

**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

**Written Response to Intervenors’
Motion to Provide Due Process Protections**

The Groundwater Management District No. 4, through its attorney, Adam C. Dees, Hays, Kansas, responds in writing to the Intervenors’ Motion to Provide Due Process Rights and the Intervenors’ Memorandum in Support of their Motion. This response will supplement the oral arguments made at the Pre-Hearing Phone Conference on October 31, 2017.

As the Chief Engineer has already determined that the Motion for Reconsideration and Memorandum in Support of the Motion for Reconsideration filed by the Intervenors’ is premature regarding the issues raised in that Motion and Memorandum in Support because many of those issues will be heard by the Chief Engineer at the Final Hearing and Ms. Owen’s Order on Initial Requirements was already heard and addressed the three conditions required to continue the Local Enhanced Management Area (LEMA) determination and designation process found in K.S.A. 82a-1041(b); this Response does not directly respond to that Motion for Reconsideration and Memorandum in Support.

Arguments and Authorities

In the 1945 Kansas Water Appropriation Act (KWAA), the Kansas Legislature dedicated the water within the state of Kansas to the use of the people, subject to the control and regulation of the state. K.S.A. 82a-701. K.S.A. 82a-1041 further describes one method of control and regulation allowed by the state of Kansas; and further the hydrological and policy conditions required to implement that method of control and regulation; the process the Chief Engineer would use to adopt corrective controls; and the ability of the Chief Engineer, and those he delegates his authority to, to monitor and enforce those corrective controls.

In enacting the LEMA statute, the Kansas Legislature unambiguously set for specific

notice requirements. The Kansas Legislature also gave the Chief Engineer control to set forth the character of the proceedings, whether informational, adversarial, or a combination of both. Here, KDA DWR complied with the notice requirements of K.S.A. 82a-1041(b). Therefore, no continuance of the matter or additional time is required or should be allowed and the November 14 and 15, 2017 Final Hearing should go forward. At that Final Hearing, the Chief Engineer can determine whether and how any cross-examination may take place of witnesses at the Final Hearing.

1. The Kansas Legislature provided timeframes and notice requirements giving the Intervenors, and others, sufficient opportunity to weigh-in during the LEMA process such that no additional time is required or should be allowed for the Intervenors to conduct discovery.

1.1. The Kansas Legislature stated that written notice given 30 days before the Initial and Final Hearings is sufficient. That notice was given.

The most fundamental rule of statutory interpretation and construction is that the intent of the legislature governs if that intent can be ascertained. *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010). Legislative intent is ascertained through the statutory language enacted by giving common words their ordinary meanings. *State v. Raschke*, 289 Kan. 911, 914, 219 P.3d 481 (2009). When a statute is plain and unambiguous, then no speculation as to the legislative intent behind it is unnecessary and parties need not read into the statute something that can readily be found within it. Where there is no ambiguity, there is no need to resort to statutory construction. Only if the statute's language or text is unclear or ambiguous do parties use canons of construction, legislative history, or other background considerations to construe the legislature's intent. *State v. Trautloff*, 289 Kan. 793, 796, 217 P.3d 15 (2009).

Under the Local Enhanced Management Area (LEMA) statute, the Kansas Legislature gave time frames that notice was required to be given to the public before the Initial Hearing and the Final Hearing. K.S.A. 82a-1041(b)(3). The Legislature required written notice be given 30 days before the Initial Hearing and written notice be given 30 days before the Final Hearing stating the time, place, and issues to be heard and determined at those hearings. K.S.A. 82a-1041(b)(3). That is clear and unambiguous. If the Legislature believed that more was required to protect the public's due process rights, then the Legislature had the ability to enact provisions addressing that concern.

In this case, the Kansas Department of Agriculture (KDA) Division of Water Resources (DWR) gave notice of the Initial Hearing on about July 12, 2017. Constance C. Owen, the Hearing Officer appointed by the Chief Engineer, held the Initial Hearing on August 23, 2017. From that hearing, Ms. Owen found that notice of the Initial Hearing was given as required by K.S.A. 82a-1041(b)(3).

Similarly, notice of the Final Hearing was given on about October 2, 2017, more than 30 days (about 43 days) before the Final Hearing. This met the 30 day notice requirement found in K.S.A. 82a-1041(b)(3). Intervenor's counsel also entered his appearance on October 10, 2017, which is also more than 30 days before the Final Hearing. Therefore, the requirements of K.S.A. 82a-1041(b)(3), unambiguously set by the Kansas Legislature, were followed.

1.2. The Intervenor had, and took advantage of, opportunities to receive information (or conduct discovery) and voice their concerns.

The Intervenor attempt to challenge that the written notice given 30 days before the Initial Hearing and the Final Hearing violated their with due process rights by not giving them an opportunity to conduct discovery. However, two of the Intervenor, Mr. Stramel and Mr. Friesen spoke at the Initial Hearing. Initial Hr'g Tr. 40:13-42:18 (Aug. 23, 2017) and 42:22-46:14 (Aug. 23, 2017), respectively.

Mr. Stramel testified at the initial hearing that, "I've followed this LEMA process pretty intensively for the last year or so." Initial Hr'g Tr. 40:15-16. Mr. Friesen specifically testified that he was on the Northwest Kansas Groundwater Management District No. 4's Board of Directors for 12 years. Some of those years during the formation, proposal, and creation of the SD-6 LEMA. Mr. Friesen further submitted written comments on about September 11, 2017 detailing his concerns with the current proposal. *See* Unsigned Letter from Mr. Friesen dated September 11, 2017 (held by KDA DWR).

After Mr. Friesen served on the GMD 4 BOD, Mr. Justin Sloan served on the GMD 4 BOD from February 2012 until April 2017. This LEMA process began in January of 2015 and continued until a formal proposal was submitted on June 9, 2017. The Proposal was discussed at the open, public GMD 4 BOD meetings on a monthly basis during that time period.

Mr. Friesen, or a person purporting to be Mr. Friesen; Mr. Bert Stramel, or a person purporting to be Mr. Stramel; and Mr. Saddler, or a person purporting to be Mr. Saddler, all signed in as present at the Colby public meeting. Proposal, 11-15.

Additionally, Mr. Saddler has already made written comments and submitted those written comments to add to the record for the Initial Hearing. *See* Unsigned and Undated Letter from Doyle E. Saddler (on file with the Kansas Dept. of Agric., Div. Water Res.). To argue that the intervenors did not have sufficient time or ability to collect information about the Proposal and prepare for the two hearings is disingenuous at best.

And again, the Intervenor want to revisit the findings made by Ms. Owens. The Intervenor had an opportunity to present evidence—several took that opportunity—and Ms. Owens' findings are a part of the record that should not be revisited. The Chief Engineer, in

delegating his authority to Ms. Owens, need not, and arguably cannot, revisit those findings of fact. In the 2017 reiteration of the SD-6 LEMA, the Chief Engineer conducted *both* the Initial Hearing and the Final Hearing. The Initial Hearing dealt with the K.S.A. 82a-1041(b) factors: (1) whether one or more of the circumstances specified in subsection (a) through (d) of K.S.A. 82a-1036 and amendments thereto, exists; (2) whether it is in the public interest to requires corrective controls; and (3) whether the geographic boundaries are reasonable. The Final Hearing dealt with whether the corrective controls were appropriate and enforcement mechanisms would aid in reaching the goal. In the SD-6 LEMA reiteration, the Chief Engineer found the conditions existed in the Initial Hearing and that the corrective controls and enforcement mechanisms were appropriate in the second hearing. In this LEMA process, Ms. Owens found those three facts exists and forwarded the matter to the Chief Engineer to set a Final Hearing. Her findings should not be revisited.

Last, to allow a continuance and further discovery, outside of the time frame contemplated by K.S.A. 82a-1041(B)(3) or any delay of the LEMA would potentially allow water users to increase the acreage they are irrigating during 2018, which could be factored into their LEMA allocation. The GMD 4 BOD, in its Proposal and when it made its Proposal, recognized that it had water use data through about December 31, 2015. In considering increasing a LEMA allocation, the GMD 4 BOD has requested staff to consider additional data from 2016 and 2017 when determining LEMA allocations. Adding an additional year, 2018, would give water users an opportunity to irrigate additional acres and thereby increase their LEMA allocation. Therefore, a delay for a year would potentially be detrimental to implementing the LEMA and additional time should be allowed to collect information, conduct discovery, or otherwise delay these proceedings.

2. While the Chief Engineer need not allow cross-examination of witnesses at the Final Hearing, he may allow it as long as all parties are allowed to cross-examine all witnesses.

The LEMA statute (or the Intensive Groundwater Use Control Area statutes) does not require cross-examination be allowed of witnesses. In fact, the SD-6 LEMA proceedings were information only and the Chief Engineer did not allow cross examination. In this case, no parties requested cross-examination at the Initial Hearing and no cross-examination of witnesses occurred. As the Chief Engineer noted in the Pre-Hearing Phone Conference held on October 31, 2017 in this matter, the Legislature does not appear to contemplate LEMA hearings to be adversarial in nature—they are Legislative in nature, which allows the Chief Engineer to ask questions of the witnesses, but the LEMA hearings are not designed to be adversarial and to allow cross-examination.

In outlining the Final Hearing agenda at the Pre-Hearing Phone Conference, which the Chief Engineer will provide greater detail of in his directions arising from the Pre-Hearing Phone Conference, GMD 4 will present its witnesses and testimony first, followed by KDA DWR,

then the Intervenors, and then the public will have an opportunity to comment. In previous hearings, GMD 4 and KDA DWR are then given an opportunity to respond to the previous testimony presented. The Chief Engineer could allow cross-examination of a limited nature of the GMD 4, KDA DWR, and Intervenors' witness but he is not required to. And if he does, then counsel for GMD 4 and KDA DWR should be allowed to cross-examine witnesses called by the Intervenors and other parties.

Conclusion

For the reasons above, the GMD 4 requests the Chief Engineer deny the Motion to Provide for Due Process Protections, not cause any delay of the Final Hearing, and provide further and other relief as the Chief Engineer determines is fair and equitable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 1 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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