ELECTRONICALLY FILED
2019 Oct 15 AM 11:17
CLERK OF THE GOVE COUNTY DISTRICT COURT
CASE NUMBER: 2018-CV-000010

**IN THE DISTRICT COURT OF GOVE COUNTY, KANSAS**

**JON AND ANN FRIESEN; FRIESEN FARMS, LLC. ET. AL.,**
**Plaintiffs,**

**v.** **Case No. 2018-CV-000010**

**DAVID BARFIELD, P.E., THE CHIEF ENGINEER OF THE STATE OF KANSAS, DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES, IN HIS OFFICIAL CAPACITY,**
**Defendants.**

# MEMORANDUM DECISION

Before the Court is the Amended Petition for Judicial Review. The Court has reviewed the Memorandum in Support of Petition for Judicial Review filed by Petitioners, the Response Memorandum to Petitioners' Memorandum filed by Defendant Chief Engineer, the Response to Petitioners' Memorandum filed by Northwest Kansas Groundwater Management District Number 4, and all associated Replies. The Court has also heard oral argument and reviewed all applicable law. The court makes the following decision:

## I. Factual/Procedural History

Prior to 1945 Kansas governed its waters through the common law rule of riparian rights. This changed with the passage of the Kansas Water Appropriation Act (KWAA) in 1945. Under the new laws, water rights would be governed by the prior appropriation doctrine. The Act changed the way water rights would be governed in several ways.

First, it decreed that both surface and groundwater were "dedicated to the people of the state". K.S.A 82a-702. This meant that the State may regulate all the water and no single person owned it. People could now only own the right to divert water from its source.

Second, diversion of water was regulated by the principle of "first in time, first in right". K.S.A 82a-707(c). This meant that whoever first diverted water from a source for beneficial use has priority of rights over any subsequent person who diverts. The Act divided up persons that divert water in to the following three categories: (1) vested right holders (those who held rights prior to the KWAA); (2) senior right holders (those who have dates of priority); and (3) junior right holders (those without priority). This created a pecking order that determined who would lose their rights if the water supply became inadequate to satisfy all water right holders.

Finally, the KWAA created the position of the Chief Engineer. The Chief Engineer's governing statute gave that office the power to "enforce and administer the laws of this state pertaining to the beneficial use of water and shall control, conserve, regulate, allot and aid in the distribution of the water resources of the state for the benefits and beneficial uses of all of its inhabitants in accordance with the rights of priority of appropriation". K.S.A 82a-706. To fulfill his or her duties the KWAA required the Chief Engineer to create "reasonable regulations". K.S.A. 82a-706a. The legislature's mandate allowed the Chief Engineer to give appropriation permits, require measuring of

water use, create field offices, and bring action against those who violate the law.

In 1972, seeing the need for conservation of water resources and to prevent economic deterioration, the legislature passed a law allowing the creation of Groundwater Management Districts (GMD). K.S.A 82a-1020. The purpose is to protect and conserve the state's groundwater, in ways consistent with state law. K.S.A 82a-1020. Currently five GMD's exist in the state. A GMD is a "body politic" created by petition and approved by the Chief Engineer. Its board members are elected by the eligible voters within the GMD. K.S.A 82a-1020-1035.

In 1978 the legislature saw fit to allow the introduction of Intensive Groundwater Use Control Areas (IGUCA) in regions where groundwater needed additional conservation measures. These areas can be created by the order of the Chief Engineer whenever any one of the five following circumstances arise: (1) groundwater levels in the area in question are declining or have declined excessively; (2) the rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area; (3) preventable waste of water is occurring or may occur within the area in question; (4) unreasonable deterioration of the quality of water is occurring or may occur within the area in question; or (5) other conditions exist within the area in question which require regulation in the public interest. K.S.A 82a-1036. Anytime that these conditions are found to exist the Chief Engineer may do the following: (1) formulate a provision closing the IGUCA to any further

appropriation of groundwater and deny further permits for appropriation; (2) adopt a provision determining the permissible total withdrawal of groundwater in the IGUCA 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 an area in accordance with the relative dates of priority of such rights; (3) adopt a provision reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the intensive groundwater use control area; (4) adopt a provision requiring and specifying a system of rotation of groundwater use in the intensive groundwater use control area; or (5) adopt any one or more other provisions making such additional requirements as are necessary to protect the public interest. K.S.A 82a-1038.

In 2012 the legislature passed another conservation act known as the Local Enhanced Management Area (LEMA) Act. This Act allows for the exact same restrictions that IGUCA's allowed for under the same circumstances as the IGUCA's dictate. The main difference is that the GMD voluntarily installs the LEMA and the Chief Engineer enforces its regulations while with the IGUCA's, the Chief Engineer installs the IGUCA and also enforces the regulations. Essentially the GMD acts as a legislative style body that, after proper hearings, creates a LEMA to target areas within its borders that require extra conservation measures.

In 2012 GMD4 was the first of the GMD's to use the LEMA Act to create the Sheridan 6 LEMA, which according to the GMD, was a great success. In

2015 GMD4 announced plans to install a district wide LEMA that would encompass all of GMD4. Throughout 2015 the GMD4 Board held nine public meetings discussing appropriate methods to promote conservation within the borders of GMD4. Planning continued into 2016 and more public meetings were held. According to GMD4 many of the 2016 meetings were held open to public comment and questions. By June 8, 2017 the Board found the district wide LEMA plan satisfactory and submitted the plan to the Chief Engineer as required by law. K.S.A 82a-1041. The Chief Engineer approved the District-Wide LEMA Plan on June 27, 2017.

After accepting the LEMA Plan, the Chief Engineer began the process of initiating legally required public hearings. Notice of the meetings was given to water rights holders within GMD4 through mail and published in local newspapers. Two public hearings were held. Oversight of the hearings was delegated by the Chief Engineer to a "Ms. Constance Owens". After the first public hearing was held, Petitioners motioned for due process protections. The motion was approved by the Chief Engineer. According to the Chief Engineer the second hearing afforded the Petitioners ample opportunity for cross examination of evidence and witnesses.

After the second public hearing on November 14, 2017, the Chief Engineer found that the LEMA plan was satisfactory to address the water conservation issues within GMD4 and the plan was approved. On April 13, 2018 the Chief Engineer issued the Order of Designation creating the GMD4 District-Wide LEMA. Shortly after, Petitioners sought review of the LEMA Order

by the Secretary of Agriculture. This request was denied. Petitioners then timely and properly filed for judicial review of the plan under the Kansas Judicial Review Act.

Petitioners claim that the GMD4 District-Wide LEMA must be struck down for several reasons. First, and most importantly, the Petitioners claim that the LEMA Plan violates the KWAA and the prior appropriation doctrine because it unlawfully diminishes the diversion rates of irrigators despite their seniority of right. Second, Petitioners contend that regulations promulgated by GMD4 and the Chief Engineer are arbitrary and capricious, and the decisions were made without regard to their rights of due process. Finally, the Petitioners contend that the LEMA Plan violates the State and Federal Constitutions.

**II. Standard of Review**

The Kansas Judicial Review Act (KJRA) was created by statute in order to allow appellate-style review of agency actions and decisions by District Courts. To be eligible for judicial review under the KJRA a petitioner must meet the following prerequisites: (1) have standing; (2) have no more administrative remedies available; (3) timely file a proper petition; and (4) the agency action challenged must be a final action under most circumstances. K.S.A. 77-607(a).

Standing is usually the most argued over precondition. Common law typically describes standing as when a party has a cognizable injury that is actual or imminent. *Sierra Club v. Moser*, 298 Kan. 22 (2013). To have standing the issues brought before the court by the petitioner must not be moot, unripe, or pose a political question. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875,

896 (2008). In addition to the common law rule of standing a petitioner must also meet at least one of four other requirements as prescribed by the KJRA. The petitioner must (1) have the agency action in question specifically directed at them; (2) have been a party to the agency proceeding that led to the agency's action; (3) be subject to the rule or regulation which is the subject of the petition before the court; (4) or have another statute bestow standing upon them. K.S.A. 77-611. In the present case the Petitioners have standing. As irrigators effected by the actions of the GMD and the Chief Engineer they have sufficient standing under common law as well as the rules of the KJRA.

The second and third requirements for the KJRA are not difficult to show. The current Petitioners have exhausted the only administrative remedy at hand when their request for review by the Secretary of Agriculture was denied. Then according to both the Petitioners and the Defendants a proper brief was timely filed in accordance with the KJRA.

The final prerequisite for judicial review is that the action by the agency be final in nature. These are actions taken by agencies that are no longer under review. *Sprint Comm'cs. Co., LP, v. Corporation Comm'n*, 45 Kan. App. 460 (2011). The case under current review should be considered a final agency action under the KJRA. Defendants argue that the Chief Engineer's order and the GMD's LEMA Plan are not final actions. This is so because the GMD4 could be considered a legislative body whose actions are not reviewable under the KJRA and because the LEMA plan is not final action as it must be reviewed

and renewed after its designated expiration date. These arguments are not persuasive. The court considers the action final.

In addition to the KJRA's limit on types of petitioners, it also limits the types of cases a District Court can review, and which standard of review the court can use. Absent any other provision of law, the KJRA allows District Courts to review only eight types of cases: (1) cases involving an agency action, statute, regulation or rule that is unconstitutional on its face or as applied; (2) an action taken by an agency beyond its jurisdiction; (3) failure of an agency to make a decision when a decision is required; (4) an agency's erroneous interpretation of law; (5) an agency's unlawfully conducted procedure; (6) the persons within the agency taking the action were not qualified to do so; (7) the action is not supported by facts or evidence within the record, or (8) the agency's action was otherwise unreasonable, arbitrary, or capricious. K.S.A. 77-621(c).

The court must apply a *de novo* review to the first six types of claims under the KJRA. This means that the court may not look at evidence beyond the record. The final two types of claims have to do with the agency's action in light of the evidence. K.S.A 77-621(c). In deciding whether the agency's action was supported by factual evidence or whether it was arbitrary or capricious, the court may look to evidence not provided within the record to review whether the action was appropriate. K.S.A 77-619.

In the current case, Petitioners believe they have claims under the first, fourth, fifth, sixth, seventh, and eighth types of claims in K.S.A 77-621. This

means that some issues must be decided through *de novo* review and some may require further evidence from beyond the record. It should also be noted that the long time practice of courts giving deference to an agency's interpretation of a statue, known as operative construction, no longer stands. *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552 (2013).

**III. Whether the District-Wide LEMA Plan and the LEMA Act that allows its designation within GMD4's borders are unconstitutional on their face, or as applied by GMD4 or the Chief Engineer.**

Petitioners claim the LEMA statute is unconstitutional for multiple reasons. First, they claim it unlawfully allows the Chief Engineer to place restrictions on appropriation permits that had been perfected in "reliance on public policy" at the time the permits were issued. Next, Petitioners claim the Statue does not provide a definitive standard for GMD4 or the Chief Engineer to follow. The third Petitioners contend the LEMA Plan violates the Petitioners "equal protection rights" because it discriminates against irrigators without justification. The final three arguments pressed by the Petitioners in this area are that the Statute adversely affects their vested property rights, that the appeals process for the Plan is inadequate, and that the records keeping process contained in the statute is unconstitutionally vague. Each of these claims will be discussed and answered individually below.

**A. Whether new restrictions imposed by the LEMA Plan and the Chief Engineer on the appropriation permits are unlawful, or a collateral attack on the Petitioners' property rights.**

Petitioners claim that the new restrictions placed on their existing permits are a "collateral attack" on a perfected water right that cannot lawfully

be changed by the Chief Engineer. A water right becomes perfected when the water at the location permitted is put to beneficial use. Once this occurs the water right becomes a property right just like any other. This does not mean the holder owns the water itself, but only the right to divert a certain amount, in a certain location. "Collateral attack" is a term typically used when defining a secondary and separate claim with the same operational questions of law brought before a trial court in order to overturn a prior decision.

Petitioners are incorrect to define the Chief Engineer's attempt to put new restrictions on old permits as a "collateral attack". However, there may be a satisfactory argument that Chief Engineer may not change perfected rights with the new LEMA Plan restrictions. Citing *Clawson*, Petitioners contend that the water rights granted and perfected prior to the LEMA Plan cannot be changed once perfected. The Court of Appeals ruled in *Clawson* that the Chief Engineer could not permanently alter perfected water rights except in instances of abandonment or when a change-of-use request was filed. *Clawson v. Div. of Water Res.*, 49 Kan.App.2d 789, 807 (2013).

The Chief Engineer distinguishes *Clawson* from the present case. The current case contains several distinguishing factors from *Clawson*. First, the current case involves restrictions authorized by the LEMA statute. The *Clawson* court reaffirmed in part *Wheatland Elec. Co-op., Inc., v. Polansky*, ruling that the Chief Engineer could enforce new restrictions on previously perfected permits if expressly granted by statute. *Wheatland Elec. Co-op., Inc., v. Polansky*, 46 Kan.App.2d 746. This is a strong argument by the Chief

Engineer as the language of the LEMA statute appears to be an express grant to the Chief Engineer that allows for the adoption of new restrictions on old water rights. K.S.A 82a-1041.

A second counter-argument by the Chief Engineer is that the new restrictions are not permanent in nature. The *Clawson* court made clear that the Chief Engineer could not make "permanent" changes to a water right, except in abandonment cases, or when there is a change-of-use application. *Clawson*, 49 Kan.App.2d at 807. The LEMA statute requires that all LEMA's be reviewed under certain conditions, or after a certain time period has passed. K.S.A 82a-1041(j). More specifically, the current GMD4 District-Wide LEMA Plan allows for review of the plan every five years and withdrawal allowances change based on the amount of decline. Because of this both the Chief Engineer and GMD4 argue that the LEMA Plan does not permanently change the rights, but rather temporarily restricts withdrawals until aquifer decline is decreased.

Petitioners claim that according to *Clawson* the Chief Engineer may only make changes to perfected rights under two circumstances, but brush over the courts affirmation of *Wheatland Elec. Co-op.* The LEMA statute gives express authority to the Chief Engineer to make certain changes to perfected permits under certain conditions. K.S.A 82a-1041. So long as the LEMA Plan restrictions falls within the purview of the statute then the Chief Engineer is able to temporarily change the permit so long as the LEMA is in place.

**B. Whether the LEMA Statute provides a definitive enough standard to guide the GMDs or Chief Engineer to guide them when enacting a LEMA.**

Petitioners' second argument is the LEMA Statute is unconstitutional because there is not a definitive statement to guide the Chief Engineer or the GMD's, and it does not contain any protection against arbitrary action, unfairness, or favoritism. Petitioners claim that the term "excessive decline" is not a sufficient guiding principle to govern the Chief Engineer and the GMD's regulations. Defendants counter these arguments by claiming that the LEMA statute contains "robust protections" for the water rights holders. This includes public hearings, specific criteria to be reviewed at such hearings, review of GMD regulations by Secretary of Agriculture, and judicial review under the KJRA.

When writing laws that delegate legislative power to administrative agencies, the statute must contain reasonable and definite standards for the agency to follow. A statute may be a broad outline that allows for agencies to "fill in the blanks". The sufficiency of the standard depends upon the type of agency and great leeway is granted to the legislature when deciding these standards. *Citizen's Util. Ratepayer Bd. v. State Corp. Com'n*, 264 Kan. 363, 403 (1998). Agencies overseeing complex areas require less detailed governing statutes. *Kansas Gas & Elec. Co. v. Kansas Corp. Comm'n.*, 239 Kan. 483, 495 (1986) (recognizing that matters concerning utilities is complex, and administration of the field is better left to the KCC).

Petitioners are incorrect in their analysis of the LEMA Statute not providing sufficient guidance to the agencies. It limits and guides the discretion of both Chief Engineer and the GMD. The LEMA Statute does not grant as much discretion to the Chief Engineer as Petitioners claim. In fact the Chief Engineer is bound by the statute to decide on only six parts of any LEMA plan that is brought before him by the GMD. Kan. Ann. Stat. 82a-1041(a). Similarly the GMD may only put a LEMA plan into place if one of five prerequisites occurs within the LEMA area. These five scenarios are dictated by the IGUCA statute and only one of them involves "excessive decline". Kan. Ann. Stat. 82a-1036(a)-(e). This coupled with the fact that water conservation is a complex field in which decisions should be made by agency experts make the LEMA Statute constitutional.

In addition, the Statute provides sufficient safeguards against favoritism and arbitrary action. Hearings must be held by the Chief Engineer under statute and LEMA plans are reviewable by the Secretary of Agriculture and by way of the KJRA. Also a GMD's is an elected body that can be held accountable by the eligible voters within its borders. Therefore the LEMA statue is definite enough to guide the Chief Engineer and the GMDs in their duties.

**C. Whether the LEMA Plan violates the Petitioners' equal protection rights under State and Federal Constitutions.**

Petitioners contend the LEMA Plan is unconstitutional because it violates their equal protection rights under the 14th Amendment of the US Constitution and the Kansas Constitution Bill of Rights. Petitioners argue their right to equal protection under the law is being violated because only irrigators are

subjected to new LEMA regulations while other water rights holders are exempt, and because the Plan completely disregards the requirement that the Chief Engineer distinguish appropriators by date of priority, but not type of use. Defendants contend there is no equal protection violation because there are "no indistinguishable classes being treated differently" and the KWAA does not require priority dates to be used to determine senior rights when there is still enough water to satisfy all.

Both the State and Federal Constitutions secure a person's right to equal protection under the law. Kan. Const. Bill of Rights § 1; U.S. Const. Amend. XIV § 1. Courts are required to construe statutes as constitutional whenever possible. When validity is questioned a court must "resolve all doubts in favor of its validity". *Miami Cnty. Bd. of Com'rs v. Kanza Rail-Trails Conservancy Inc.*, 292 Kan. 285, 315 (2011). To determine whether the discrimination by a statute is valid, courts apply a three part test. First, the court must determine whether the statute divides people into classes and whether those classes are treated differently from each other. If the court finds that similarly situated people are being treated differently then there is a question for the Court. The second part is to determine which one of three scrutiny levels to apply to the statute in question. The rational basis standard is used to determine whether the classification bears a rational relationship to a valid legislative purpose. The heightened scrutiny standard is used to determine whether the classification substantially furthers legitimate legislation. The strict scrutiny standard is used to determine whether classification is necessary to serve a

compelling state interest. *Id.* at 316. Finally, once the court determines the level of scrutiny it must analyze whether the statute is valid.

The Chief Engineer's contention that there is no equal protection argument because the LEMA Statute does not place appropriators in to indistinguishable classes is correct. However, the LEMA Plan itself seems to do so and, furthermore, the KWAA divides appropriators into classes when the water supply cannot satisfy all appropriators. Kan. Ann. Stat. 82a-707(b). It is unlikely that this actually creates an indistinguishable group being treated differently because the type of water usage varies widely enough to make the categories distinguishable. Regardless of this the test will be applied.

The first step is determining whether the statute is to determine the class that is being targeted by the statute, or in this case, the LEMA Plan regulations. The Plan uses the same categories as the KWAA, dividing water rights holders into the following distinguishable categories: domestic; municipal; irrigation; industrial; recreation; and water power sources. The regulations then call for irrigators to cut a certain amount of water from their yearly appropriation, while allowing other classes of water rights to maintain or voluntarily reduce their appropriation amounts.

The second step is to determine which level of scrutiny to use. The rational basis standard is the best fit because the Petitioners are not members of a suspect class and their fundamental rights are not at stake. However, even if the scrutiny were at a higher standard the Petitioners' equal protection argument fails.

The final step is analyzing the statute or regulation and determining whether the classification created by the Plan is rationally connected to the purpose of the Plan. The LEMA statute, and the subsequent GMD4 District-Wide LEMA Plan, were created in order to slow or conserve the quickly diminishing groundwater of the State. In order to do this the Defendants diminished the amount of groundwater irrigators could withdraw from the area. Their reasoning was that irrigators are responsible for approximately 97% of all groundwater used. Because the irrigators take a great majority of the groundwater inside GMD4's borders, it is rational that the irrigator's appropriation be limited in order to achieve the purpose of the LEMA Plan. Even under the other higher levels of scrutiny this reasoning prevails.

In conclusion, the LEMA Statute and the GMD4 LEMA Plan meet the equal protection standards of the Federal and State Constitutions. Even if the class that was created by the Plan were indistinguishable, the class and the regulations thrust upon it survive the rational basis test and would pass other higher standards of scrutiny. The regulations are a logical and rational way of fulfilling the purpose of the LEMA Statute and Plan.

**D. Whether the LEMA Statute cannot adversely affects the Petitioners' vested property rights.**

Petitioners also argue the LEMA Statue cannot adversely affect their vested property rights. They make this argument in two ways. First, Petitioners claim the legislator cannot retroactively change their vested water rights. Second, they claim the LEMA Plan's required reductions are an unconstitutional taking by the government for a public purpose.

The KWAA divides water rights into the two categories of vested rights and appropriation rights. Vested rights are water rights perfected prior to 1945, when the KWAA was put in place. Appropriation rights were granted by the Chief Engineer after the Act was in place. Petitioners seem to claim that both vested water rights and appropriation water rights become vested once resources are committed, and the rights are perfected and therefore cannot be adversely affected by the LEMA Statute or LEMA Plan. This may be true for vested water rights under the KWAA because the rights were created under common law. However, for the appropriation rights this is not true. Using the same rule put forth in *Clawson*, that appropriation permits may not be changed permanently, and applying it to this argument, that even though the rights are perfected they can still be temporarily changed. As stated before, the LEMA Plan does not permanently change the permits. The Plan has an expiration date and must be reviewed on a regular basis by statute. The GMD is a political and legislative body that can vote on a sooner review of the Plan or elect new board members in order to change it. This argument is the same as before, but simply phrased a different way.

Next Petitioners claim the new limit on water usage constitutes an unconstitutional regulatory taking of private property for public use. The Defendants subvert this argument by claiming that the new regulations surpass the *Penn Central* test used by the Kansas Supreme Court in *Frick v. City of Salina*. The *Penn Central* test states that there are only the following three scenarios in which a regulation can turn into a taking: (1) when there is

a permanent invasion of the property by the government; (2) when the owner is completely deprived of all beneficial use of the property or; (3) a weighing of three factors that include: (a) the economic impact on the petitioner; (b) the extent that the regulation has on distinct, investment backed expectations, and; (c) the character of the governmental action. *Frick v. City of Salina,* 290 Kan. 869. (2010).

Petitioners' claims do not rise to the level of a regulatory taking. First, the LEMA Plan is not permanent in nature. It has a designated expiration date, it is subject to review upon petition by the voting GMD members, and the regulations will end when the aquifer is sufficiently recharged. Second, the Petitioners are not completely deprived of all economical beneficial use of the property. The LEMA Plan allocates a five year allocation of water to each irrigator in GMD4. While the Petitioners may have to use less water, they are not completely deprived of all economic benefit. In fact, Defendants claim that it is likely that the Petitioners may even gain an economic benefit from the reduced water usage.

The final assessment of the LEMA Plan is the three-part "catch all" test. The court must weigh the three factors together. First, according to the Defendants, the economic impact to the Petitioners is unknown. However, they allege in their brief that the Petitioners will be harmed more economically if the aquifer is allowed to dry up completely. If this allegation were backed by sufficient evidence then the LEMA Plan should stand. The second question is whether the LEMA Plan negatively impacts distinct investment back

expectations. Once again, it is currently unknown whether the LEMA Plan will have a negative impact. However, Defendants allege there is evidence showing that even with the LEMA Plan in place the Petitioners' return on their investment will likely be the same or more than if the LEMA were not in place. Finally, the court must look at the nature of the government action. Because the LEMA Plan is for the "common good" it passes the final factor. GMD4 claims the LEMA Plan was created in the interest of public welfare. As such the governmental action should not be considered a taking.

Petitioners argument that perfected water rights are vested property rights and cannot be temporarily changed fails. As stated the LEMA Plan does not make permanent changes to any of the water rights within GMD4. Nor does the LEMA Plan constitute a taking. It surpasses the first two parts of the *Penn Central* test because it is not a permanent physical invasion of the Petitioners' property and it does not completely deprive the Petitioners of all economic benefit. Finally, if the allegations by the Defendants concerning the negative economic impact are true then the LEMA Plan is not considered a taking under the *Penn Central* test.

**E. Whether the LEMA Plan appeal process is unconstitutionally inadequate.**

Petitioners claim the appeal process for the LEMA Plan is inadequate because it does not provide for review by an independent unbiased tribunal. According to the Petitioners, the LEMA Plan restricts appeals to only one category: "eligible acres and allocated water". No other issues may be appealed through the LEMA Plans appeal process. Due to the fact that the Petitioners

are currently appealing a variety of other issues this argument is weak. While the Petitioners may be correct that the GMD4's LEMA Plan does not contain a provision for appeal, the actual LEMA Statute does. The LEMA Statute allows for review under K.S.A 82a-1901, which in turn allows for review under the Kansas Judicial Review Act through the Kansas Administrative Procedure Act. K.S.A 82a-1041(j); K.S.A 82a-1901.

**F. Whether the LEMA Plan's record keeping requirements are unconstitutionally vague.**

Petitioners contend the record keeping requirements contained in the LEMA Plan are unconstitutionally vague because the Plan does not define an "alternative method" of recording water usage. Defendants disagree, claiming that the only difference between the previous recording requirements under State law and the current requirements under the LEMA Plan is the frequency that meters should be checked and recorded.

Under K.S.A. 82a-732, water rights holders are required to report their usage annually and failure to do so may result in a civil penalty. K.S.A. 82a-732. The Department of Water Resources added more detailed procedures to K.S.A. 82a-732 with a regulation that defined with more specificity the expectations of the DWR. It requires that the water right holder record (1) the beginning and ending readings of meters each year; (2) the units in which the meter registers; and (3) the quantity of water diverted in the same calendar year in the same units as the meter registers. K.A.R. 5-35e(b). The LEMA Plan extends the requirements of the DWR regulation to require a bi-weekly inspection and recording of the meter. GMD4 District-Wide LEMA Plan 8a(1). It

also allows for water rights holders to come up with an alternative method for measuring the operating time of the well. GMD4 District-Wide LEMA Plan 8(a)(2). The LEMA Plan does not define what any alternative methods are.

Both sides cite *City of Lincoln Center v. Farmway Co-Op, Inc.*, in order argue their case concerning whether this part of the regulation is too vague. In that case the court used a two-prong analysis to determine whether a statute or regulation was unconstitutionally vague. The first prong requires that the statute must give sufficient notice to those tasked with following it, and that it gives a definite warning against the prohibited or required activity. *City of Lincoln Center v. Farmway Co-Op, Inc.*, 298 Kan. 540, 545 (2013). For a regulation to be unconstitutional the terms of the statute or regulation must be "so vague that persons of common intelligence must necessarily guess at its meaning". *Id.* The second prong of the test requires that the terms of the statute or regulation be precise enough to protect persons from arbitrary discrimination by those who are to enforce it. *Id.*

When reviewing the constitutionality of a regulation or statute the court must presume that it is constitutional, resolve all doubts in favor of constitutionality, uphold the ordinance if there is any reasonable way to do so, and *only* strike down the ordinance when it is clearly unconstitutional. *Id.* This means that the Petitioners have a weighty burden of proving the unconstitutionality of the regulation. *Id.*

The LEMA Plan requires that water rights holders do at least one of two things. It requires them to inspect and record meter readings on a bi-weekly

basis or, alternatively, it allows them to "install or maintain an alternative method of recording," other than the meter. When the first sentence is read alone, the regulation is rather vague. However, it is followed by a not so vague condition for the alternative method, stating "[t]his information must be sufficient to be used to determine operating time in the event of a meter failure," meaning that whatever alternative method is used, it must contain the equivalent information as the meter. This sufficiently puts water appropriators on notice and satisfies for first prong of the test. The second prong of the test is also met by this second sentence of the regulation. It gives a fairly clear objective standard for those enforcing the regulation to follow, preventing arbitrary discrimination.

**IV. Whether the Chief Engineer or GMD4 erroneously interpreted the KWAA, GMD Act, LEMA Act or LEMA Plan.**

The main crux of the Petitioners' argument is that of statutory interpretation. Petitioners' contend that the LEMA Plan, LEMA Statute and GMD Statutes must be read *in pari materia* with the KWAA. This would mean that the LEMA Statute and GMD Statute would be required to apply the prior appropriation doctrine. By interpreting the statutes in this fashion, the GMD4 LEMA Plan would violate state law and be unconstitutional. On the other side, the Defendants contend that the statutes are not ambiguous and that the statutory interpretation by the Petitioners is not needed.

In the past, courts have given deference to agency interpretations of laws. However, since the decision in *Douglas v. Ad Astra Info. Sys.,* the doctrine of operative construction has been "abandoned, abrogated, disallowed,

disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal". *Douglas v. Ad Astra Info. Sys. L.L.C.*, 296 Kan. 552, 556 (2013). Now the court must decide whether or not the statutes in question are ambiguous and if so interpret them without input from the agency.

The Petitioners' claim is reasonable. The KWAA, the GMD statute, and the Chief Engineer's governing statute all call for the use of the prior appropriation doctrine. K.S.A. 82a-707; K.S.A. 82a-1028(n); K.S.A. 82a-706. If the court finds this to be true then the LEMA Plan, LEMA Statute, and the IGUCA statutes must be consistent with the prior appropriation doctrine. It would make the current LEMA Plan unlawful and also make the majority of the corrective controls allowed by the LEMA statute and IGUCA statute unlawful and make the statutes effectively useless.

While Petitioners could be correct in contending the plain reading of the statutes may be ambiguous, the plain meaning of the words are not as important as the legislature's intent. "It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs, if that intent can be ascertained". *State v. Reider*, 31 Kan.App.2d 509 (2003). Fortunately, for the Defendants it appears that the Legislatures intent was rather clear. The Legislature passed the IGUCA statute in 1978 with the conservation as its goal. Years later they emulated the IGUCA when they enacted the LEMA Statute.

Both statutes allow the Chief Engineer or the GMD to impose corrective controls on water appropriators. These controls directly conflict with the prior appropriation doctrine. It should be presumed that the Legislature writes laws the way they are for a reason. Had the Legislature meant for the prior appropriation to apply to LEMA's and IGUCA's then there would have been mention of it within the statute. Instead, the Legislature authorized the corrective controls that directly and unambiguously contravene with the prior appropriation doctrine. The statutes are only unclear once they are read in tandem with the KWAA.

Defendants make another interesting analysis of the KWAA. They claim the statute only calls for use of the prior appropriation doctrine when there is not enough water to satisfy all appropriators. *Garetson Bros. v. American Warrior, Inc.*, 51 Kan. App.2d 370, 388 (2015). Currently there is enough water to satisfy all appropriators and the corrective controls are only a preemptive measure to prevent a scenario in which prior appropriation would have to be used. Whether this argument holds water is based on whether to read the IGUCA and LEMA Statutes individually or with the KWAA and GMD Acts.

Petitioners' reading of the statutes would cause an issue later on down the road. Ruling the LEMA Plan and LEMA Statute unlawful would essentially rule the IGUCA's unlawful because the statutes are nearly identical. A ruling against the statutes would hamstring the GMD's and Chief Engineer's ability to institute conservation controls within the State. This may cause irreparable harm to the State's groundwater supply and, in turn, the State economy.

**V. Whether the Chief Engineer unlawfully conducted procedure in designating the LEMA Plan.**

Petitioners claim that the Chief Engineer violated the Kansas Administrative Procedure Act (KAPA). First, they claim that the June 27, 2017 letter, which concluded that the LEMA Plan was satisfactory and consistent with state law, did not provide findings of fact and conclusions of law as required by the KAPA. Second, Petitioners claim that the Chief Engineer's Order of Designation violates KAPA because it does not address key issues within the Order.

**A. Whether the June 27, 2017 letter violates the KAPA because it does not provide findings of fact or law.**

The June 27, 2017 letter does not violate the KAPA. Defendants are correct in their contention. The KAPA requirement that requires orders to contain findings of fact does not apply to the GMD Act, LEMA Act, or Chief Engineer. KAPA only applies to agencies whose governing statutes call for it. Kan. Ann. Stat. 77-503(a). The only KAPA requirement mentioned within the governing statutes is that of K.S.A 82a-1901, which allows for orders by the Chief Engineer to be reviewed by the Secretary of Agriculture. Kan. Ann. Stat. 77-527.

**B. Whether the April 13, 2018 Final Order violates KAPA because the Chief Engineer did not address constitutionality.**

Petitioners contend the Chief Engineer incorrectly conducted procedure because he did not clarify concerns about the constitutionality of the Final Order. However, the KAPA requirements regarding orders do not apply to the Chief Engineer, LEMA Act, or the GMD's. Even if the KAPA order requirements

did apply, constitutional issues must be decided by the courts. *Katz v. Kansas Dept. of Rev.*, Kan.App.2d 877, 895 (2011).

**VI. Whether the Chief Engineer unlawfully delegated his statutory duty to preside over the initial hearing.**

Petitioner's argue that the Chief Engineer unlawfully delegated the oversight of the initial LEMA hearing. They refer to the LEMA statute which states, "the Chief Engineer ***shall*** conduct an initial public hearing". K.S.A. 82a-1041(b). The statute appears to place a duty for the Chief Engineer to conduct the hearing himself and not delegate. Defendants counter this by citing the Attorney General's opinion of the IGUCA statute and the IGUCA regulation. The AG opinion states that the Chief Engineer may promulgate rules and regulations in order to achieve the IGUCA statute's purpose. Kan. Atty. Gen. Op. No. 2007-32. One of these regulations was the delegation of IGUCA hearings to a hearing officer other than the Chief Engineer. K.A.R. 5-20-1. Defendants claim that because the IGUCA Statute mirrors the LEMA statute then the same regulation may be applied.

Petitioners are correct on this issue. Simply because the IGUCA Statute and the LEMA Statute are very similar in most aspects does not give the Chief Engineer authority to apply regulations of one matter to regulations of another. The Chief Engineer did not promulgate a regulation concerning delegation of LEMA hearings and therefore the delegation was unlawful.

However, Defendants are correct in their assertion that the delegation was a harmless error. A harmless error occurs when action taken does not affect the outcome of the proceedings. *State v. Jones*, 306 Kan. 948, 954

(2017). Petitioners make no claim that they were harmed by the hearing oversight delegation and even if the Chief Engineer had presided personally over the hearing the outcome would have been the same. No agency action should be overruled simply because harmless error has occurred. *Sw. Kan. Royalty Owners Ass'n v. K.C.C*, 244 Kan. 157 (1989).

**VII. Whether the LEMA Plan is otherwise unreasonable, arbitrary, or capricious.**

Arbitrary and capricious agency actions may be ruled invalid by the court. However, an agency action is only arbitrary or capricious when there is no substantial evidence backing the agency's decision. *Sokol v. Kan. Dept. of Social and Rehab. Serv.*, 267 Kan. 740, 746 (1999). There is substantial evidence to back the Defendants' actions. Even so, if the Court finds the evidence lacking it may look to evidence outside the record in order to make its decision.

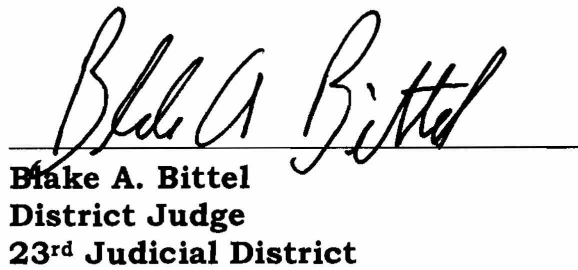
**VIII. Conclusion**

The GMD4 District Wide LEMA should be upheld. The LEMA Plan restrictions do not appear to be unconstitutional on their face as applied. While the interpretation of the Statues may be seen as erroneous when read *in pari materia*, the intent of the legislature is clear. The Petitioners' various procedural concerns are likely unwarranted. There is substantial evidence backing the agency's decision and therefore it is not arbitrary or capricious. Finally, the delegation of the initial hearing by the Chief Engineer could be

unlawful. However, it is considered a harmless error because it had no effect on the outcome of the hearing.

**IT IS SO ORDERED.**

Dated this 15th day of October, 2019.



**Blake A. Bittel**
**District Judge**
**23rd Judicial District**

Copy to: David Traster (via efiling)
Daniel Buller (via efiling)
Kenneth Titus (via efiling)
Adam Dees (via efiling)