PROTEST

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May 4, 2026

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WATER RIGHTS
ONLINE

Protestant: Center for Biological Diversity
c/o Scott Lake
PO Box 6205
Reno, NV 89503

RE: Protest of Change Application a54385 (13-4148)

A hearing is requested.

The Center for Biological Diversity hereby protests Application Number A54385 (Water Right: 13-4148) made by Bar H Ranch in Water Right Area 13. Please see attachment for details.

Scott Lake

Enclosure

SCANNED

May 4, 2026

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

Re: Protest of Water Right Application A54385 (Water Right: 13-4148), Bar H Ranch; Hearing Requested

Submitted electronically

The Center for Biological Diversity hereby submits a timely protest pursuant to Utah Code § 73-3-7 concerning Application Number A54385 (Water Right: 13-4148) made by Bar H Ranch in Water Right Area 13.

Protestant's Standing

Under Utah Code § 73-3-7, any person is able to file a protest.

The protestant, the Center for Biological Diversity (Center), is a 501(c)(3) non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, environmental law, and creative media. The Center has over 1.5 million members and supporters throughout Utah and the United States, including supporters who live in Salt Lake City, and who utilize public lands and waters for spiritual, aesthetic, scientific, recreational, and other uses. The Center's Great Basin program focuses on the protection of wildlife and endangered species, the preservation of public lands, and the sustainability of the Great Basin's groundwater resources. The Center has a well-established interest in the conservation of the Great Salt Lake, its tributary sources, and the wildlife that depend on the lake, including the Wilson's phalarope.

The Center has staff and members who regularly use and enjoy and will continue to use and enjoy Great Salt Lake for birdwatching, boating, photographing, hiking and studying natural areas. The Center its staff and its members are harmed and will be harmed by the State Engineer's approval of this application. As such, the Center's staff and members are "persons interested" for the purposes of Utah Code Ann. § 73-3-7. *See Bonham v. Morgan*,

788 P.2d 497, 502 (1989) ("Section 73-3-7 permits 'any person,' not just a water user or an owner of vested rights, to protest the granting of an application under title 73").

Statutory Framework

In evaluating a permanent change application, the State Engineer must "follow the same procedures provided [in Utah Code § 73-3-8] for approving an application to appropriate water." Utah Code Ann. § 73-3-8(5)(a).

In evaluating an application to appropriate water, the State Engineer must determine, among other things: (1) whether there is unappropriated water in the proposed source of supply, *id*. § 73-3-8(1)(a)(i); (2) whether the proposed use would interfere with the more beneficial use of the water, *id*. § 73-3-8(1)(a)(ii); (3) whether the proposed use would prove detrimental to the public welfare, *id*. § 73-3-8(1)(a)(iii)(B); (4) whether the proposed plan is physically and economically feasible, *id*. § 73-3-8(1)(a)(iii)(A); (5) whether the applicant has the financial ability to complete the proposed works, *id*. § 73-3-8(1)(a)(iv); and (6) whether the application was filed for speculative purposes, *id*. § 73-3-8(1)(a)(v).

In addition, Utah Code Section 73-3-8(1)(b) provides that where "information in the state engineer's possession" indicates that the application may "unreasonably affect public recreation or the natural stream environment, or . . . prove detrimental to the public welfare," the State Engineer must withhold approval of the application until she investigates the matter fully.

An application that fails to meet the requirements of Section 73-3-8 "shall be rejected." *Id*. § 73-3-8(1)(c).

Throughout the application process, the burden is on the applicant to show that the application would comply with the requirements of Section 73-3-8. *Searle v. Milburn Irrigation Company*, 2006 UT 16, ¶ 53 133 P.3d 382, 395. If the applicant cannot meet this burden, or if a protestor produces evidence that undermines the reasonableness of the applicant's "no reason to believe" assertions, the application must be rejected. *Id*. at ¶ 56.

Protest

Application A54385 falls well short of the statutory requirements and must therefore be rejected. The application states that the purpose of the change is to construct a 7.5-gigawatt natural gas power plant, along with a data center. However, given the complete absence of details in the application regarding the specifics of this project—which would be the largest of its kind ever proposed in the United States—and given that the applicant cannot demonstrate its ability to meet the Section 73-3-8 provisions, there is no legal basis for the State Engineer to approve this application. At the very least, the State Engineer must

withhold approval until the application's impact on public recreation and the public welfare have been fully investigated.

The Application Should be Denied Because There is No Unappropriated Water in the Proposed Source (Utah Code Ann. § 73-3-8(1)(a)(i)).

The application seeks to change the place and manner of use of a surface water right in Area 13, where "[s]urface waters are limited and generally considered to be fully appropriated." Utah State Engineer, Area 13 Water Rights Policies, https://www.waterrights.utah.gov/wrinfo/policy/wrareas/area13.asp (last visited March 3, 2026).

The applicant claims the proposed change would not increase the quantity of water historically "diverted." However, this fails to address the actual consumption of the base right, and whether the proposed change would increase the amount of water consumed.

Given that the existing use is an agricultural operation on the very shore of Great Salt Lake, the return flow to the Lake from that operation would represent a significant portion of what has been diverted. Further, although the State Engineer's website does not contain any water use reporting for this water right, the satellite imagery map provided by the Division does not show evidence of irrigation use within the area associated with Water Right 13-4148. The State Engineer must therefore consider the possibility that the applicant has not put the full amount of the existing right to beneficial use, and that, as a consequence, the requested 1,900 acre-feet would represent a significant increase in the actual consumption rate, and a correspondingly significant loss of inflow to the Great Salt Lake.

The Application Should be Denied Because it Would Interfere with the More Beneficial Use of the Water (Utah Code Ann. § 73-3-8(1)(a)(ii)).

The application would interfere with at least two more beneficial uses: the conservation and restoration of the Great Salt Lake, and wildlife habitat restoration at the Locomotive Springs Waterfowl Management Area, which is adjacent to the proposed powerplant and datacenter development.

As the State Engineer is aware, the decline of the Great Salt Lake is a matter of utmost public concern. The Lake is the largest saline lake in the Western Hemisphere and the eighth largest in the world. Its shorelines boast Utah's highest density of wetlands, and it provides habitat for plants, brine shrimp, reptiles, amphibians, mammals, shorebirds, and waterfowl.

The Great Salt Lake is particularly important to migratory birds. It is a critical link in the Pacific Flyway between North and South America. Every year, 10 to 12 million birds from 338 species arrive to rest, eat, and breed during migrations of a thousand miles or more.

These include critically imperiled species such as the Wilson's phalarope and eared grebes. With the decline of other saline lakes, the Great Salt Lake is increasingly important to these species. In recognition of its role in these international flights, the Great Salt Lake is designated as one of only eight sites with a "hemispheric" designation—as opposed to regional or international designation—of the 40 Western Hemisphere Shorebird Reserve Network sites in the United States.

The Great Salt Lake also contributes $1.3 billion each year to the local economy and provides over 7,700 jobs. Other economic activity associated with a healthy lake bolsters economic activity as well. The ski industry, for instance, supports 20,000 jobs and another $1.2 billion.

However, due largely to increasing human demands on water resources within its tributary watersheds, the Lake and its ecosystem are at risk of collapse. *See* Benjamin Abbott, *et al*. Emergency measures needed to rescue Great Salt Lake from ongoing collapse (2023), available at: https://pws.byu.edu/great-salt-lake. In November of 2022, the Great Salt Lake fell to a new record low water level, not seen in all the years since elevation levels were first recorded from when settlers arrived in 1847. *Id*. This decline in water levels had severe ecological and economic consequences. *Id*. Salinity in the Lake spiked, brine fly and brine shrimp populations—the foundation of the Lake's food web—crashed, recreational access to the Lake was limited, and pollution from airborne dust increased substantially. *Id*.

In response, the State of Utah, along with private individuals and entitles, made unprecedented commitments and investments toward halting and reversing the Lake's decline. For instance, on November 3, 2022, Governor Cox issued Proclamation 2022-1, "Suspending New Appropriations of Surplus and Unappropriated Waters in Great Salt Lake Basin" ("Proclamation"). As a basis for the closure, the Proclamation cites "increased demand" as a threat to the dwindling Lake and "pauses further appropriations of surface water and groundwater that are tributary to [the] Great Salt Lake." The Proclamation states further appropriations will likely result in a diminished Great Salt Lake, resulting in "increased dust, worsening air quality, reduced snow, diminished lake access, increased salinity, habitat loss and negative economic repercussions to the state."

In addition, the State has "responded with significant public investments and policy changes," and "is actively working to enhance conservation efforts." Great Salt Lake Strategic Plan (Strategic Plan) at 3, 12, available at: https://greatsaltlake.utah.gov/wp-content/uploads/Great-Salt-Lake-Strategic-Plan-1.pdf. Those efforts include focused regional conservation goals, a $250+ million investment in secondary water metering, landscape conversion incentive programs, water-saving device rebates, integrated land use and water planning, at least $300 million in agricultural conservation efforts, $40

million spent to fund a Great Salt Lake water trust, and numerous other legislative initiatives, regulatory changes, agency efforts and dedicated expenditures.

Additionally, through the Great Salt Lake 2034 Charter, the State has partnered with private entities who have pledged upwards of $200 million, in a renewed effort to bring the Lake back to a healthy level by the 2034 Olympics. In speaking to the need for such a commitment, the Governor stated that "Great Salt Lake is our lake, our heritage, and our responsibility," and that "[w]e will not let the Great Salt Lake fail." *See* Governor Cox, GSL 2034, https://governor.utah.gov/gsl/.

These substantial investments and commitments demonstrate that the restoration of the Great Salt Lake is a beneficial use of the highest order. However, they would be substantially undermined were the State to permit continued water-intensive development within the Lake's watershed. Put simply, the proposed development is wholly incompatible with the State's commitment to delivering more water to the Great Salt Lake.

The proposed withdrawal would also interfere with the State's management of the Locomotive Springs Wildlife Management Area (LSWMA). Composed of both State and Federal lands, with acquisitions dating back to 1931, the purpose of the LSWMA is to "protect, restore, and enhance both aquatic and terrestrial habitat for wildlife; protect cultural resource, and provide for recreational opportunities that are compatible with the purpose of a wetland ecosystem." Locomotive Springs Wildlife Management Area Habitat Management Plan at 2, 6-7. The LSWMA provides crucial habitat for a variety of bird species, including seven State species of concern: American white pelican, bald eagle, bobolink, burrowing owl, ferruginous hawk, long-billed curlew and short-eared owl. *Id*. at 2, 10. In all, 137 bird species have been identified in the area. *Id*. at 10. In addition, the LSWMA provides habitat for numerous other wildlife species, including mammals, fish, and reptiles. *Id*. at 8. Public recreational uses include hunting and fishing. *Id*. However, ongoing habitat conservation efforts on LSWMA have been stymied by a lack of water. *Id*. at 2-3. Authorizing additional withdrawals in the area, along with large-scale industrial development, could further impair the State's efforts to maintain and restore critical wildlife habitat in the LSWMA.

Because the application will undermine the State's current, more beneficial objectives of getting more water into the Great Salt Lake and restoring wildlife habitat in the LSWMA, it must be denied pursuant to Utah Code § 73-3-8(1)(a)(ii).

The Application Should Be Denied Because it would Prove Detrimental to the Public Welfare (Utah Code Ann. § 73-3-8(1)(a)(iii)(B)).

As discussed above, State leadership has made it clear that anything that undermines the protection and restoration of Great Salt Lake is detrimental to the public welfare, including the proposed withdrawal of 1,900 acre-feet on the Lake's North shore. In addition, the application will interfere with the State's management of the LSWMA. Therefore, the proposed use will be detrimental to the public welfare, and the application must be denied pursuant to Utah Code Ann. § 73-3-8(1)(a)(iii)(B). *See also* Utah Code Ann. § 73-3-8(1)(b).

The Application Should be Denied Because the Proposed Plan is Not Physically or Economically Feasible (Utah Code Ann. § 73-3-8(1)(a)(iii)(A)).

A proposed use of the State's water must be physically and economically feasible. *See* Utah Code Ann. § 73-3-8(1)(a)(iii)(A). This requirement asks whether the applicant's proposed plan can actually work as described. Where material questions about the plan's feasibility remain unresolved, and where the applicant's own disclosures reveal that critical technical systems have not been designed, tested, or even selected, the plan cannot satisfy this statutory criterion. Here, several aspects of the applicant's proposal call into question its physical and economic feasibility.

First, the project's asserted water-use levels are unsupported and unrealistic. The project proponent, O'Leary Digital, has asserted through various agents and representatives that the proposed development would use only 24 acre-feet of water. *See, e.g.* Mike Anderson, *Scientists share concerns over proposed mega data center in Box Elder County*, KSLTV, April 28, 2026, https://ksltv.com/environment/scientists-share-concerns-over-proposed-mega-data-center-in-box-elder-county/903505/. O'Leary Digital has also claimed that the development would use less water than ranching. Grace Doerfler, *MIDA, 'Shark Tank' Kevin O'Leary announce new data center project area*, KPCW, April 24, 2026, https://www.kpcw.org/state-regional/2026-04-24/mida-shark-tank-kevin-oleary-announce-new-data-center-project-area. Given that the proposed development would include the largest datacenter complex in the United States, along with up to 9GW of power generation (more than is currently generated across the entire state of Utah and enough to power a city the size of New York), these figures cannot be considered accurate, realistic or credible. Indeed, these representations have been publicly challenged by local experts, who describe them as "extraordinary" and question the project's feasibility. *See* Anderson, *supra*. Further, O'Leary Digital has failed to produce any information about its proposed facilities that could substantiate these astonishing claims. As noted, the applicant bears the burden of showing that its plan is physically and economically feasible. Accordingly, the State Engineer cannot simply take O'Leary Digital at its word that the project will work as it

claims. Unless the company can produce credible and probative evidence to substantiate its extraordinary claims regarding water use, the application must be denied.

Second, the development relies on a speculative business model that has not been shown to be economically feasible. It has been widely reported that the project has no committed anchor tenant, no executed financing agreements, and no announced construction timeline. Additionally, no schematics, blueprints, plans, specifications, or studies have been produced in connection with this project.

As with a nearly identical proposed datacenter development in Alberta, O'Leary Digital's strategy for this project appears to be to acquire the necessary State and Federal permits on a speculative basis, without first designing the project facilities, acquiring the necessary financing, or securing tenants. The company's principal, Kevin O'Leary, has publicly acknowledged this, stating, "[t]he minute we get the permit, that triggers a whole bunch of other activities in terms of how we finance it, when we start engineering, design, everything else." Eagle Anderson, *Wonder Valley AI Data Centre exempt from provincial environmental impact assessment, still needs permits*, CBC News, April 10, 2026, https://www.cbc.ca/news/canada/edmonton/wonder-valley-data-centre-environmental-impact-assessment-9.7158526. This has not been shown to be an economically viable development strategy. Indeed, O'Leary's Alberta development was approved by local authorities in 2024, but as of early 2026 it had yet to break ground, and had no confirmed anchor tenant (e.g., a large company such as Google or Amazon that would make its proposed "hyperscale" data center economically viable). David Reevely, *The truth about Wonder Valley, Kevin O'Leary's data-centre dream*, The Logic, https://thelogic.co/news/the-big-read/wonder-valley-data-centre-alberta-kevin-oleary/. A project that will not be planned, designed, engineered, or financed until after permitting is approved cannot demonstrate physical and economic feasibility within the meaning of Utah Code Section 73-3-8(1)(a)(iii)(A).

Finally, the development's excessive reliance on tax incentives and other public subsidies calls into question its financial viability. According to public statements from O'Leary Digital representatives and officials from the Military Installation Development Authority (MIDA), the project would receive unprecedented and extraordinarily favorable tax treatment. See Samantha Moilanen and Sean P. Means, *'Hyperscale' data center project in Utah— expected to generate and consume more power than entire state—nears final approval*, Salt Lake Tribune, April 27, 2026, https://www.sltrib.com/news/2026/04/25/hyperscale-data-center-may-be/. Specifically, the development's property tax rate would be reduced to a flat 1.2% of the site's value through a "letter of completion," and further reduced through tax credits to 0.926%. *Id.* And, of the tax revenue collected at that reduced rate, 80% would be directly refunded to O'Leary Digital. *Id.* In addition to this substantial

tax break, MIDA's customary 6% energy use tax would be reduced to a nominal 0.5%. *Id*. Kevin O'Leary and others associated with the development have publicly stated that these generous incentives are necessary to ensure its financial viability. For instance, in an April 2026 interview, Mr. O'Leary stated that the project would need "every incentive" it could obtain. Kishalaya Kundu, *Mr. Wonderful's AI data center in Utah could consume 2x more power than the whole state*, TechSpot, April 28, 2026, https://www.techspot.com/news/112206-wonderful-ai-data-center-utah-could-consume-2x.html. And, MIDA officials have conceded that the incentives are "need[ed]" to "lure the hyperscalers," and the project "would not get any hyperscalers to come" if it was subject to normal tax rates. Moilanen & Means, *supra*. In other words, the development's proponents have admitted that it would not be financially viable if it were forced to compete on an equal basis with other Utah businesses. This raises substantial questions about the development's economic feasibility and suggests that the applicant cannot meet its burden under Utah Code 73-3-8(1)(a)(iii)(A).

The Application Should be Denied because the Applicant has not Shown it has the Financial Ability to Complete the Proposed Works (Utah Code Ann. § 73-3-8(1)(a)(iv)).

For the reasons discussed above, regarding the applicant's inability to demonstrate the project's physical and economic feasibility, the applicant has also failed to show that it has the financial ability to complete the proposed works.

Utah Code § 73-3-8(1)(a)(iv) requires the State Engineer to find, before approving a water right application, that "the applicant has the financial ability to complete the proposed works." This criterion is not satisfied by aspirational claims of project value or anticipated economic benefit. It requires a present-tense showing—demonstrated at the time of application—that the applicant has the financial resources necessary to build the infrastructure the water right is intended to serve. Where that showing cannot be made, the application must be rejected. *See* Utah Code Ann. § 73-3-8(1)(c). Utah Code § 73-3-11 reinforces this requirement by specifically authorizing the State Engineer to demand, from any incorporated applicant, submission of articles of incorporation, the names and residences of its directors and officers, and the amount of its authorized and paid-up capital to enable the State Engineer to evaluate whether the applicant has the financial capacity to carry out the proposed work. The existence of § 73-3-11 confirms that financial ability is not presumed and must be demonstrated through concrete disclosure, not promotional representations.

Here, the available evidentiary record confirms that the applicant does not presently have the financial ability to complete the proposed project. As noted, the proposed development is highly ambitious and would be the largest of its kind in the United States. It

would include up to 9GW of onsite power generation, a hyperscale data center campus spanning approximately 41,200 acres, and associated water diversion, conveyance, and treatment works—all in an unincorporated area of western Box Elder County with no existing utility-scale infrastructure. The project has been publicly valued at tens of billions of dollars. Even Phase 1, with 3 gigawatts of generation capacity, would represent one of the largest single infrastructure investments in Utah's history.

Yet the applicant has supplied no evidence whatsoever that it has the necessary financial capacity to construct this massive development. It has disclosed no anticipated construction schedule, no committed financing, no executed loan agreements, no equity commitments, no construction-ready capital, and no anchor tenant that would provide the revenue necessary to make the development viable. Rather, the plan, in the applicant's own words, is to obtain permits first, and obtain the necessary financing later. In addition, the project appears to be entirely reliant upon generous public subsidies, which the applicant is seeking long before any concrete development plans have materialized. This approach is exactly the inverse of what § 73-3-8(1)(a)(iv) requires. Because the applicant has not shown that it has the financial capability to complete the proposed works, the application must be denied.

The Application Should be Denied Because it was Filed for Purposes of Speculation (Utah Code Ann. § 73-3-8(1)(a)(v)).

The anti-speculation doctrine prevents parties from acquiring water rights without a specific, immediate plan to use the water. *See, e.g., Colorado River Water Conservation Dist. v. Vidler Tunnel Contractors, Inc.* 594 P.2d 566 (Colo. 1979). Here, the applicant has only asserted an immediate need for only 24 acre-feet of water. Anderson, *supra*. It has provided no information whatsoever regarding its need for the remaining 1,876 acre-feet sought through the application, or how it would put this water to beneficial use. Although the applicant's stated need for only 24 acre-feet annually is unsupported and unrealistic, as discussed above, the applicant has nevertheless failed to show a specific, immediate need for the full amount applied for, and consequently the application violates the anti-speculation doctrine. Further, the applicant's ability to construct and operate the proposed development is speculative because it depends on plans that have not been developed, financing that has not been secured, and investment decisions that have not been made. Because the application was filed for speculative purposes, it must be denied. Utah Code Ann. § 73-3-8(1)(a)(v).

Relief Requested

For the reasons stated above, the Center requests that the State Engineer reject application A54385.

Respectfully submitted May 4, 2026,

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