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Sent via email to: nathanmoses@utah.gov and jreese@utah.gov

Mailed copy to:

Division of Water Rights
646 North Main St.
P.O. Box 506
Cedar City, UT 84721-0506

Re: Roberts Legacy, LLC comments on a proposed Groundwater Management Plan for the Parowan Valley

Division of Water Rights,

Roberts Legacy, LLC ("Roberts") submits the following comments on the proposed Parowan Valley Groundwater Management Plan ("GMP"), that supplement its prior comments provided in public meetings on April 27, 2021 and January 11, 2022. Recorded April 27, 2021 meeting at 34:30-36:10, 57:15-59:30, and 1:01:26-1:01:51; recorded January 11, 2022 meeting at 53:28-55:30 and 1:04:46-1:07:45.

The Division of Water Rights ("Division") should adopt two GMPs, one for the North Parowan subarea and another for the South Parowan subarea, because it is consistent with the Division's policy in treating the north subarea separately from the south subarea, the known groundwater hydrology in the area, and principles of prior appropriation. In addition, adaptive management, and experimentation to understand aquifer responses, as described by the Division in its 10/5/2021 presentation slide, are inconsistent with Roberts' limited time to file a de novo action challenging the GMP—Roberts can only consider what the Division is proposing to do now, not what it might contemplate in the future.

Division Parowan Valley Policy since 1972 and USGS studies

The Division's groundwater policy in the Parowan Valley has divided and treated the north and south subareas, "generally delineated by the southern boundary line of T32S," as distinct groundwater basins since February 7, 1972, preventing change applications from moving water between the two subareas. Division's 12/11/2018 PowerPoint presentation at slide 11; https://www.waterrights.utah.gov/wrinfo/policy/wrareas/area75.asp.

That policy is ostensibly guided by the USGS groundwater study of the basin which, as recently as 2017, found "that the source of groundwater to the northern part of the valley is different than for the rest of the valley." Marston, T.M., 2017, Water resources of Parowan Valley, Iron County, Utah: U.S. Geological Survey Scientific Investigations Report 2017–5033, at p. 40. In addition, the groundwater declines are substantially less in the northern subarea compared to the southern subarea. *See* the Division's 12/11/2018 PowerPoint Slide No. 22.

Although, "most of the groundwater in Parowan Valley and in Cedar Valley near Enoch is similar in isotopic composition to water in mountain streams entering the valley, which reflects meteoric water recharged in high-altitude areas on the adjacent Markagunt Plateau" wells from the northern portion of the valley have a "source that is lower in altitude than that for wells in the rest of Parowan Valley." Marston, 2017 USGS study at p. 43. Accordingly, the sources for the north and south areas are separate and distinct. Even though, in the northern part of the valley groundwater "moves southwestward from recharge areas on . . . highlands located north of the valley near the divide between the Parowan Valley drainage and the Beaver Valley drainage," the Division's own presentation slides from 4/27/2021 note that the "north and south subareas are [only] hydrologically connected (*to some degree*)." Marston, 2017 USGS study at p. 19; Division's 4/27/2021 PowerPoint presentation Slide No. 7 (emphasis added).

The Division's own 4/27/2021 slides reflect that it does not know how the hydrologic system would respond to priority regulation of the groundwater basin as one. *See* Division's 4/27/2021 PowerPoint presentation Slide No. 6. Because managing the entire Parowan Valley groundwater basin as one is uncertain, the Division should adopt separate GMPs for the north and south subareas.[1] Then once the relationship between the two subareas is better understood, the GMPs can be amended to incorporate the known connection and response times between groundwater flow between the two subareas. Otherwise, the Division is experimenting with Roberts' valuable property rights. Where the two subareas differ in these known ways, a one-size-fits-all plan places the risk of getting in wrong on Roberts and is not the right approach in this matter.

<u>Adopting separate GMPs for the north and the south subareas is consistent with principles of prior appropriation</u>

Prior appropriation embodies not only the first in time first in right principle, but also the policies of preventing waste of a vital resource and only curtailing junior uses where it will accrue to the benefit of a senior user.

The Division's own presentation slides note the uncertainty with administering the entire Parowan Valley as one basin, describing that water levels would "continue to decline in the southern subarea [and] rise in the northern subarea (*with possible temporary return of phreatophytes and springs*)." *See* Division's 4/27/2021 PowerPoint presentation Slide No. 12 (emphasis added). An increase in phreatophytes and springs, not otherwise connected to a beneficial use of water, is waste and inconsistent with prior appropriation.

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[1] Although there is a hydrologic connection between the Parowan and Cedar Valley the "[s]ubsurface groundwater discharge to Cedar Valley is likely minimal" and the Division is not proposing to administer both the Parowan and Cedar aquifers as one. Marston, 2017 USGS study at p. 1. Similarly, the Division should not administer the north and south subareas in Parowan Valley as one until it understands the subsurface groundwater discharge between the two subareas.

The Division speculates that over time water levels would stabilize but admits the time for stabilization might be "unreasonably long" and the water level changes might be "unreasonably large." *See* Division's 4/27/2021 PowerPoint presentation Slide No. 12. At bottom, priority regulation in a GMP is curtailment of junior users to protect the aquifer and ensure that the senior users have available groundwater to satisfy their needs within the safe yield of the aquifer. While most often applied in the surface water distribution context, the principle of futile call is applicable here. If curtailing junior users in the north subarea does not raise ground water levels, i.e., protect the senior users in the south subarea, the Division is making a futile call on groundwater. While a year or two response time is reasonable in the groundwater context, if the response time is decades, which it could be, that is in the Division's own words "unreasonably long," and a futile call on groundwater.

Adaptive management and experimentation are inconsistent with a limited opportunity for filing a de novo review action

Adaptive management and experimentation, while important scientific management flexibility tools, are inadequate safeguards if the groundwater basin is managed as one and curtailing rights in the north subarea fails to increase the groundwater levels in the south subarea within a reasonable time. Although the Division could amend its GMP to create a GMP for each subarea, the damage to Roberts would already have occurred—its rights would have been curtailed for potentially years and the lost farming revenue cannot be recouped. Also, if the Division chose not to amend its GMP, even if the data reflected that curtailing rights in the north subarea failed to increase the groundwater levels in the south subarea within a reasonable time, Roberts could not challenge the decision not to amend the GMP because the time to challenge the GMP would have expired. *See* Utah Code § 73-5-15(10)(a) (a de novo action must be filed within 60 days of adoption of a GMP).

Conclusion

Collectively the Division's policy since 1972, the known groundwater hydrology, and the application of prior appropriation justify adopting two GMPs. Then after curtailing junior rights in each subarea, observing, and documenting the impact on groundwater levels in each subarea, the Division can amend its GMPs using known data to achieve safe yield in the Parowan Valley. Attempting to adopt one GMP for the entire valley with the existing uncertainty about groundwater movement and response times, risks waste of water and unnecessarily curtailing rights in the northern subarea—impermissibly shifting the risk of getting it wrong to Roberts.

Roberts remains willing to work with the Division to adopt a GMP, but the concept of adaptive management and experimentation is wholly inconsistent with Roberts's limited window to assert its legal remedy, filing a de novo action to challenge the GMP within 60 days of adoption.

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