist in the allocation process. *Id.* at 42-45. Once the allocation is made, any aggrieved party may appeal the decision to the GMD4 staff and Board. *Id.* at 45-46. The allocation and appeals processes are part of enforcement of the corrective controls. Therefore, the Chief Engineer has the authority to delegate the allocation process and the hearing of appeals of those allocations to GMD4. Thus, the Order of Designation Sections 5 and 6 are not an unlawful delegation of authority.

IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss GMD4 requested by GMD4 and the Department of Agriculture is granted; the Court affirms the agency action of the Department of Agriculture in its order of May 31, 2018.

ITS IS FURTHER ORDERED, that the Order of Designation Sections 5 and 6 are a lawful delegation of power from the Chief Engineer to the GMD4. The Court denies the Plaintiffs' request for declaratory relief set forth in its Petition.

IT IS BY THE COURT SO ORDERED.



Kevin N. Berens District Judge

CERTIFICATE OF SERVICE

On the date shown on the electronic file stamp, a true and correct copy of the above and foregoing Order was uploaded to the e-flex electronic court filing system to be filed with the Clerk of the Court and for notifications of the electronic filing to be sent to counsel of record, as shown below:

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