

May 15, 2018

**Via Electronic Mail**

Jackie McClaskey  
Secretary of Agriculture  
State of Kansas, Dept. of Agriculture  
900 SW Jackson, Room 456  
Topeka, KS 66612

Re: GMD 5 LEMA – response to your April 26, 2018 letter

Dear Secretary McClaskey:

As you know, we represent GMD 5 in connection with the impairment complaint filed by United States Fish & Wildlife Service (the "Service"). Thank you for your letter of April 26, 2018, and the continued efforts of your department to work with GMD 5 to craft an appropriate solution.

GMD 5 continues to work diligently to complete a revised draft of the proposed LEMA. While we recognize that your letter requests a revised draft by Friday, May 18, 2018, GMD 5 is requesting more time for the reasons I will outline below.

Your letter states that GMD 5 and KDA have agreed on three points that the plan should contain. While GMD 5 agrees in concept with the first two points, Balleau Groundwater has noted that a numerical amount of allowable use for the LEMA and water rights hinges on the annual results of the "Climate Method." Therefore, the LEMA document may need to detail the use and application of the Climate Method to address the first two points without giving a number.

Regarding the third point, GMD 5 does not, and has never, agreed that if total water use over 2020-2024 is greater than the target amount, then defined allocations, by water right, for 2025-2029 will be implemented using an allocation tool to ensure that the 2020-2029 withdrawals do not exceed the allowable withdrawals for that entire period. GMD 5 has always understood that it would need to adjust going forward in the event the total water use from 2020-2024 exceeds the target amount. We know that the LEMA will need to include language mandating that adjustment. However, GMD 5 has always taken the position that it wants flexibility to accomplish the adjustment, rather than simply mandating reductions in allocations on a water right by water right basis. For example, if the total overage for 2020-2024 is 1000 AF, GMD 5 wants the ability to simply purchase water rights and retire them to correct the problem. Nothing about that approach lessens GMD 5's mandatory obligation in the LEMA to make the adjustment. And, a workable allocation tool can certainly be one of the options. We may have misunderstood your letter, however, as the language on page

two regarding a "hydrological equivalent" may be intended to grant the requested flexibility. If so, let us know.

Both in your letter and in other discussions, KDA has indicated that the flexibility requested above is not acceptable because it is not within the authority of the chief engineer to order. We respectfully disagree. Under the LEMA statute, K.S.A. § 82a-1041, the chief engineer can require corrective controls (see K.S.A. § 82a-1041 (b)(2)), and it is clear that the chief engineer intends to do so in this case. But, nothing in the statute, by fact or implication, precludes the chief engineer from adopting the flexible approach to corrective controls GMD 5 has requested. Rather, the statute on its face indicates the opposite and provides for great flexibility. The LEMA statute provides as follows:

(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.**

K.S.A. § 82a-1041 (f) (emphasis supplied).

This language is extremely permissive and flexible, using the term "may" and even allowing the GMD to seek to enforce the LEMA corrective controls. Please consider this letter,

together with its proposed LEMA, as GMD 5's written request to enforce the corrective controls and ensure compliance.

Independent of the LEMA statute, the chief engineer would not have the authority to order augmentation. However, clearly the LEMA statute requires the chief engineer to enter a final order of designation adopting the LEMA and putting its provisions into effect, including any augmentation requirements. Similarly, the LEMA can include language, and the chief engineer can order, that multiple options are available to GMD 5 to make the appropriate adjustment while still mandating that the adjustment be made. From our perspective, nothing in the statute or any other law states that the only acceptable corrective control is use of the allocation tool. Of course, we would consider any contrary legal authority you provide.

Your letter suggests that rather than using GMD 5's flexible approach, we can simply institute a new LEMA near the end of the initial period. GMD 5 is opposed to that concept. If nothing else, this process has taught all of us that addressing these issues is time-consuming and requires extensive effort and expense. GMD 5 sees no reason to go through the long process of obtaining an additional LEMA when the solution can easily be incorporated into this LEMA.

We just received the revised climate adjustment tool late in the day last Wednesday, May 9, 2018. Before we can finalize our most current draft of the LEMA, GMD 5 wants to have workable versions of both the allocation tool and the climate adjustment tool. Balleau Groundwater has not had time to complete its review of these tools. That is a key reason GMD 5 needs more time before submitting its next draft.

Your letter correctly notes that GMD 5 has concerns about the tools. Initially, while the tool is still under review, we believe the KDA allocation tool will impose a much bigger cut than is necessary to remedy any water use above the targeted amount. Upon first glance, the tool appears to calculate a reduction that makes sense in terms of a general average. However, applying that average to individual wells reveals a troubling disparity. While some wells would have to decrease their use, as expected, others would actually need to increase their use—sometimes drastically—to make this number a true average. In a nutshell, when you consider the water use data on an individual basis, the tool will shift more water use than is targeted to be cut.

Thank you in advance for considering our concerns. GMD 5 continues to work diligently towards a solution. At the end of the day, all involved want a solution that works and that does not merely kick the can down the road.

After you have had the chance to consider this letter, please contact me and we can schedule a time to discuss this matter further. Also, feel free to give me a call with any questions.

Jackie McClaskey  
May 15, 2018  
Page 4

Sincerely,

Stinson Leonard Street LLP

*s/ Lynn D. Preheim*

Lynn D. Preheim

LDP:kla

cc: David Barfield  
Orrin Feril  
Darrel Wood  
Kenneth Titus