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February 8, 2018

HAND-DELIVERED

Mr. Kent L. Jones, State Engineer
Utah Division of Water Rights
1594 West North Temple, Suite 220
Salt Lake City, Utah 84114-6300

Re: *Proposed Groundwater Management Policy for
Malad and Bear River Drainages in Water Right Area 29*

MD

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Dear Mr. Jones:

As legal counsel for The Bear River Club Company (“Club”), I appreciate the opportunity to provide comments on behalf of the Club on the recently proposed Groundwater Management Policy for Malad and Bear River Drainages in Water Right Area 29 (the “Proposed Policy”). You might recall that seven or eight years ago the Club took the opportunity to sit down with you and your staff and express the Club’s concerns over the continued filing of new applications to appropriate, the responsive filing of protests by the Club and other owners of impacted water rights, the holding of water right hearings on such protests, and the State Engineer’s actions relative to such applications. The guiding Technical Publication for the area indicated to the Club that new groundwater development near the Malad River and Lower Bear River would take water at times of the year to which the Club was justly entitled, and the Club felt the appropriations process at that time, without a clear policy, was an unproductive way to administer the available water resources in that area.

You concurred and, with the appreciation of the Club and others, you held a public meeting and adopted an interim policy for the area while detailed technical studies were performed. Those studies have now been completed, and the USGS has now published Scientific Investigations Report 2017-5011 (the “SI Report”). The Club understands that the major findings of the SI Report are (1) that there is, at times, unappropriated water in these sources (*see* SI Report at 73-74),



and (2) that groundwater development within a several mile band around the Lower Bear River and Malad River will definitely take water from those surface water sources (*id.*).

The Club's senior (1902) Bear River water right for 75.2 cfs diverts water near the bottom of the river and well below its confluence with the Malad River. Therefore, any impact to either the Malad River or the Lower Bear River during times that the Club is not fully receiving its water right will deprive the Club of waters to which it holds a senior appropriation. The Bear River Migratory Bird Refuge (the "**Refuge**") holds, among others, a senior water right for 1,000 cfs with a point of diversion just below the Club's. Though historically there was generally always more than 1,000 cfs available for diversion even during the summer months, now rarely is there sufficient water to satisfy both water rights. Therefore, impacts to either the Malad or the Lower Bear River during the summer months will directly and adversely impact the Club (and the Refuge).

The Club applauds the State Engineer for taking the initiative to have detailed studies performed and for your plan to incorporate the results of those studies into a new groundwater management policy. The introduction to the Proposed Policy emphasizes that the "*primary objective is to protect prior water rights while putting to beneficial use the greatest amount of available water.*" The Proposed Policy then provides that: "*The policy strives to balance the protection of existing water rights in a reasonable manner, with the objective of encouraging the greatest amount of available water be put to beneficial use.*" While the Club concurs with these statements of need for balance, the Club respectfully submits that the Proposed Policy's generic application-by-application review without any specified approval restrictions and without any articulated mitigation strategies does not efficiently achieve this balance and creates a risk that similar applications may receive disparate treatment. Specifically, the Club is concerned that (1) the Proposed Policy does not adequately address key information obtained from the USGS study and contained in the SI Report, (2) the Proposed Policy does not provide meaningful direction to new groundwater applicants or your office in protecting vested rights, and (3) the State Engineer did not provide adequate public involvement before issuing the Proposed Policy.

First, in preparing the SI Report, the USGS developed and employed a groundwater impact model, yet utilization of that model on a given groundwater application is not part of the Proposed Policy. The USGS study explicitly found that new groundwater appropriations in proximity to the Malad or Lower Bear Rivers will take water from the rivers, but the Proposed Policy fails to impose any restrictions on such appropriations (regardless of their proximity to the rivers) or any requirement to mitigate the impact on senior river rights (regardless of the modeled consequences).

Second, there is absolutely nothing in the Proposed Policy that recognizes or addresses the negative impacts on senior downstream water rights or the USGS's findings that groundwater development within a several mile band along the Malad and Lower Bear Rivers will, without doubt, capture waters that would otherwise discharge to these surface sources. Instead, the Proposed Policy, as written, will embolden new appropriators seeking to develop groundwater

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resources without any consideration of the negative impact on senior water rights, and the Club, the Refuge and others will be left again to protest all applications that are within a few miles of the rivers and then participate in repeated water right hearings with angry applicants who will argue that the State Engineer told them that there was unappropriated water and that they wouldn't impact senior water rights. That anger will only intensify as such administrative matters are carried over into expensive judicial proceedings.

The Club finds the situation in the Lower Bear and Malad River drainages not unlike the situation in Cache Valley. There, as here, we have unappropriated groundwater but several large senior water rights at the bottom of the system often don't receive their full water rights during the summer months. However, in the Cache Valley groundwater management policy, the State Engineer recognized the senior water rights and "balanced" the encouragement of fully developing the water resources while protecting senior water rights by implementing a system that allows for approval of new groundwater appropriations as long as they mitigate for their impacts to the senior water rights. That same approach should be followed here.

Finally, the Club believes that the Proposed Policy was issued prematurely, and that additional discussion and analysis is warranted before settling on a new groundwater appropriations policy. The SI Report was only recently issued, and the first (and only) public meeting to discuss the findings of that report occurred less than a month ago. Without any prior input from stakeholders, the Proposed Policy was formulated and announced by your office just moments after the results of the extensive USGS study were disclosed to the attendees. And it was clear from that meeting that there is some confusion over what the USGS study found. Now, armed with the considerable information contained in the SI Report, the stakeholders can have meaningful discussions on how best to achieve the mandatory balance between protecting vested rights and maximizing beneficial use of the resource. Those discussions can and should address issues beyond the brief macro-scale language of the Proposed Policy (including geographic restrictions on known impairment areas, as well as appropriate and uniformly-applied mitigation strategies).

The Club urges the State Engineer to step back, hold additional public meetings, and seek input and dialogue from the water community on ways that the articulated proper balance can be struck, before adopting a formal groundwater management policy. The Club in nowise wants to hold up the development of additional water resources, so long as such development can be done without impacting the Club's senior water rights. The Club, however, would urge the State Engineer to set aside the recently announced draft policy, open a dialogue with the water users, and seek potential alternatives before adopting a policy. Proposing a new policy without input from affected water right holders and within moments after first presenting the findings of the USGS study is premature and destined for dispute. The Club hopes that, with prior public input from stakeholders, a more detailed policy can be developed that will properly recognize the band of known impairment areas and provide new appropriators with a uniform policy of mitigation, rather

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than having such issues be contested on an application-by-application basis, which wastes the economic resources of the State Engineer, the applicant, and the senior water right holders.

The Club would welcome the opportunity to meet with the State Engineer and others to discuss further the Club's knowledge of the river systems and the Club's ideas on how to strike the proper balance between the governing objective of protecting prior water rights while putting to beneficial use the greatest amount of available water.

Respectfully yours,

PARR BROWN GEE & LOVELESS

By 
Daniel A. Jensen
Attorneys for The Bear River Club Company

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