



January 31, 2022

Richard R. Hall
201 S Main Street, Suite 1100
Salt Lake City, UT 84111
D. 801.578.6960
richard.hall@stoel.com

VIA EMAIL: TERESAWILHELMSSEN@UTAH.GOV

Teresa Wilhelmsen, State Engineer
Utah Division of Water Rights
1594 W. North Temple, Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300

Re: Deseret Power's Response to the Request for Agency Action by PVR Inc. and the Grand Canyon Trust regarding Water Right 49-258

Dear Ms. Wilhelmsen,

Deseret Power appreciates the opportunity to respond to the request for agency action filed by PVR Inc. and the Grand Canyon Trust (the "**PVR Request**") regarding Deseret Power's water right 49-258 (the "**WR 49-258**").¹ In this letter, PVR Inc. and Grand Canyon Trust, as the requesting parties, will be referred to collectively as "**PVR**."

1. The State Engineer Should Deny the PVR Request as Untimely

The PVR Request is best characterized as a water right protest, and depending on the point of view, that protest has been filed either eight and a half years too late or three and half years too early. Either way, at this point, the State Engineer, the Utah Division of Water Rights, and Deseret Power should not be required to expend resources responding to the PVR Request. It is simply the wrong time.

The State Engineer's Order dated January 6, 2015 (the "**2015 Order**") determined:

Once all other permits have been acquired, this is your authority to develop the water right under the above-referenced application which under § 73-3-10 and 73-

¹ Deseret Power previously did business under the business name Deseret Generation & Transmission Co-Operative or DG&T. This response uses Deseret Power throughout for clarity.

3-12, Utah Code Annotated, 1953, as amended, must be diligently prosecuted to completion. The water must be put to beneficial use and proof must be filed on or before **July 30, 2025, under Water Right Number 49-258 (A36730) which is the parent water right**, or a request for extension of time **beyond fifty-years** must be acceptably filed; otherwise the application will be lapsed.²

Under the express terms of the 2015 Order, Deseret Power has until July 30, 2025 to either proceed with diligent development of WR 49-258 and file a corresponding proof of beneficial use, or in the alternative, request an additional extension of time pursuant to Utah Code § 73-3-12(4)(b). The 2015 Order established the timeline for Deseret Power's next actions, and Deseret Power has the right to rely on the 2015 Order. Under the terms of the 2015 Order, Deseret Power, as a wholesale electrical cooperative, is under no obligation to demonstrate diligent development currently. By July 30, 2025, Deseret Power will need to either put the water to beneficial use (and complete the proof of beneficial use) or file the extension request under § 73-3-12(4)(b). Therefore, there is no reason or legal basis to consider the PVR Request at this time.

As a broader point, allowing protests, brought under § 73-3-13, of extensions granted under § 73-3-12(4), will create a waste of valuable state resources. A public water supplier or wholesale electrical cooperative that has properly obtained an extension under § 73-3-12(4) may not yet have sufficient demand to justify constructing the works to put the water applied for to use, or otherwise taking specific actions to develop the water right. Yet, if protests are allowed against these extensions under § 73-3-13, as demonstrated by this protest, an otherwise uninterested and unaffected applicant or user of water could bring a protest requiring the State Engineer to review the same information the applicant relied on in requesting the extension in the first place – whether or not the water is needed for the reasonable future requirements of the public. The appropriate time to protest an extension granted under § 73-3-12(4) is at the time the extension is requested. This will conserve the State's and the applicant's valuable resources.

Accordingly, Deseret Power requests the State Engineer dismiss the PVR Request, with the recognition that PVR can refile its protest in 2025, assuming Deseret Power files an extension request at that time.

In the alternative, the State Engineer could hold the PVR Request, and schedule the adjudicative hearing in 2025, after an extension request is filed by Deseret Power. Utah Code § 73-3-13(2) does not require the State Engineer hold an adjudicative hearing within a set timeline, and PVR has not alleged any harm (either immediate or long term) arising from the current status of WR 49-258. Therefore, there appears to be no immediate need to expend resources to adjudicate the PVR Request. If an extension request is subsequently filed by Deseret Power in 2025, the PVR Request can be considered in the hearing held in connection with that request.

² Note the emphasis is included in the State Engineer's Order.

2. Deseret Power Is Exercising Reasonable Due Diligence in Developing WR 49-258 to the Extent Required by § 73-3-12(4)

Deseret Power sought, and was granted, an extension of the proof due period for WR 49-258 under § 73-3-12(4)(b) based on the showing of “reasonable future requirements,” and the facts supporting that showing remain unchanged today. Subsection (4)(b) allows the State Engineer to extend the proof due period, set forth in subsection (2)(a), upon a showing by a wholesale electrical cooperative that the water is “needed to meet the reasonable future requirements of the public.” § 73-3-12(4)(b)(i)(B). It must be noted that the plain language of § 73-2-12 shows a clear intent of the Utah Legislature that an applicant granted an extension under subsection (4) is not subject to the typical “due diligence” requirements set out in subsection (2)(g). This conclusion is compelled by both the plain language of the statute and the nature of extensions granted under subsection (4).

When interpreting a statute, the “primary objective ‘is to ascertain the intent of the legislature.’” *Castro v. Lemus*, 2019 UT 71, ¶ 17, 456 P.3d 750, 753 (citation omitted). As the Court stated in *McKittrick v. Gibson*:

Because the best evidence of the legislature's intent is the plain language of the statute itself, we look first to the statutory text. But we do not interpret statutory text in isolation. Instead, we determine the meaning of the text given the relevant context of the statute (including, particularly, the structure and language of the statutory scheme). In doing so, we presume, absent a contrary indication, that the legislature used each term advisedly.

2021 UT 48, ¶ 19, 496 P.3d 147, 152 (quotation simplified).

The Legislature repeatedly and purposefully exempted extensions under subsection (4) from the provisions of subsections (2) and (3). Furthermore, subsection (4) structurally separates extensions beyond 50 years of the application date from extensions within 50 years of the application date. *See Ivory Homes, Ltd. v. Utah State Tax Comm’n*, 2011 UT 54, ¶ 26, 266 P.3d 751, 758.

Simply put, almost all extensions of the proof due period for a water right application will occur within 50 years from the date of the application. Anyone with a water right application can request such an extension. To secure such an extension, the statute requires an applicant demonstrate diligence (1) to obtain an extension within 50 years from the application, and (2) to maintain that extension right during the extension term. § 73-3-12(2)(g).

In contrast to the general extension and diligence requirements under § 73-3-12(2)(g), and in recognition of the unique role that public water suppliers and wholesale electrical cooperatives play in serving the public, as well as the unique need for increased water supply as the population grows, the Legislature created a different standard for diligence for public water suppliers and wholesale electrical cooperatives. That standard requires a showing that the water is “needed to meet the reasonable future requirements of the public.” § 73-3-12(2)(h). The only applicants who

may extend their application beyond 50 years are 1) applicants who have fully constructed the works to put the water to beneficial use, but who have not yet filed proof, and 2) public water suppliers and electrical wholesale cooperatives that demonstrate the water is needed for the reasonable future requirements of the public. § 73-3-12(4). Each time a public water supplier or electrical wholesale cooperative requests an extension the State Engineer evaluates whether the extension is warranted – e.g., whether the water is really needed to meet the reasonable future requirements of the public.

Notably, in contrast to § 73-3-12(2)(g), which requires the applicant (that is not a public water supplier or wholesale electrical cooperative) “continue[] to exercise reasonable and due diligence in completing the appropriation” in order to maintain the extension right. When it comes to a wholesale electrical cooperative, § 73-3-12(2)(h) states that “[t]he state engineer shall consider the holding of an approved application by a public water supplier or a wholesale electrical cooperative to meet the reasonable future water or electricity requirements of the public to be reasonable and due diligence in completing the appropriation” process (emphasis added). In other words, a wholesale electrical cooperative need not demonstrate diligence in the typical sense, but rather must demonstrate a “need to meet the reasonable future requirements of the public,” which is sufficient to meet the diligent prosecution requirement.

To be clear, nowhere in § 73-3-12(4) did the Legislature reference the “due diligence” requirement of subsection 12(2)(b) or (g). Indeed, it would be odd for the Legislature to allow a public water supplier or wholesale power cooperative to hold a water right application for the first 50 years under § 73-3-12(2) on a showing that the water applied for is needed for the reasonable future requirements of the public, but then on the first day of the fifty-first year, require the public water supplier or wholesale electrical cooperative to begin exercising overt diligence. This is especially true where the Legislature did not reference the diligence requirements of subsection (2), but instead continued to require a showing that the water was needed for the reasonable future requirements of the public. See *Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, ¶ 15, 301 P.3d 984, 989 (“We presume that the expression of one term should be interpreted as the exclusion of another, and we therefore seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.” (quotation simplified)).

Subsection 12(4) applies in a narrow and unique set of circumstances, where the subsection (2)(g) ongoing showing of diligence is not applicable. Subsection (4)(a) applies to situations where the works are already constructed – demonstrating a significant investment by the applicant. Subsections (4)(b) and (c) apply to extensions requested by public water suppliers or wholesale electrical cooperatives. Under subsection (4)(b) the public water supplier or wholesale electrical cooperative is required to provide a report with its extension request forecasting the need for water over the next 40 years. § 73-3-12(4)(b)(ii) (public water supplier), (iii)(B) (wholesale electrical cooperative). The structure of the statute demonstrates that the Legislature understood that a wholesale electrical cooperative may need additional water at some point in the future, and provided for the wholesale electrical cooperative to extend its application until such time as electricity demand has increased to a point that the additional water is required.

In 2013 Deseret Power filed a request for extension, complying with § 73-3-12(4) by demonstrating that the water applied for is needed for the reasonable future requirements of the public. The State Engineer relied on this showing in granting the extension of the proof due period for WR 49-258 until 2025. The facts supporting the State Engineer's decision remain unchanged and, therefore, Deseret Power's extension of WR 49-258 should be maintained and the PVR Request should be denied.

3. Deseret Power Holds WR 49-258 to Meet the Growing Future Electricity Demand of the Public Through Additional Generation Sources

Electricity demand throughout Deseret Power's service area and the State of Utah will increase in the future. This point is undisputed. Recent studies indicate that the population in Utah will increase by over 2.2 million people (a 66% increase) over the next 40 years.³ This population growth will in turn increase electricity demand in Deseret Power's service area, and Utah generally. While the electric generation landscape has changed considerably since 2015, to meet future demands, Deseret Power still anticipates a second generating unit (and possibly a third generating unit) will be constructed at the Bonanza Power Plant (the "*Bonanza Plant*") over the next 30 years, as indicated previously in its July 17, 2013 Request for Extension.⁴ Deseret Power is currently evaluating further options to increase and diversify electricity generation capacity at the Bonanza Plant. Water Right 49-258 gives Deseret Power important flexibility in meeting the future electricity needs of its member cooperatives and the public.

In its request, PVR suggests that Deseret Power is likely to retire the Bonanza Plant around 2030. This is simply not accurate. In 2015, Deseret Power entered into a settlement with the EPA, the Sierra Club, and WildEarth Guardians. *See* 80 Fed. Reg. 63,993 (Oct. 22, 2015) (notice of proposed settlement agreement). The settlement agreement required Deseret Power to submit an application for a minor New Source Review permit that included new NOx control requirements and emission limits, and set a coal consumption cap for Unit 1. The permit sets a coal consumption cap for Unit 1 at 20 million tons of coal. There is no requirement in the permit that the entirety of the 20 million tons be used by Unit 1 prior to 2030. Instead, Deseret Power retains flexibility to operate Unit 1 on a seasonal basis that may extend the operational life of Unit 1 well beyond 2033. Further, Deseret Power retains the option to install additional emission control technology on Unit 1, which

³ Kem C. Gardner Policy Institute, Utah Long-Term Planning Projections (Jan. 2022), <https://gardner.utah.edu/wp-content/uploads/LongTermProj-Jan2022.pdf?x71849>.

⁴ On page 2 of the PVR Request, PVR states, "The Division of Water Rights (DWR) approved DGT's extension request based on the electrical cooperative's sworn statement that it needed the water right at two new coal-fired generating units that it planned to build at the Bonanza plant over the next 25 years." This statement is incorrect. Deseret Power's July 17, 2013 Request for Extension states, "DG&T anticipates that a second 500 MW generating unit will be constructed and put into operation within the next 5 to 15 years, and a third generating unit thereafter will be needed within the next 15 to 25 years." Deseret Power did not state that these units would be "coal-fired." Indeed, barring some dramatic and unanticipated shift in the energy landscape, it is unlikely any new coal-fired units would be built at the Bonanza Plant.

will remove the coal consumption cap. Furthermore, Deseret Power is exploring opportunities for carbon capture and sequestration in connection with the operation of Unit 1. Such environmental pollution control technologies would require extensive water resources, but would allow Deseret Power to continue operating Unit 1 well beyond 2030. Irrespective of the fate of Unit 1, the Bonanza Plant will continue to play an important role in Deseret Power's generation portfolio.

More importantly, the EPA settlement does not prevent the further expansion of the Bonanza Plant. The Bonanza Plant supplies a significant portion of the electricity generation for Deseret Power to meet its supply obligations to its member cooperatives. Deseret Power has invested significant resources in transmission lines and related infrastructure to increase the generation capacity at the Bonanza Plant and carry electricity from the plant to its member cooperatives. Deseret Power is currently evaluating alternative generation options at the Bonanza Plant, which include building combined cycle natural gas units at the plant. Currently Deseret Power envisions installing natural gas units that would operate simultaneously with Unit 1 (and likely replace Unit 1 in the future). All the additional generation capacity will increase the water demand at the Bonanza Plant, which demand will be met, in part, by WR 49-258.

Additionally, the existing transmission infrastructure creates opportunities for the Bonanza Plant to add electric generating capacity. If Deseret Power was required to build additional capacity at another location, there would be significant costs associated with developing concomitant transmission capacity. Beyond transmission capacity, the Bonanza Plant is also served by a pipeline carrying water from the Green River. The pipeline is currently operated well below maximum capacity. Once additional generation capacity is installed at the Bonanza Plant, the existing pipeline infrastructure will already be in place to transport the additional water from WR 49-258 to the Bonanza Plant.

To be clear, the Bonanza Plant will continue to play a key role in producing electricity for Deseret Power's customers and the public. While Unit 1 will likely be retired as a coal-fired unit at some point in the future, that date has not been determined. More importantly, the retirement of Unit 1 will not mean the closure of the plant. The Bonanza Plant will continue to operate as an electricity generation facility, and WR 49-258 gives Deseret Power important optionality in continuing the operation of the plant to meet the reasonable future electricity requirements of the public.

4. Grand Canyon Trust Does Not Have Standing

Grand Canyon Trust is neither an "applicant" nor a "user of water," § 73-3-13(1), and therefore lacks standing to bring this protest. *See McKittrick*, 2021 UT 48, ¶ 17.

Utah Code § 73-3-13(1) limits who may file a request for agency action to an "applicant" or a "user of water." *See Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989) (citation omitted). Grand Canyon Trust is neither.

Grand Canyon Trust suggests that its members and staff are “users of water,” but has offered no evidence to support the statement. The term “user of water,” does not mean anyone who drinks Utah water or swims in Utah’s rivers. Instead, the Utah Legislature has given “user of water” a specific meaning. Under § 73-5-1 the Legislature provided that a water commissioner’s salary and any other expenses for the distribution of water from a river system “shall be borne pro rata by the *users of water* from [] the river system.” *See Bacon v. Gunnison Fayette Canal Co.*, 75 Utah 278, 282, 284 P. 1004, 1005 (1930) (citation omitted). This use of the term demonstrates that the Legislature had a specific meaning in mind when it used the term in § 73-3-13 – that a “user of water” is someone who actually holds a water right and is entitled to withdraw water from a river system or other waterbody.

This interpretation comports with the remaining provisions of the statute. In § 73-3-7 the Legislature allowed “[a]ny person interested” to file a protest against an application to appropriate water. This demonstrates that the Legislature intended “user of water” to mean something more specific than any person in Utah who simply enjoys Utah’s waters.

“[I]t is axiomatic that where the right of action is one created by statute, the law creating the right can also prescribe the conditions of its enforcement.” *McKittrick*, 2021 UT 48, ¶ 17 (quotation simplified). Here, the Legislature has limited who may bring a protest under § 73-3-13, and Grand Canyon Trust is not in that class. *Bonham*, 788 P.2d at 502.

Nor can Grand Canyon Trust rely on associational standing. First, Grand Canyon Trust has not alleged that its members, beyond PVR Inc., are “applicants” or “users of water,” within the meaning of that term. Second, and more importantly, the Legislature has narrowly defined who may bring a request for agency action under § 73-3-13, and an association is not included. In *McKittrick*, the Utah Supreme Court explained that, where the petitioner relies on a cause of action created by statute, the petitioner must also be in the class of parties authorized to file suit.

Because Grand Canyon Trust is not an “applicant” nor a “user of water,” it is not within the class of parties that the Legislature has authorized to challenge a water right under § 73-3-13, and therefore it lacks standing to protest the extension of the proof due period for WR 49-258.

5. Conclusion

Deseret Power appreciates the opportunity to respond to the PVR Request. The protest’s description of the future of the Bonanza Plant is inaccurate, and the legal assertions are contrary to Utah law. WR 49-258 will play an important role in Deseret Power’s continued operation of the Bonanza Plant and its ability to meet the reasonable future electricity needs of the public. Accordingly, the PVR Request should be denied.

Please feel free to contact me if you have any questions regarding Deseret Power’s response set forth in this letter and direct all further correspondence regarding this matter to me at the address listed above.

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Best regards,



Richard R. Hall

cc: Renee Spooner
Jared Manning
Jeff Peterson
David Crabtree
Wade Foster
Michael Toll
Jeffrey W. Appel