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Big Bend GMD #5

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Via electronic and U.S. mail.

Re: Comments on the proposed Big Bend GMD LEMA Plan

Dear Orrin,

At the GMD annual meeting, you and Lynn Preheim asked for comments and questions and promised responses. This list of issues, comments, and questions is not complete includes some of the more pressing issues that need to be dealt with.

As you may know, I have fundamental concerns about the proper interpretation of the LEMA statute, its application vis-à-vis the Water Appropriation Act, and about its facial and as-applied constitutionality. I am as concerned as anyone, and probably more than most, about conserving one of the State's most valuable resources. But that lofty goal cannot be legitimately achieved at the expense of the Rule of Law.

While many of these questions are about the draft LEMA Plan itself, I do not concede the legality of the proposed Plan or the LEMA statute.

1. Why does the GMD credit the Chief Engineer's position that across-the-board percentage reductions are permissible under the GMD Act?

Once a permit is issued, the Chief Engineer has no power to reduce the quantity of water that can lawfully be diverted pursuant to a valid water appropriation right except to the extent that the water right is not fully perfected, pursuant to the prior appropriation doctrine, or to achieve compliance with the MDS requirements. *Clawson v. State, Dept. of Agriculture, Div. of Water Resources*, 49 Kan.App.2d 789, 799, 315 P.3d 896 (2013).

Kansas public policy, unchanged since 1945, mandates the use of the prior appropriation doctrine when there is insufficient water available to meet the needs of all appropriators. The prior appropriation doctrine permeates the Kansas Water Appropriation Act and is fundamental Kansas public policy that is binding on all water users and government agencies, including DWR and the GMD. K.S.A. 82a-703b(b); 82a-

706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; and 82a-745.

Moreover, Kansas public policy specifically permits groundwater mining in areas where there is little or no recharge even though it reduces the quantity of water available to senior users, the public, and future users. K.S.A. 82a-711 and 82a-711a. Changing that policy is the exclusive right of the Kansas Legislature.

The Groundwater Management District Act is subject to, controlled by, and does not amend the Kansas Water Appropriation Act making all of the GMD Act's provisions subject to the prior appropriation doctrine. For example, the GMD includes the following provisions:

- ◆ "It is the *policy of this [GMD] act to preserve basic water use doctrine* and to establish the right of local water users to determine their destiny with respect to the use of the groundwater *insofar as it does not conflict with the basic laws and policies of the state of Kansas.*" K.S.A. 82a-1020 (emphasis added).
- ◆ Moreover, GMDs are permitted to "adopt administrative standards and policies" that are "*not inconsistent with the provisions of . . . the Kansas water appropriation act.*" K.S.A. 82a-1028(n) (emphasis added).
- ◆ GMDs are permitted to recommend rules and regulations to be adopted by the Chief Engineer *so long as they are "not inconsistent with . . . the Kansas water appropriation act."* K.S.A. 82a-1028(o) (emphasis added).
- ◆ The GMD Act also requires that each GMD develop a management plan that must be approved by the CE but only "if he or she finds that it is *compatible with article 7 of chapter 82a of the Kansas Statutes Annotated*, and all acts amendatory thereof." K.S.A. 82a-1029 (emphasis added).
- ◆ The 1978 IGUCA amendments include K.S.A. 82a-1039 which states: "Nothing in this act shall be construed as limiting or affecting any duty or power of the chief engineer granted pursuant to the Kansas water appropriation act."

The Chief Engineer's "duties and powers granted pursuant to the Kansas water appropriation act" are broad but not unlimited. The clearest statement of those duties and powers is found in K.S.A. 82a-706 which reads:

The chief engineer shall 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*. (Emphasis added).

Thus, the Legislature reiterated its mandate that the GMD Act be interpreted and applied in compliance with the Water Appropriation Act.

It is difficult to reconcile the provisions cited above with some of the IGUCA and LEMA remedy provisions in K.S.A. 82a-1038(b) and K.S.A. 82a-1041(f). But DWR's self-serving arguments to justify its refusal to recognize the effect of the provisions of the GMD Act cited above do not survive scrutiny.

Reading the GMD Act as a whole, construing all of its provisions together and harmonizing them, it's clear that across the board cuts are not permitted by the IGUCA or LEMA provisions. The LEMA provisions cannot be read to amend the Kansas Water Appropriation Act or K.S.A. 82a-1020, 82a-1028(n), 82a-1028(o), or K.S.A. 82a-1029 cited above.

2. There has been some discussion about shutting down MDS wells. Not only are the MDS wells junior water rights so that the previous discussion about priority applies, but they are also subject to the minimum desirable streamflow requirements at Macksville and Zenith. I understand that the shutting down all of the MDS wells in the basin will not directly affect streamflow in the short run. But why doesn't the plan call for administering all of the MDS wells? When a form of this question was asked at the Annual Meeting, the Chief Engineer did not provide a direct response.

3. If a revised LEMA Plan is adopted and if sufficient progress toward the 4,000 acre-foot reduction in Zone D is not being made, will the GMD ask the Chief Engineer to enforce the MDS provisions of the Water Appropriation Act to avoid implementation of the backstop provisions, whatever they end up being?

4. The definition of "end gun" is, in essence, the last nozzle on a center pivot with a bore diameter that is larger than the next to the last nozzle. I understand that nozzle sizes and spacing are different from one end of a center pivot to the other and that they're calibrated as a package. But why can't someone, for example, replace the last two with nozzles with equal bore diameters but large enough that water use is not reduced? I suggest that the definition of "end gun" needs further thought.

5. In Section 3.a., reductions in Zone D include "permanent movement of water from hydrologically sensitive areas to lesser sensitive areas." As explained during the annual meeting, DWR and the GMD intend to allow wells in Zone D to be redrilled

in Zone A. Is this the only kind of move that's contemplated by this provision? If not, what other kinds of moves are contemplated?

6. Zone D includes wells that, according to GMD's model, have a 40% or greater impact on streamflow. The percentages go up as one moves from the outer edges of Zone D toward the River. K.S.A. 82a-708b requires changes in the point of diversion to be in the same local source of supply. That term is not defined in the Water Appropriation Act or in DWR or GMD5 regulations but DWR has been jealous about limiting the "local sources of supply" to one-half mile radii. *See*, for example, K.A.R. 5-25-2a limiting moves to no more than 2,640 feet. While the regulation can be waived there are numerous practical limitations on moving wells very far.

Because of these distance limits, it seems likely that the majority of the credits against the 4,000 acre-foot reductions in Zone D using this option would be achieved with moves from areas with a 40% impact to areas with a 30% impact. Moving any well from Zone A to Zone D will count toward the 4,000 acre-foot reduction in Zone D but real impact on streamflow would be best achieved by moving wells with a higher percentage impact away from the River.

Given the GMD's assertion, contradicted by the Chief Engineer, that the GMD model is capable of assessing the impact of individual wells on streamflow, DWR should allow credits against the 4,000 acre-feet if a well is moved from an area that has a higher percentage impact to an area with a lower impact even if it can't be moved out of Zone D for any reason. Stated another way, reductions should be measured with a combination of reductions in quantity and reductions in the percentage of impact.

7. Has the draft LEMA Plan been vetted by EPA, the Corps of Engineers, KDHE, KDWPT, and other agencies with jurisdiction or interest in the issues at stake?

8. I'm not aware of the nature of the soils in the proposed augmentation well field but based on the draft LEMA Plan and comments at the Annual Meeting, it appears that the well field will be in an area that includes a high percentage of regulated wetlands. Drilling wells and almost any other activity in wetlands is risky business and dewatering hydric soils, even partially, may be problematic. I strongly suggest that Parthy Evans be consulted about the regulatory and the practical/political implications of the planned well field.

9. Section 5.d. includes provisions indicating what DWR will do. I doubt that the LEMA order can legitimately limit the exercise of DWR's discretionary authority.

10. Section 7.a. references “backstops” and “credits.” Credits are not mentioned in the draft LEMA Plan and according to Mr. Preheim, the backstops are to be redrafted. These are critical components of the plan and need to be fully and carefully vetted before the plan is submitted to the Chief Engineer. And while there are legitimate reasons to include backstops, there are better reasons to limit the term of the proposed LEMA and to impose “Plan B” if it’s needed based on the facts in place at that time.

Those reasons include the difficulty of accurately predicting the contours of an appropriate backstop. If the draft LEMA Plan fails to achieve its stated goals, it is unlikely to fail completely. Plan B needs to be tailored to the facts in place at the time.

Moreover, it is likely that the contours of what can and cannot be included in a backstop will change between now and 2025. The Chief Engineer has failed to follow the Legislative mandate to promulgate regulations to implement the LEMA Act. And statements made at the annual meeting—that the Chief Engineer did not contradict—indicated that without a LEMA, the Chief Engineer would impose across-the-board percentage reductions, presumably without regard to the prior appropriation doctrine. This approach violates the Kansas Water Appropriation Act, see, e.g., K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710; 82a-711(b)(3); 82a-711a; 82a-712; 82a-716; 82a-717a; 82a-742; and 82a-745, and it violates the Groundwater Management District Act. See, e.g., K.S.A. 82a-1020; 82a-1028(n); 82a-1028(o); 82a-1029; and 82a-1039.

The Chief Engineer’s concern about entering a single order that assures him that the problem will be solved on a permanent basis does not outweigh the irrigator’s interest in a narrowly tailored solution to the impairment concerns that drive the proposed LEMA. Stated another way, what the Chief Engineer wants or needs is important but it’s not the only factor to consider.

Although deferring the details of “Plan B” so that they can be tailored to the facts in 2025 is more cumbersome and time consuming than including backstops in the proposed LEMA, it will provide water right owners, the GMD, and the Chief Engineer with the opportunity to formulate the best and most efficient plan with the least impact on property interests held by irrigators that are junior to the FWS water right.

11. I understand that the backstop provisions in the Draft LEMA Plan are to be redrafted, but why would the GMD have suggest that the Chief Engineer apply across-the-board cuts to all water rights when:

- a. Doing so violates the prior appropriation doctrine?

- b. Without first shutting down or at least curtailing some water rights that are subject to MDS requirements?

12. The LEMA statute clearly indicates that the plan is to be developed by the GMD and submitted to the Chief Engineer for review and approval. And the GMD's purpose includes "the right of local water users to determine their destiny with respect to the use of the groundwater." K.S.A. 82a-1020. A LEMA plan that the Chief Engineer will not approve does not advance the ball so some initial discussion to determine the contours of the plan makes sense. That said, the final version of the proposed plan is still subject to the Board's final approval and the Chief Engineer has no power under the act to dictate the inclusion of specific terms. It was clear that the Chief Engineer has insisted on backstop provisions. Will the Chief Engineer really disapprove a plan that meets all of his other objectives but does not include the backstops?

13. Please confirm that the backstop provisions in section 9.b.i. of the Draft LEMA Plan presented at the GMD's annual meeting are to be completely redrafted.

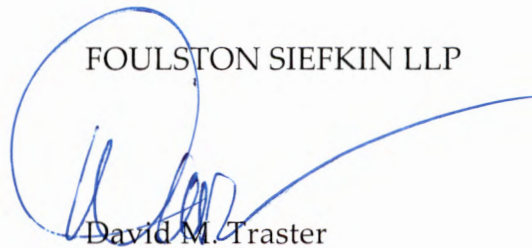
14. Please confirm that the backstop provisions in section 9.b. of the final LEMA Plan will factor in priority, past conservation, and impact on the stream.

15. The review committee provisions are unclear. What powers will the committee have?

16. Likewise, the draft LEMA Plan states that it the plan can be amended. Please explain the amendment process and how individual irrigators will be able to obtain amendments to address particular issues or concerns.

Very truly yours,

FOULSTON SIEFKIN LLP



David M. Traster

C: Lynn Preheim