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July 8, 2024

## **VIA EMAIL**

Attn:

Parowan Valley Groundwater Management Plan  
Teresa Wilhelmsen, Utah State Engineer  
Nathan Moses, Regional Engineer Cedar City Office  
James Reese, State Engineer's Office  
Utah Division of Water Rights  
PO Box 146300  
Salt Lake City, Utah 84114-6300  
[waterrights@utah.gov](mailto:waterrights@utah.gov)

Subject: Response to Roberts Legacy, LLC 6.14.23 – Parowan Valley Groundwater Management Comment

Dear Ms. Wilhelmsen, Mr. Moses, and Mr. Reese,

This Firm represents the water users listed below (“Respondents”) and respectfully submits this Response to comments submitted by legal counsel for Roberts Legacy, LLC (“Roberts Legacy”) on June 14, 2023. Roberts Legacy’s comments were filed 93 days after the State Engineer extended the comment period to March 13, 2023, to comment on the [DRAFT Groundwater Management Plan](#) (“DRAFT GMP”). This Response is filed to inform recent activities to reform and meet with the Groundwater Management Plan Committee.

The Parowan Valley is best served by adopting the DRAFT GMP as currently proposed by the State Engineer on January 9, 2023. Critically, the DRAFT GMP treats the entire valley as a single aquifer and does not split the aquifer into two separate groundwater plans as suggested by Robert’s Legacy. This one-aquifer approach best protects and upholds the tenets of the prior appropriation doctrine, lends itself to collaborative valley-wide conservation activities currently in process and under consideration, and reflects the best available science. The DRAFT GMP meets the criteria of Utah Code Ann. § 73-5-15 (“GMP Act”) and the State Engineer has the authority to adopt the DRAFT GMP.

The Parowan Valley has been studied extensively and Respondents have participated in years of committee meetings and discussions. Respondents understand, and sympathize, with, the

concerns brought by Roberts Legacy. However, the current DRAFT GMP reflects the consensus of the community and provides a framework to both engage in voluntary efforts to ameliorate the harsher impacts of the prior appropriation doctrine and sets a binding plan for reaching safe yields. The time has come to move forward with adopting the DRAFT GMP. The Parowan Valley had numerous pressing water challenges, of which groundwater management is one. Adopting the DRAFT GMP will allow the Respondents, and all other water users in the area, to focus time and resources implementing actions to reach safe yield, not just study them.

**D) The DRAFT GMP Protects the Tenets of the Prior Appropriation Doctrine While Allowing Local Groundwater Users to Continue to Engage in Collaborative Solutions that Reach Safe Yield.**

**a) Adhering to the Prior Appropriation Doctrine is Essential to Maintaining Order and Stability in the Parowan Valley and Across Utah more Broadly.**

Since prior to its inception as a State, Utah has employed the prior appropriation doctrine to govern the public's rights to use water. Prior appropriation has created stability and order by prospectively determining who is to receive water in times of shortage.<sup>1</sup> Not to be understated, priority is the bed rock principle of law and practicality that anchors the entire State of Utah. Deviating, or finding "work arounds" to priority distribution undermines the value of water rights and the ability of local water users to manage their water assets.

The Parowan Valley has recognized water rights based on priority since the drilling of the first well in 1892. As noted in the Respondents' earlier comment, the Draft GMP reflects these principles by curtailing water rights based on priority date so that senior appropriations are entitled to their whole supply before withdrawals by junior appropriators. Priority distribution creates certainty and all users in the area know what that will get when. This certainty enables local water users to trade, market, and sell local water rights to meet supply and demand imbalances.

Roberts Legacy's recommendations to split the local aquifer into two different groundwater management plans will essentially eviscerate the local prior appropriation system and allow junior appropriators drawing from the same aquifer to divert water before senior appropriators. To work around the confines of priority distribution, Roberts Legacy makes statements that curtailing withdrawals in the Northern Buckhorn area will not stabilize water levels in the Southern part of the valley where overdraft is most severe and therefore not meet the "safe yield"

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<sup>1</sup> See Utah Code Ann. § 73-3-21.1. Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator is entitled to receive the appropriator's whole supply before any subsequent appropriator has any right.

goals of the GMP Act.<sup>2</sup> To make these claims, Roberts Legacy relies on legal concepts similar to a “futile call,” where junior water uses can take water ahead of senior water users where the water would not have otherwise reached the senior user. While Respondents are sympathetic to the junior appropriators' plight, as discussed below, the two-aquifer proposal is not supported by the best available science. Accordingly, there is no basis for deviating from applying curtailment on priority basis across the whole aquifer and proposed DRAFT GMP area.

Adopting Roberts Legacy’s two-aquifer proposal will be incredibly disruptive and prolong achieving safe yield as water users will be focused on fighting the validity of priority distribution and not implementing voluntary water conservation measures or market tools to reduce water use. Moreover, adopting the two-aquifer proposal will create a precedent for water users in other areas of the State to push to administer hydrologically connected aquifers on a subbasin level to maximize priority benefits instead of achieving overall safe yield.

Accordingly, Roberts Legacy’s proposal should not be seriously entertained by the State Engineer.

**b) Local Conservation Efforts Will Work in Concert with the Adopted GMP and Can Alleviate Many of Roberts Legacy’s Concerns.**

Parowan Valley groundwater users are constructively engaging in collaborative solutions to promote water efficiencies and engage in water conservation strategies. Significant large and small-scale conservation efforts in the Parowan Valley are actively focusing on increasing supply through watershed improvements, aquifer recharge enhancement, and efficiency improvements. Given the significant amount of time the DRAFT GMP provides before cuts in the Northern Buckhorn area are anticipated, these voluntary activities could prolong the need for curtailment and contribute to meeting safe yield goals.

**i) Precedent for Adaptive Management and Voluntary Arrangements as Way Forward.**

Robert Legacy acknowledges that priority curtailment is not the only way to achieve safe yield. Roberts Legacy recognizes existing aquifer recharge activities<sup>3</sup> and a voluntary 10% reduction in water use due to water efficiency improvements already implemented by Roberts Legacy in the North.<sup>4</sup> Roberts Legacy recommends the Southern area of the valley conduct similar activities. Respondents agree and have detailed such activities below.

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<sup>2</sup>See, Roberts Legacy, LLC, Comment June 14, 2023, Pages 5-6.

<sup>3</sup> See, Roberts Legacy, LLC, Comment June 14, 2023, Pages 7-8.

<sup>4</sup> See, Roberts Legacy, LLC, Comment June 14, 2023, Alternative 2, Page 10.

Respondents disagree that such activities should act as stand-alone alternative to a GMP. Instead, Respondents argue that DRAFT GMP *already* takes into consideration and includes adaptive management and voluntary arrangement provisions. The [Beryl - Enterprise Groundwater Management Plan](#) includes similar language and can act as model for the Parowan Valley. While noting that decreasing depletion of water is the ultimate goal of water conservation, [water users](#) in the Beryl area are working with the State Engineer under that groundwater plan to account for water efficiency projects.

Contrary to Roberts Legacy's statements that adopting the DRAFT GMP will *disincentivize* the Southern Parowan Valley from adopting voluntary measures, the threat of priority-based cuts under the DRAFT GMP provides the consequences required to *promote* these activities. The threat of community discord and the promise of opportunities to engage in mutually beneficial actions to avoid required priority cuts provides parties the impetus to identify strategies to meet safe yields.

**ii) Southern Parowan Valley Aquifer Recovery and Recharge Activities**

The Parowan Valley Pumpers Association ("Pumpers Association"), who represent many of the Respondents here, is engaging in aquifer recharge activities resulting in a majority of the non-irrigation season high flow water recharging the Parowan Valley aquifer. This collaborative recharge project involves the Pumpers Association, Parowan City, Parowan Reservoir Company, Iron County, and Parowan Valley Distribution System Committee and is planned for winter 2024-2025 construction. This project will also focus on flood control and infrastructure other water conveyance improvements.

The Pumpers Association received \$1.25 million in UDAF water optimization grant funding, and, as the owner of high flow water rights, is well positioned to ensure the success of the project. Parowan City received a \$1 million grant from the Governor's Office of Economic Opportunity and has committed other funds to assist with the project. The City will also provide rights of way on City-owned property. Parowan Reservoir Company will own and fund a portion of a new diversion structure connecting to the recharge pipeline and to a new pipeline connecting to its distribution system and improving water efficiency. Iron County will provide access to a gravel pit as the groundwater recharge site and rights of way across County property. For the past three years, the Distribution System Committee has assessed groundwater users a \$4.00 per irrigated acre per year charge to provide matching funds for the recharge effort. The accumulated balance at year-end 2023 was approximately \$114,000 and is anticipated to be approximately \$170,000 by the end of 2024.

It is anticipated this aquifer recharge project will help boost local aquifer levels and prolong curtailment under the adopted GMP.

**iii) “Farm Level” Water Efficiency Improvements**

Individual groundwater users are actively engaged in collaborative solutions to efficiently and effectively conserve water. Among the conservation activities respondents are engaging in are updating irrigation technologies to promote conservation by updating single-speed pump motors to Variable Frequency Drives (“VFDs”) which allow for groundwater to be pumped at a lower rate and speed thereby being more responsive to groundwater pumping; replacing wheel lines and hand lines with pivots; cutting down on evaporative losses by replacing ponds with troughs, tree-cutting, and curating excess vegetation to curb unnecessary water depletions

More time is required to complete these projects and to provide these large and small scale efforts the opportunity to show the value of combined collaborative efforts to address groundwater issues in the Parowan Valley. The current DRAFT GMP allows time for these activities to occur and water savings to come to fruition. Accordingly, the DRAFT GMP can be adopted now and the local water users can continue to move forward with conservation activities.

The Respondents strongly urge the State Engineer to adopt the DRAFT GMP as currently proposed as the DRAFT GMP best protects the tenets of prior appropriation and provides ample time to meet safe yield goals through alternative means to curtailment.

**II) The DRAFT GMP is Based on the Best Available Science and Roberts Legacy’s June 2023 Comments Do Not Disturb those Findings.**

Roberts Legacy’s primary argument for deviating from the valley wide priority cuts proposed in the DRAFT GMP rests on a finding that the Parowan Valley represents two distinct aquifers. This position is not supported by the best available science nor does the most recent Roberts Legacy comment disturb those findings.

**a) History of Groundwater Development in the Parowan Valley**

The Parowan Valley has historically been used and managed as a single aquifer system. Logically, the first wells were drilled in areas of the valley overlying the aquifer where pumps were unnecessary and artesian springs were abundant. Later, as prime locations with artesian wells were occupied, development and new wells moved out towards other areas of the valley, including areas to the north now considered to be the Buckhorn Flat area. These new areas required wells with pumps. While the conditions of the aquifer changed from being an unconfined aquifer with higher transmissivity to a confined aquifer with lower transmissivity, it still represents the same aquifer.

By the mid-1960's, following the conclusion of the Parowan Valley Adjudication, the State Engineer required all wells irrigating more than five acres to use flow meters. The 1968 annual report for Area 75 shows 70,416.44 Acre-Feet ("AF") of Decreed withdrawals available and actual water use with metered withdrawals as 20,200.46 AF

The Buckhorn Flat data in the 1968 report is instructive. Buckhorn Flat was historically considered to be the area where Highway 91 was straight for about 11 miles, basically consisting of the north half of Township 33, South Range 8 West and Township 32, South Range 8 West. If aggregated correctly from the 1968 report, the north half of Township 33 South Range 8 West showed decreed water rights of 6000.8 AF and actual water withdrawals of 39.7 AF in 1968. For Township 32 South Range 8 West, decreed water rights were 10,760.61 AF, and actual water withdrawals were 431,61 AF in 1968. The combined Buckhorn Flat numbers were 16,761.00 AF of decreed rights and 471.31 AF of actual water withdrawals in 1968.

More recently, Page 14 of the "Scientific Investigations Report 2017-5033" by Thomas M. Marston ("Marston Report") states:

"Well log data from wells located on the Red Creek and Little Creek alluvial fans, as well as the Chimney Meadows and in the southern part of Buckhorn Flat, show a thick clay layer extending from land surface down to 50 to 250 ft. This clay layer likely contributes to the confined conditions in the aquifer that produced the many flowing wells through the north-central part of Parowan Valley historically. Interbedded clay and gravel layers are observed in the majority of well logs in the valley".

These flowing (artesian) wells and others nearer the Little Salt Lake became the source of the earliest irrigation groundwater rights in Parowan Valley. In contrast, the Marston Report finds that "well log data from the wells located in the northern part of the valley indicate that water producing-producing layers are dominated by volcanic debris and volcanic sands." The Northern part of the valley is upstream from the clay layer contributing to confining conditions required for flowing wells.

The 2023 Distribution System Annual Report helps show that the evolution of withdrawals in the Valley are from a shared aquifer. In contrast to the central and southern parts of Parowan Valley, where sprinkler systems were installed almost exclusively on previously flood-irrigated lands, Buckhorn Flat sprinkler systems were installed almost exclusively on previously uncultivated acres. The 2023 Distribution System Annual Report indicates that the decreed water rights in the Buckhorn Flat area are fully used. Similar events have occurred in the balance of the aquifer.

In summary, lower priority water rights coming into production, like the Buckhorn Flat rights, explain the dramatic increase in withdrawals in Parowan Valley and the water table declines between 1968 and 2023. This history shows that aquifer is a shared aquifer, not two distinct aquifers.

**b) The Documents Relied on by the State Engineer Constitute the “Best Available Science” and Support Adoption of the DRAFT GMP**

Roberts Legacy makes several statements in their June 2023 comment to conclude that that there is a “barrier” between the Southern Parowan Valley and the Buckhorn Flat area that would prevent the DRAFT GMP from reaching the “safe yield” required to adopt a groundwater management plan under the Groundwater Management Act.

First Roberts Legacy cites to statements from the State Engineer’s April 27, 2021 meeting.<sup>5</sup> In summary, these statements reaffirm the connectivity between the Northern Buckhorn Flat area and the Southern Parowan Valley and simply lay out that achieving a safe yield in the most impacted area of the aquifer will take time. Besides these statements, there is no other justification for Roberts Legacy’s statement that aquifer “stabilization will never occur, and that groundwater levels in the south will continue to decline indefinitely.”<sup>6</sup>

Similarly, Roberts Legacy’s statements regarding “Best Available Science” do not justify the State Engineer deviating from the recommendations of the DRAFT GMP and continuing to rely on the Marston Report and Scientific Investigations Report 2017-5072 by Lynnette E. Brooks (“Brooks Report”). Roberts Legacy is incorrect to categorize the modeling done under Brooks report as regional and “too large to reflect local hydrological variations.”<sup>7</sup> In actuality, the opposite is true.

The Brooks Report uses localized Parowan Valley data to extrapolate out to the regional level to model groundwater flows. The model was calibrated using Parowan Valley specific data in part to develop coefficients that might be extrapolated to other basins in the study area. But it is a detailed Parowan Valley specific model based on detailed Parowan Valley specific data. In the Abstract on Page 1 of the “Model Report” Brooks that “The objective of the model for Parowan Valley were to simulate revised conceptual estimates of recharge and discharge, to estimate simulated aquifer storage properties and the amount of reduction in storage as a result of historical withdrawals, and to assess reduction in groundwater withdrawals necessary to mitigate groundwater-level declines in the basin”.

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<sup>5</sup> See, Roberts Legacy, LLC, Comment June 14, 2023, Page 5.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at Page 8.

In both the Abstract (Page 1) and Summary (page 61) Brooks writes “The model was used to estimate that reducing withdrawals in Parowan Valley from 35,000 to about 22,000 AF/yr would likely stabilize groundwater levels in the valley if recharge varies as it did from about 1950 to 2012”. This is consistent with the State Engineer’s statutory mandate requiring the creation of groundwater management plans in declining aquifer situations by reducing withdrawals to Safe Yield.

**c) Change Application administration does create a reason for separating the local aquifer into two distinct aquifers.**

Roberts Legacy also points to the State Engineer’s current Change Application policy as a reason and precedent for separating the local aquifer into two areas. In their prior comment Respondents included numerous examples of the State Engineer having different groundwater policies for different areas but still operating under once groundwater management plan or treating the area as one aquifer. Those examples remain pertinent today.

In the interests of consistency and to promote adoption of the DRAFT GMP, the Respondents do not oppose the State Engineer removing the current Change Application restriction and treating Change Applications similarly and on their own individual merits across the entire Parowan Valley.

Accordingly, raising only questions about timing and presenting no new scientific data pointing to the contrary, Roberts Legacy’s June 2023 Comment does not present a scientific basis for separating the local area into two distinct aquifers. As such, the Respondents reiterate that the current DRAFT GMP is based on the best available science and should be adopted as currently presented.

**III) Roberts Legacy’s Takings and Waste Claims Are Beyond the Scope of the GMP Act and Do Not Present a Basis for the State Engineer to Reject the DRAFT GMP.**

Roberts Legacy’s June 2023 Comment makes several legal arguments that are beyond the scope of the State Engineer’s authority and should be disregarded.

The GMP Act provides discreet criteria the State Engineer is to review and to adhere to when determining whether a groundwater management plan should and can be adopted. Roberts Legacy clearly identifies the relevant criteria in their Comment, such as using the best available science to determine safe yield etc. Utah Code Ann. § 73-5-15(5) specifically establishes what the State Engineer “shall” do to adopt a groundwater management plan, such as holding the required public meetings, noticing the DRAFT GMP, and collecting public comment. The State Engineer has satisfied these criteria and is now authorized to adopt the DRAFT GMP.



Nowhere in the GMP Act does it authorize the State Engineer to take into account legal determinations like determining whether the DRAFT GMP represents a “waste” of water or a “constitutional takings.”<sup>8</sup> In discussing the State Engineer’s ability to declare a water right forfeited in a Change Application proceeding, the Utah Supreme Court clearly established a separation of powers between the State Engineer, who is a representative of the executive branch, and the judiciary.<sup>9</sup> Only Courts can determine the scope and extent of a property right: the State Engineer does not have this power.<sup>10</sup> Accordingly, involving a property right, the State Engineer has no authority to determine whether the “safe yield” provisions of the DRAFT GMP violate the 5<sup>th</sup> Amendment Taking Clause of the U.S. Constitution.<sup>11</sup> As such these comments should be disregarded by the State Engineer.

If Roberts Legacy truly believes the DRAFT GMP raises the issue of “waste” and the proposed “safe yield determination” presents a constitutional “takings” the remedy is already provided for in the GMP Act: file a complaint in the local District Court within 60 Days of the DRAFT GMP being adopted as final.<sup>12</sup> Accordingly, the threat of future litigation does not present a bar or barrier to the State Engineer adopting the DRAFT GMP as currently proposed. Roberts Legacy has an avenue for legal relief for their legal claims and the State Engineer can move forward with adopting the DRAFT GMP.

### SUMMARY

In summary, the DRAFT GMP meets the criteria of Utah Code Ann. § 73-5-15 and can be approved by the State Engineer. The DRAFT GMP properly protects the tenets of the Prior Appropriation Doctrine and priority distribution while allowing ample time for local water users to avoid curtailment through other means. Roberts Legacy has provided no data to counter the Brooks and Marston Reports as being relied upon as the “best available” science. Additionally, the threat of litigation on grounds outside the GMP Act is not a reason for not approving the DRAFT GMP.

Most importantly, local water users, here represented by the Respondents, are ready to move forward and conclude this process. The Parowan Valley has been extensively studied and the public has provided robust public comment. The DRAFT GMP presents community consensus and will achieve the safe yield goals everyone desires. The Respondents are excited about the numerous water conservation activities occurring in the local area and wish to direct resources in that direction. These collaborative solutions present a constructive way forward that strengthens

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<sup>8</sup> See, Roberts Legacy, LLC, Comment Juze 14, 2023, Page 7.

<sup>9</sup> See generally, *Jensen v. Jones*, 2011 UT 67.

<sup>10</sup> *Id.*

<sup>11</sup> See, Roberts Legacy, LLC, Comment June 14, 2023, Page 7.

<sup>12</sup> Utah Code Ann. § 73-5-15(10).

the local community and makes local water users more resilient. The Respondents urge the State Engineer to move forward with adopting the DRAFT GMP.

Sincerely,



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Robert DeBirk  
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