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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.

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,

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By



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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
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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.

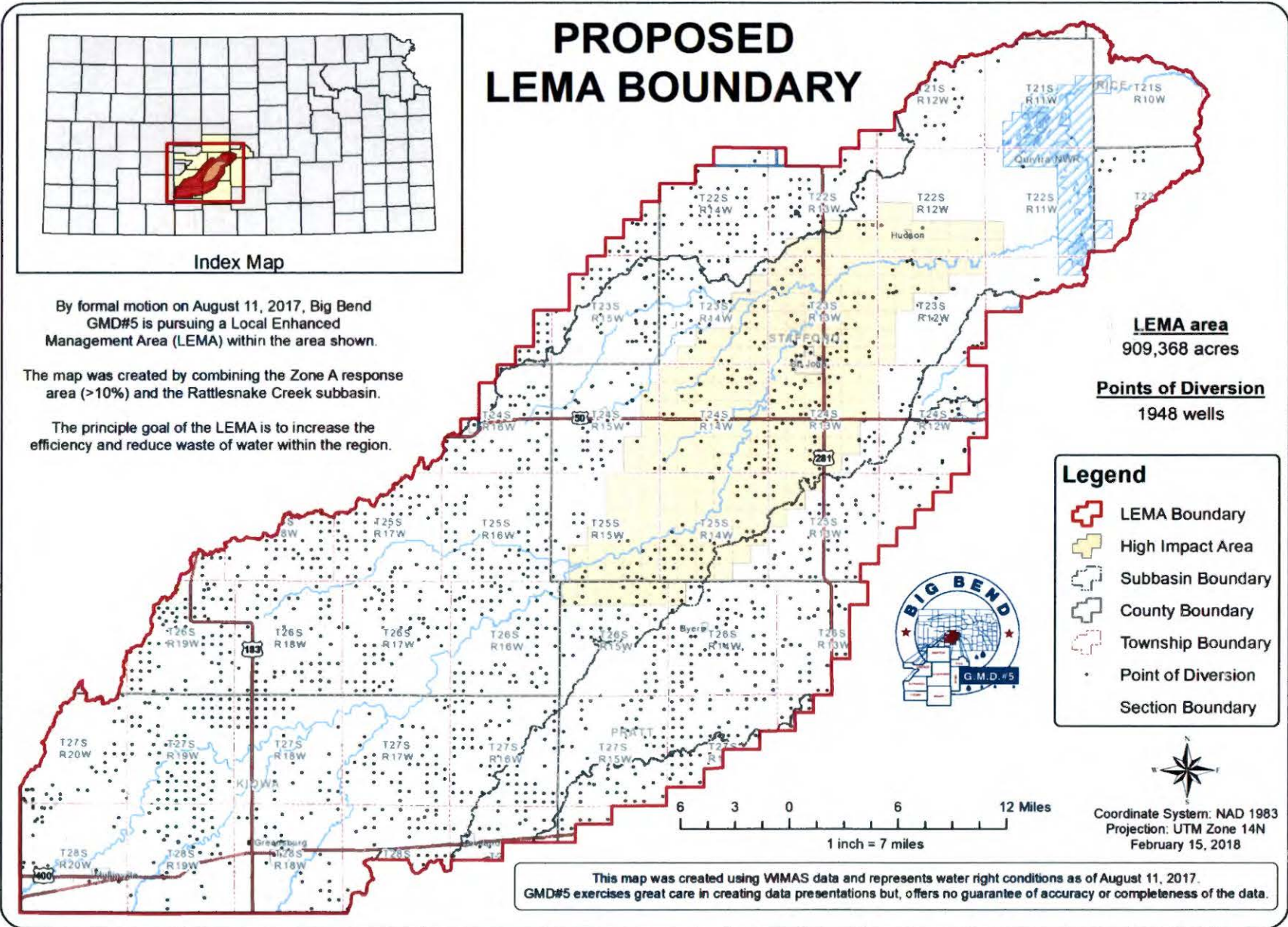


Exhibit B