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ATTORNEY GENERAL OPINION NO. 92-97

Jeffery A. Mason
Counsel for Northwest Kansas Groundwater
Management District #4
214 E. 10th Street, Box 767
Goodland, Kansas 67735

Re: Waters and Watercourses--Groundwater Management
Districts--Initiation of Proceedings for
Designation of Intensive Groundwater Use Control
Areas; Duties of Chief Engineer; Findings; District
Powers; Home Office

Synopsis: A groundwater management district created pursuant
to K.S.A. 82a-1020 is not authorized to implement a
conservation plan resembling an intensive
groundwater use control area without action by the
chief engineer as required by K.S.A. 82a-1036.
Cited herein: K.S.A. 82a-701; K.S.A. 1991 Supp.
82a-733; K.S.A. 82a-1020; 82a-1028; 82a-1036;
K.S.A. 1991 Supp. 82a-1038; K.S.A. 82a-1039.

* * *

Dear Mr. Mason:

As counsel for the Northwest Kansas groundwater management
district no. 4 (hereinafter GMD #4) you inquire whether the
following water conservation plan can be implemented through
regulations and without the use of K.S.A. 1991 Supp. 82a-1038.

You indicate that GMD #4 is a groundwater management
district properly formed and operating under K.S.A. 82a-1020
et seq., as amended, and includes "water rights" as

defined by K.S.A. 82a-701. The board of directors of GMD #4 want to implement a plan which, over time, will eliminate the diversion of underground water from the Ogallala aquifer within the district beyond that which can be sustained by the annual recharge of the aquifer. The plan proposes to determine a reserve of water to be left in the aquifer wherein pumping would be phased out in the area, with junior rights phased out prior to senior rights, in accordance with the relative priority dates. Under this plan a water right holder may be ordered to cease and desist pumping when the reserve established for that point of diversion has been reached under various circumstances. Although the plan would be implemented through rules and regulations promulgated by the Kansas department of agriculture, division of water resources, GMD #4 would retain the authority to implement the plan on its own initiative without seeking the approval of the chief engineer.

As a creature of statute GMD #4 has only those powers provided by statute or necessarily inferred therefrom. Thus the issue presented is one of statutory authority. Initially though, a review of what the GDM proposes to do is in order. The plan in question resembles an intensive groundwater use control area (IGUCA) as contemplated by K.S.A. 82a-1036. This statute authorizes the chief engineer (at the request of a GMD or 5% of its voters) to initiate proceedings for the designation of the control area as an IGUCA when the chief engineer believes that (a) groundwater levels in the area in question are declining or have declined excessively; or (b) the rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area; or (c) preventable waste of water is occurring or may occur within the area in question; or (d) unreasonable deterioration of the quality of water is occurring or may occur within the area in question; or (e) other conditions exist within the area in question which require regulation in the public interest.

Under any of these circumstances the chief engineer may order measures much like those proposed by the plan in question. He may refuse applications for permit to appropriate water, limit the withdrawal of groundwater, require a system of rotation of groundwater use and delegate the enforcement of these corrective control provisions to GMD #4, K.S.A. 1991 Supp. 82a-1038. Both the plan in question and the establishment of an IGUCA appear to have the same objective, namely the conservation of water. And though the enforcement of the corrective plan for the conservation of water may be delegated

to GMD #4 specifically, we nonetheless find no statutory authority for implementing the proposed plan without the chief engineer.

Having found no specific power to implement the plan in question we must now peruse the district's general powers which are found in K.S.A. 82a-1028. Relevant to our question are subsections (h), (o) and (s) that state respectively (the district may)

"(n) adopt, amend, promulgate, and enforce by suitable actions, administrative or otherwise, reasonable standards and policies relating to the conservation and management of groundwater within the district which are not inconsistent with the provisions of this act. . . .

"(o) recommend to the chief engineer rules and regulations to implement and enforce the policies of the board. Such rules and regulations shall be of no force and effect unless and until adopted by the chief engineer. . . .

. . . .

"(s) recommend to the chief engineer the initiation of proceedings for the designation of a certain area within the district as an intensive groundwater use control area."

The statute delineates the district's power allowing each GMD the authority for independent regulation in the area of standards and policies provided these standards and policies do not conflict with the act. See Peck, J.C. Legal Constraints on the State of Kansas in Imposing Conservation Practices on Holders of Existing Water Rights, p. IV-17 (June 1986) (Kansas Water Resources Research Institute, Contribution No. 254). Relative to the establishment of an intensive groundwater use control area, however, the GMD has only the power to recommend its initiation rather than initiate it on their own. Additionally K.S.A. 82a-1039 states that nothing in the Kansas water appropriation act can be construed as limiting or affecting the chief engineer's duty or power. To allow GMD #4 to implement its proposed plan under it's

general power to adopt and enforce standards and policies would conflict with the chief engineer's primary power or duty of issuing water right permits. See Peck, J. Kansas Groundwater Management Districts, 29 K.L.R. 51, 66 (1980).

It is therefore our opinion that in spite of the broad legislative declaration found in K.S.A. 82a-1020 that GMD's are created "to establish the right of local water users to determine their destiny with respect to the use of the [sic] groundwater" GMD's are not empowered to implement a plan resembling an intensive groundwater use control area without action by the chief engineer pursuant to K.S.A. 82a-1036.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Guen Easley
Assistant Attorney General

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