

BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE

1320 Research Park Drive
Manhattan, Kansas 66502

In the Matter of the)
U.S. Fish and Wildlife Service's)
Impairment Complaint filed on) **19 WATER 16274**
behalf of the Quivira National)
Wildlife Refuge)
_____)

**ORDER DENYING PETITION FOR STAY OF PROCEEDINGS AND GRANTING
PETITION FOR ADMINISTRATIVE REVIEW SUBMITTED BY BIG BEND
GROUNDWATER MANAGEMENT DISTRICT NO. 5 AND NOTICE OF
PREHEARING CONFERENCE**

COMES NOW, Michael M. Beam, Secretary, Kansas Department of Agriculture (“Secretary”) and hereby grants the Petition for Review of Chief Engineer’s Rejection of GMD 5’s Proposed LEMA Plan (“Petition for Review”) and denies the Petition for Stay of Proceedings Pending Resolution of Big Bend Groundwater Management District 5’s Petition for Review (“Petition for Stay”), both submitted by Big Bend Groundwater Management District No. 5 (“GMD 5”) on August 14, 2019. Accordingly, the Secretary finds and orders as follows:

On February 22, 2019, as part of ongoing efforts to remedy the impairment of the senior water right held by the U.S. Fish and Wildlife Service (“Service”) for the administration of the Quivira National Wildlife Refuge, GMD 5 submitted a Local Enhanced Management Area (“LEMA”) plan to the Chief Engineer of the Kansas Department of Agriculture’s Division of Water Resources (“Chief Engineer”) for his consideration.

The Chief Engineer notified GMD 5 by letter on July 30, 2019 that he would not initiate proceedings to consider the implementation of the LEMA plan. The Chief Engineer set out in the July 30, 2019 letter a list of elements that he had identified as necessary components of a LEMA plan aimed at resolving the Service’s impairment and also stated that he “intend[s]” to administer water rights in the Rattlesnake Creek Basin, many of which lie within the boundary of GMD 5’s proposed LEMA “by administrative orders issued on or about September 1, 2019.”

On August 14, 2019, GMD 5 timely filed both the Petition for Review and the Petition for Stay. The Petition for review requested the Secretary review the Chief Engineer’s decision not to initiate proceedings to consider the implementation of GMD 5’s LEMA plan, and the Petition for Stay “requests the Secretary stay any further action in this matter—including any administrative orders issued by the Chief Engineer” pending resolution of the Petition for Review.

The Secretary finds that the Chief Engineer has taken no action properly subject to Stay by the Secretary pursuant to K.S.A. 77-528. That statute states that a party may submit to an agency head “a petition for stay of effectiveness of an initial or final *order*.” K.S.A. 77-502(d) provides that an “order” is “a state agency action of particular applicability that determines the legal rights,

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duties, privileges, immunities or other legal interest of one or more specific persons.” A statement by the Chief Engineer that he intends to take an action at some future date does not constitute an agency action of particular applicability or one that determines the legal rights, duties, immunities, or other legal interest of any person. The Chief Engineer has likewise not taken any other “further action in this matter” that meets the definition of an order pursuant to K.S.A. 77-502(d). A Stay can therefore not properly be granted.

Review by the Secretary shall be limited to determining whether the Chief Engineer should have initiated proceedings pursuant to K.S.A. 82a-1041 to consider the implementation of GMD 5’s LEMA plan. Review by the Secretary shall not include a determination of whether GMD 5’s LEMA plan should have been required to contain the components set out in the Chief Engineer’s July 30, 2019 letter in order for proceedings pursuant to K.S.A. 82a-1041 to have been initiated or whether the Chief Engineer exceeded his statutory authority by listing those components in the July 30, 2019 letter. The Secretary urges GMD 5 and other stakeholders to move forward with implementing augmentation as well as voluntary water conservation initiatives and to renew efforts to arrive at and agree to a solution that resolves the Service’s impairment during the pendency of this matter.


The prehearing conference shall be held on **September 16, 2019 at 10:00 a.m.** The primary purpose of this prehearing conference shall be to discuss preliminary matters and formulate a procedure for the remainder of the proceeding.

The prehearing conference will be conducted by telephone pursuant to K.S.A. 77-517(a). All parties are instructed to dial 866-620-7326 at the designated time. When prompted, enter the following conference code: 5731469809.

The prehearing conference is being held pursuant to K.S.A. 77-516. At any time during the proceeding, without further notice, the prehearing conference may be converted into a conference hearing or summary proceeding for disposition of the matter.

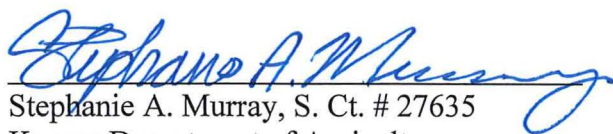
Any party who fails to attend or participate in the prehearing conference, hearing or other stage of the proceeding may be found to be in default pursuant to K.S.A. 77-520.

IT IS SO ORDERED, THIS 30th DAY OF AUGUST, 2019.



Michael M. Beam, Secretary
Kansas Department of Agriculture

Prepared by:



Stephanie A. Murray, S. Ct. # 27635
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
Phone: (785) 564-6715
Fax: (785) 564-6777
stephanie.murray@ks.gov
Counsel for the Secretary

CERTIFICATE OF SERVICE

On the 30th day of August, 2019, I hereby certify that a true and correct copy of the foregoing Order Denying the Petition for Stay of Proceedings and Granting the Petition for Administrative Review and Notice of Prehearing Conference was deposited in the U.S. mail, first class postage prepaid, and a true and correct copy was sent by electronic mail, addressed to the following:

Lynn D. Preheim
Christina J. Hansen
STINSON LLP
1625 N. Waterfront Parkway, Suite 300
Wichita, Kansas 67206
lynn.preheim@stinson.com
christina.hansen@stinson.com
Counsel for GMD 5

and by electronic mail and hand delivery to the following:

David W. Barfield, Chief Engineer, Division of Water Resources
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
david.barfield@ks.gov

Kenneth B. Titus
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, Kansas 66502
kenneth.titus@ks.gov
Counsel for the Chief Engineer


Staff Person
Kansas Department of Agriculture