

**Testimony to the  
Interim Legislative Committee  
HB 2070 and IGUCAs  
Presented by Wayne Bossert, Manager  
Northwest Kansas Groundwater Management District #4  
October 22, 2007**

Thank you, Mister Chairman and members of the committee. I am Wayne Bossert and I represent the Northwest Kansas Groundwater Management District #4 headquartered in Colby, KS. I am testifying for the GMD 4 board of directors in opposition to the concepts that were embodied in HB 2070, and also on other issues concerning the IGUCA process in general.

Our board firmly believes that IF regulation of groundwater occurs, our district members are going to desire the management options contained in the IGUCA statutes rather than the strict administration of water rights under the Kansas Water Appropriation Act – i.e., reverse order of priority. The IGUCA management options become even more important to the regulated water right owners and the general area if the groundwater regulation is initiated because of an impairment complaint. For these reasons we oppose any moratorium on the establishment of IGUCAs.

Our board also firmly believes the IGUCA process can be improved upon.

It is important to note that the IGUCA statutes, KSA 82a-1036 through 1040, reside within the GMD act, and more importantly, are made specifically part of the GMD act by KSA 82a-1040.

Our board sees the current IGUCA statutes as deficient in three areas:

- 1) There is currently no prescribed and guaranteed review process for any IGUCA established, and there should be.**
- 2) There should be clarification of the role of the GMD in initiating any IGUCA proceeding that is wholly or partially within a GMD boundary that recognizes the Legislative intent of KSA 82a-1020 et. seq.**
- 3) There should be clarification of the process of setting goals for any IGUCA and in the role of the GMDs and their management programs in setting IGUCA goals for any IGUCA within a GMD boundary that also recognizes the Legislative intent of KSA 82a-1020 et. seq.**

For each of the deficiencies noted, the GMD 4 board recommends the following actions:

**1) IGUCA Review Process:** While we acknowledged that most, if not all, historical IGUCA's have involved local stakeholders as advisors in some level of periodic review process, this approach is not required; nor is it sufficiently defined.

The most obvious way to afford a guaranteed review process would be a simple Legislative amendment of KSA 82a-1038 (b) adding a specified review process to the current list of items any IGUCA order must contain.

Alternatively, a suitable review process also appears possible by promulgating a statewide agency regulation. However, the fact that the IGUCA statutes hold the chief engineer to a very different process outside a GMD than inside a GMD causes our board to believe that a single, statewide regulation may not be the best approach.

**GMD 4 Board Recommendation:** that GMD 4 be given the opportunity to recommend a district regulation regarding a mandatory IGUCA review process for promulgation by the chief engineer as a GMD 4 regulation. Further, that DWR promulgate a separate regulation for reviewing IGUCA's outside any GMD boundary if the regulated community requests same. For any single IGUCA covering both non-GMD lands and GMD lands, both regulations, if promulgated, must be compatible.

The GMD 4 board does not support a Memorandum of Agreement approach to any specified periodic IGUCA review procedure. This approach is the least binding and is subject to re-interpretation by each new administration – both state and district.

**2) DWR / GMD IGUCA Role Clarification – Initiating an IGUCA:**

Prior to Attorney General's opinion 2002-24, it was understood that the district board, or a prescribed number of district members, if the board failed to act, were the only entities that could initiate an IGUCA proceedings inside a GMD. AG opinion 2002-24 reinterpreted this arrangement such that the chief engineer can now initiate an IGUCA either outside a GMD or inside a GMD – on his or her own initiative. With AG opinion 2002-24 rendered, the state agencies have no other recourse but to follow its direction until it is changed – either by a subsequent AG's opinion, the Legislature or the courts

The GMD 4 board believes the current legislative language of KSA 82a-1036 (and its interpretation prior to AG opinion 2002-24) was precisely the 1978 Legislature's intent and completely consistent with the legislative declaration of the GMD Act - making it state policy that local landowners and water users have the right to

determine their own groundwater use destiny as long as that destiny does not conflict with state law.

In other words, the GMD 4 board believes the AG's 2002-24 opinion is contrary to original Legislative intent, and through this reinterpretation, Legislative intent has been altered. The board is recommending that the Kansas Legislature clarify/correct this situation.

The GMD 4 board also believes the chief engineer always had full authority to administer groundwater within a GMD, on his or her own initiative, via any of the authorities granted under the Kansas Water Appropriation Act – despite this subject AG's opinion.

**GMD 4 Board Recommendations:** that KSA 82a-1036 be amended by the Legislature to clarify its original intent to reserve for the GMDs the exclusive right to initiate an IGUCA within their boundaries while retaining the chief engineer's right to: initiate an IGUCA outside a GMD as prescribed; and to administer groundwater within a GMD by any means authorized within the Kansas Water Appropriation Act.

Attorney General Stovall's own words as she denied the GMD 4 request to reconsider opinion 2002-24 merit consideration. She says: "*As I am sure you know, only the Legislature can provide further and final clarification of the issue.*" The GMD 4 board is asking for that clarification at this time.

### **3) DWR / GMD IGUCA Role Clarification – Setting Goals and recognizing the GMD Management Programs:**

It is interesting to note that the statutes never mention any process of setting goals for any IGUCA. Outside of hearing notice, and that the documentary and oral evidence must be taken and recorded, KSA 82a-1037 only requires the consideration of one, single issue: "...the question of designating such an area as an intensive groundwater use control area."

KSA 82a-1038 next requires the chief engineer to establish the IGUCA if any one or more of the circumstances in KSA 82a-1036 are met AND the public interest requires any one or more corrective control measures. Again, no mention of possible goals that should be driving much of this process.

It seems to us that the issue of IGUCA goals, or where the IGUCA needs to end up, is a critical piece of the process that is at least not clearly defined, if not missing altogether. How can the appropriate corrective control provisions be chosen if there are no IGUCA goals established first? How can any review process be applied if the IGUCA goals are not specified?

While the regulated community can document specific goals they desire during the hearing process, and some have, the hearing process is not required to do so.

Under this arrangement requesting an IGUCA by the regulated community of NW Kansas is a deterrent due to the uncertainty over the ultimate goals of any IGUCA established. The goals can range from a quick and complete solution to whatever problem(s) precipitated the IGUCA all the way to taking a “wait and see” posture. And any of these goals may or may not take into consideration the socio-economic conditions or impacts. The concerns heighten even more with the AG’s opinion 2002-24 that currently allows the chief engineer to establish an IGUCA within a GMD on his or her own initiative.

**GMD 4 Board Recommendation:** Amend KSA 82a-1037 to at least add IGUCA goal setting into the hearing process as a required element.

The board also recommends that 1037 be amended to specify the role of the GMD in goal setting, or, alternatively require the chief engineer to consider and include the GMD management plan and programs into the goal setting process.

In closing, while we can state that most IGUCAs have actually incorporated, to some degree or another, most of the deficiencies we are proposing corrections for, these efforts are not required – and we believe Kansans will be best served if they are.