

Orrin Feril

From: Preheim, Lynn
Sent: Monday, October 15, 2018 9:43 AM
To: Beightel, Chris [KDA]; Orrin Feril; KDA Office of the Secretary; Grother, Brittney [KDA]
Cc: Titus, Kenneth [KDA]; Barfield, David [KDA]; Letourneau, Lane; Darrell Wood; Fred Grunder; John Janssen; Tom Taylor; Hansen, Christina J.; Preheim, Lynn
Subject: GMD 5's LEMA Proposal and response to KDA/DWR's latest demands

All,

The GMD 5 Board met last Thursday night and discussed the email below. Based on the email, and the comments the KDA/DWR team made during recent calls, the Chief Engineer will not approve GMD 5's proposed Zone A LEMA unless total annual average allowable withdrawals do not exceed 156,307 AF for Zone A (GMD 5 proposed 166,987 AF, a difference of 10,680 AF) and 22,200 AF for Zone D (GMD 5 proposed 25,763 AF, a difference of 3,563 AF). The authorized use in Zone A is approximately 240,000 AF, and average use in Zone A is approximately 176,000 AF. GMD 5 is not willing to propose a LEMA with the KDA/DWR reductions, and unfortunately we may be at an impasse. The Board has spent literally hundreds of hours in service to its members trying to craft a LEMA acceptable to KDA/DWR and the Chief Engineer, using an expensive scientific model it paid for, while at the same time trying to protect the interests and livelihood of the GMD 5 stakeholders that it serves. Given the history of this process and the extensive work and discussions the Board has had with KDA/DWR trying to arrive at a workable solution, some explanation is appropriate.

The cuts sought by KDA/DWR would have devastating economic consequences, and have the very real possibility of putting farmers out of business. Every person in this part of Kansas will be affected, given that agriculture drives the economic engine in this area. While not providing a detailed economic analysis here, the impact will be tens of millions of dollars every year. KDA/DWR looks at the issues through a different lens, seemingly focusing only on the water and the hydrology, without giving due consideration to the real world implications of this LEMA on the families affected by it. As far as we know, KDA/DWR has not done any analysis of how these cuts would affect farmers, or what they would do to a farmer's ability to use any specific water right. These questions are not important if the analysis is limited to streamflow and hydrology. But these questions are of vital importance to the Board, and to every person in this area, whether they are water right holders or not.

As part of its responsibility to the GMD 5 membership, the Board must look beyond hydrology. What are the consequences of the cut? How does the cut affect farming practices and decisions? Could these farmers continue to raise corn? How often? What is the effect on property values? How are the farmers' financial statements impacted? Can the farmer afford to make his loan payments if he can't farm in the same way? These are just a few of the considerations. Even the cuts proposed by the Board are drastic and have a huge effect on these families, but the Board believes that the membership can at least largely survive them. That is not the case with the cuts demanded by KDA/DWR.

The Board respectfully requests that KDA/DWR and the Chief Engineer please reconsider the position taken in the email below, and that the issues identified above become part of the analysis. In our view, the Chief Engineer can do so as part of his obligation to protect the public interest, which is a consideration not only under the LEMA statute (K.S.A. 82a-1041(f)(5)), but also throughout the Appropriation Act, the IGUCA statutes (K.S.A. 82a-1036) and elsewhere.

This process began with the Service's filing of an impairment complaint on April 8, 2013 in connection with surface water right 7571. Augmentation can be used to solve the impairment in the Rattlesnake creek subbasin under K.S.A. 82a-706b. That statute requires the Chief Engineer to "allow augmentation for the replacement in time, location and quantity of the unlawful diversion, if such replacement is available and offered voluntarily." Since shortly after the Chief Engineer's final report was issued in July of 2016, GMD 5 has "offered voluntarily" to augment to remedy the

impairment complaint using a 15 cfs wellfield. Although the model irrefutably shows that augmentation can solve the impairment complaint (and ultimately becomes sustainable), and although the Chief Engineer is required to “allow augmentation” for that purpose, the Chief Engineer refused to accept augmentation as a solution, demanded curtailment, and imposed additional goals and requirements, primarily relating to streamflow in Rattlesnake Creek. Augmentation, especially as offered to the Service and KDA/DWR, is also a superior solution, since it allows for controlled releases in time and quantity – a benefit not available if the Service relies on streamflow. Augmentation is also superior since it will be a substantial period of time before even drastic curtailment would provide a meaningful streamflow increase, if it ever does.

Throughout this process, GMD 5 has raised a number of other concerns about what is being demanded by the Chief Engineer. For example, although the Service’s right is an annual water right, the Chief Engineer is requiring that GMD 5 satisfy the Service’s monthly requests. GMD 5 has also raised a number of other issues regarding the Service’s water right and the Chief Engineer’s analysis/regulation of that right, including challenging perfection, the failure to account for evaporation and storage, the failure to capture and use the water, the failure to require a conservation plan under K.S.A. 82a-733 that prevents waste and ensures beneficial use, the failure to consider the reasonable raising and lowering of the streamflow, inadequate metering and measuring, and a number of other similar issues.

GMD raises these points again not to debate them, but instead to show that GMD 5 has operated in good faith and has made offers far beyond what it believes are required to solve the Service’s impairment complaint. GMD 5’s current LEMA proposal includes removal of end guns (removing considerable wetted acres), total allowable annual withdrawals from Zone A of approximately 167,000 AF in Zone A (about a 10,000 AF additional cut), and removal of another 4,000 AF or its hydrological equivalent in Zone D, not to mention the cost of the proposed augmentation field. These are significant cuts and have a very real and a very substantial impact on the incomes of the GMD 5 members and their families - when solving the impairment can be accomplished with augmentation alone. GMD 5 has reached the point where cuts beyond what it has proposed are too harmful to the membership and their families, and the communities at large. As you may imagine, because these proposals hit the GMD 5 members directly in the pocketbook, the GMD 5 Board and staff have spent literally hundreds of hours fielding calls or visiting with people expressing concern about these proposals and the financial impact. These concerns come not only from GMD 5 members, but also bankers, affected communities, affected counties, businesses and organizations.

The GMD 5 Board recognizes that KDA/DWR and the Chief Engineer have at their disposal a number of tools that can be used as leverage to force GMD 5 to succumb to demands or to force GMD 5 members to curtail usage, and that alternatives such as strict enforcement or commencement of an IGUCA could be devastating to GMD 5 and its members. The Chief Engineer could also use the power of the office to impose obstacles or make findings harmful to GMD 5, such as refusing to grant the necessary permits for an augmentation wellfield, whether valid under the law or not. These risks are well known to the GMD 5 Board and the membership. The Board implores KDA/DWR not to take those actions, but instead look at how the public interest can be best served, to protect both the resource and the families that depend on it.

As stated above, please reconsider and accept the GMD 5 proposed LEMA (including the other terms not discussed here, such as securing the flowmeters to the pipes, the ability to move water in and out of the LEMA area, five-year water use targets, etc.). Let us know whether you will accept the proposed LEMA as soon as possible, so that GMD 5 can determine its next steps. Of course, as has been the case throughout, GMD 5 is always open to entertaining any additional thoughts or ideas that do not have the draconian consequences of KDA/DWR’s current curtailment demand.

We look forward to hearing from you.

Thanks

Lynn

This communication (including any attachments) is from a law firm and may contain confidential and/or privileged information. If it has been sent to you in error, please contact the sender for instructions concerning return or destruction, and do not use or disclose the contents to others.

From: Beightel, Chris [KDA]

Sent: Wednesday, October 10, 2018 1:42 PM

To: Orrin Feril

Cc: Titus, Kenneth [KDA]

Barfield, David [KDA]

Letourneau, Lane

Darrell Wood

Fred Grunder

John

Janssen

Tom Taylor

Preheim, Lynn

Hansen, Christina J.

Subject: Oct 9 proposal of the GMD5 LEMA Committee

Orrin,

On September 6, 2018 KDA provided to the GMD5 LEMA Committee ("Committee") the amount of allowable water withdrawals in the proposed "Zone A-only" LEMA where 1) pumping impacts to streamflow are modeled to be 10% or greater (Zone A), and 2) pumping impacts to streamflow are modeled to be 40% or greater (Zone D). The values KDA provided are:

Zone A: 156,307 AF

Zone D: 22,200 AF

On October 9, 2018 you informed Kenny Titus and me that the Committee now proposes allowable withdrawals of:

Zone A: 166,987 AF

Zone D: 25,753 AF

The Committee's proposal is unacceptable to KDA.

Is this the Committee's best and final proposal to make pumping reductions through a LEMA?

Please send us your response in writing (email is fine) by the end of the week.

Regards,

Chris

Chris Beightel, P.E.
Program Manager
Water Management Services
Division of Water Resources
Kansas Department of Agriculture