TO: **House Committee on Water**
FROM: **Burke Griggs**
RE: **HB2686**
DATE: **February 14, 2022**

My name is Burke Griggs. I have represented the State of Kansas and the chief engineer in matters before the Supreme Court of the United States, the federal district court of Kansas, numerous state courts, and many administrative hearings. I have drafted water legislation enacted by the legislature. I serve as a law professor at Washburn University School of Law, where I specialize in property and water law, writing books and numerous articles on the subject. I have studied Kansas water law on a full-time professional basis for nearly twenty years. The House Committee on Water has requested that I submit testimony on HB 2686. I did not participate in the drafting of this legislation. Based on my reading of the bill, my experience, and my expertise, I submit this testimony in support of the bill. The committee has summoned the courage to restore Kansas water law to several of its most important principles and clear statutory directives. It has been carefully drafted.

Inevitably, then, the bill has already been opposed by private interests whose power allows them to block reform legislation that might dilute their influence, usually without much of an explanation. Likewise, it may be uncritically supported by interests whose enthusiasm for the public and the environment can displace their appreciation of the importance of property rights in water and of water to agriculture. As a consequence of these two polarized but unequal forces, the real contents of the bill are probably much different than the bill that was introduced just last week. That rending process will continue as the bill moves forward. Thus, in my testimony today, I want to emphasize two critical reforms—two restorations—that the bill achieves, and which must be protected amid all the horse-trading.

1. **Regardless of how the legislature reorganizes our water agencies, the bill must protect property rights by restoring the independence of the chief engineer.**

Sections 1-6 of HB2686 reorganize our water-focused state agencies into a Department of Water and Environment. Such a reorganization is sensible and long overdue. Last year, I shared with the committee a digest of how most of the western states organize their water agencies. It shows an embarrassing fact: **Kansas is the only state in which the state water engineer is subordinate to an agriculture department led by a political appointee. I challenge opponents of reorganization to explain why Kansas should continue to occupy this structurally indefensible position.** Starting in 1943, our interstate water compacts—enacted as both federal and state law—conferred authority for compact administration on the chief engineer.[1] The legislature enacted the KWAA in 1945 to place all of the waters of the state under the jurisdiction of the chief engineer, who is charged with conserving those waters and with regulating their use according to the prior appropriation doctrine.[2] In passing these laws, the legislature recognized a structural imperative: it must secure the technical, jurisdictional, and legal independence of the chief engineer. Without such a clear and exclusive delegation of state

[1] E.g., Republican River Compact, K.S.A. § 82a-518, at art. IX (1943); Arkansas River Compact, K.S.A. § 82a-520, at art. VIII.C (1948).
[2] K.S.A. § 82a-706.

authority, the United States would not build federal reservoirs in Kansas. Banks would not lend money to develop water rights and irrigated farms if their security as property could be put in doubt.[3] Owners of senior rights would be threatened by junior but more politically powerful rights.[4] This is why the KWAA has long provided for the chief engineer to obtain independent legal counsel through the attorney general.[5]

Unfortunately, our current organization contains corrupting incentives for both the secretary of agriculture and the chief engineer—**at the expense of vested property rights.** The KWAA is blind to the use made of water: the priority of the right, not its user or its beneficial use, determines the right to use water.[6] Yet the secretary, who answers to the Governor, has the structural incentive to reward favored agricultural interests, ignore water rights priorities, and override the chief engineer. Likewise, the chief engineer has the structural incentive to avoid making hard but necessary decisions to protect senior water rights and conserve the waters of the state, lest he run afoul of powerful political interests. Testimony claiming that the secretary has not interfered with the duties of the chief engineer or has not undercut his authority to protect senior rights is false. **This is not just a political problem; this is a property problem.** Under the prior appropriation doctrine, shutting off junior rights to protect senior rights is perfectly legal; in fact, it is the essence of the system.[7] But when either the secretary or the chief engineer fails to protect senior rights, they are essentially transferring property from the senior owner to the junior owner. That violates the 5th Amendment of the U.S. Constitution: government cannot take private property for private use, only public use. It also violates Kansas law.[8]

HB2686 eliminates these unconstitutional incentives. In Section 249, it eliminates secretarial review of decisions by the chief engineer, and makes the chief engineer the chief officer for purposes of administrative and legal review—**in keeping with the practices and procedures of every other western state.**

2. The GMD conservation and election provisions of HB2686 harmonize the KWAA with the GMD Act.

Under the KWAA, the chief engineer has a duty to conserve water "for the benefits and beneficial uses of **all of its inhabitants**" [emphasis added].[9] Under the GMD Act, the legislature established "the right of **local water users** to determine their destiny with respect to the use of the groundwater" of the state, provided it does not conflict with the KWAA [emphasis added again].[10] Note the expansiveness of these two statutory sections: they refer to "inhabitants" and "water users," not owners of water rights, because water is a public resource. The legislature

[3] Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion,* 62 U. KAN. L. REV. 1263, 1276-79 (2014) (summarizing the discussions of the Governor's select committee on water law, 1944).
[4] The most unfortunate case is Nebraska: *see* Spear T. Ranch v. Knaub, 269 Neb. 177, 691 N.W.2d 116, (2005) (holding that a senior right is not a defensible property interest against junior rights).
[5] K.S.A. § 82a-706d (L. 1957, ch. 539, § 12).
[6] *Id.,* § 82a-707(b).
[7] Garetson Bros. v. American Warrior, Inc., 51 Kan.App.2d 370, 347 P.3d 687 (2015); Kobobel v. Dep't of Natural Resources, 249 P.3d 1127 (Colo. 2011).
[8] K.S.A. § 77-701 *et seq.* (Private property protection act).
[9] *Id.,* § 82a-706.
[10] *Id.,* §§ 82a-1020, -1039.

recognized the imperative to conserve water for the benefit of all, and not just water right owners. HB2686 brings the KWAA and the GMD Act together in two vital ways—in support of all water users.

First, in Section 14 of the bill, it requires GMDs to submit water conservation plans to the chief engineer, incorporate them into their management plans, and requires the chief engineer to implement such plans. If the GMD does not take these affirmative steps to conserve water, the bill authorizes the chief engineer to initiate proceedings to establish Intensive Groundwater Use Control Areas ("IGUCA") pursuant to the GMD Act. This backstop provision restores two vital elements of our water law. By creating an affirmative duty on behalf of the GMD to conserve water, it grants initiative to the GMDs, as K.S.A. § 82a-1020 intended. And by requiring the chief engineer to initiate IGUCA proceedings in the absence of such local initiative, it accords with his conservation duties under the KWAA, K.S.A. § 82a-706. The chief engineer, it can be argued, has failed in his statutory duty to conserve water across the state, and especially across the High Plains-Ogallala Aquifer. However, two GMDs, most prominently GMD4, have led conservation efforts through a more recent, alternative mechanism, the Local Enhanced Management Plan ("LEMA"). Under the LEMA mechanism, the GMD proposes the water-reduction plan, the chief engineer vets it, and, if it meets statutory requirements of water conservation, it is approved as an order of the chief engineer.[11] LEMAs are consistent with the original intentions of the GMD Act, which was enacted at a time when local water users and water rights holders were more concerned with the problem of groundwater depletion than was DWR. Notably, economists studying LEMAs in Kansas have found that their pumping reductions did **not** create economic hardship for irrigators. On the contrary, in some situations irrigators profited by the reductions.[12] GMDs can easily avoid an imposed IGUCA by taking the lead on water conservation through LEMAs—as the GMD Act has always intended.

Second, Sections 10-11 of the bill reform the voting rules for GMD boards. These reforms are consistent with the legislative declaration in K.S.A. § 82a-1020 that the local right to determine water management policy extends to all "water users," and not just water rights holders. Under the current election rules for GMD boards, most "water users" are excluded—and that raises troubling constitutional issues. Under the "one person, one vote" principle of the 14th Amendment of the U.S. Constitution, courts have articulated the boundaries of where it is constitutionally permissible to restrict voting rights within a particular district to a group smaller than the general citizenry. Where the agency is a general governmental agency such as KDA, the "one person, one vote" principle clearly applies.[13] Voting eligibility restrictions **may** be permissible if the purpose of the district is substantially limited, so that its functions do not really impede equal protection. However, water is a public resource under Kansas law; and because the

[11] *Id.,* § 82a-1041.
[12] For an extensive discussion of Kansas LEMAs, *see* Burke W. Griggs, *Reaching Consensus about Conservation: High Plains Lessons for California's Sustainable Groundwater Management Act,* 52 U. PAC. L. REV. 495, 522-33 (2021) .
[13] This principle was upheld in Hellebust v. Brownback, 812 F. Supp. 1511, 1514 (D. Kan., 1993), in which a federal court held that electoral process used to select the Kansas state board of agriculture (through the statutory system of delegating that choice to farm organization delegates) violated the one person, one vote principle, and so enjoined the entire process. The court placed the Kansas board of agriculture under receivership during the pendency of the injunction; as a consequence, the agency was reconstituted as the Kansas Department of Agriculture.

voting eligibility restrictions in the GMD Act are so conspicuously restrictive, they invite a constitutional challenge. They privilege property owners and punish the public.

The GMD Act's allocation of voting rights is opaque and undemocratic. Begin with the definition of "eligible voter:" one must be "a natural person 18 years of age or older, or a public or private corporation, municipality or any other legal or commercial entity" that meets one of two sub-definitions.[14] The first sub-definition of an "eligible voter" is that of a landowner: one "that owns, of record, any land, or any interest in land, comprising 40 or more contiguous acres located within the boundaries of the district and **not** within the corporate limits of any municipality" [emphasis added].[15] "Person" means "any natural person, public or private corporation, municipality or any other legal or commercial entity."[16] The second sub-definition is that of a water user, which is defined as "any person who is withdrawing or using groundwater" from within a GMD "in an amount not less than" 1 acre-foot per year. However, this second sub-definition of "eligible voter" contains a glaring handicap for municipal users. If a municipality is a water user within the GMD, "it shall represent all persons within its corporate limits who are not water users as defined above."[17]

Behold this deep reservoir of potential electioneering abuse. A landowner who owns one quarter section of land—160 acres—could subdivide her parcel into 4 distinct 40-acre tracts, convey voting authority for each parcel to 4 entities, and thus effectively control 4 votes. Meanwhile, the cities of Colby, Garden City, Dodge City, and Wichita, since they are municipal users, could each exercise only 1 vote apiece—even though they are home to approximately 450,000 Kansans.[18] Similarly, imagine a 160-acre subdivision of 40 single-family homes, each of which sits upon 4 acres in an unincorporated part of Ford County, and each home uses a domestic well for its water supply. (Owners of domestic rights are not required to obtain a permit under the KWAA.) Each record owner of each home in that small subdivision would enjoy one vote; collectively, these owners' voting power would dwarf that of Dodge City by a ratio of 40:1. Finally, "landowners" can choose to avoid GMD tax assessments by serving notice of an "election of exclusion" that constitutes a temporary abandonment of their voting rights; but municipal "water users" have no such option, because the term "landowner" is limited to the ownership of land outside of a municipality.[19] This is all pretty outrageous—possibly to the point of unconstitutionality. By reforming these election rules to a simple "one person, one vote" rule, the bill reforms GMD voting to accord with the Constitution—and to protect the rights of all "water users," as the GMD Act states.

In conclusion, HB2686 enhances the private property rights of water rights holders by protecting them from political interference, and it restores the public's rightful claim to participate in forming GMD policy—as the legislature intended. I am happy to stand for questions. Thank you.

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[14] K.S.A. § 82a-1021(a)(5).
[15] *Id.,* § 82a-1021(a)(5)(A).
[16] *Id.,* § 82a-1021(a)(9).
[17] *Id.,* §§ 82a-1021(a)(5)(B), 82a-1021(a)(11).
[18] *Id.,* § 82a-1021(b).
[19] *Id.,* §§ 82a-1021(c)-(d); 82a-1021(a)(7).