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November 16, 2021

By Hand Delivery and Email

Teresa Wilhelmsen
State Engineer
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Re: Request for Agency Action Under Section 73-3-13 Regarding Deseret Generation and Transmission Co-Operative's Lack of Diligence in Putting Water Right 49-258 to Beneficial Use

Dear Ms. Wilhelmsen:

On behalf of PVR Inc. and the Grand Canyon Trust, please accept this request for agency action under section 73-3-13 of the Utah Code, protesting Deseret Generation and Transmission Co-Operative's lack of diligence in putting water right 49-258 to beneficial use.

In 2011, an Estonian state-owned oil shale company named Enefit acquired water right 49-258, an unperfected right with a 1965 priority for 15 cubic feet per second (cfs) from the Green and White rivers. Enefit planned to use up to the full amount of the water right at its proposed

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oil shale mine and processing plant in the Uinta Basin. But Enefit faced a problem, for the unperfected right would lapse by law if it was not put to beneficial use by the looming 50-year deadline, and the company could not put the water right to beneficial use for many years yet. Met with that predicament, Enefit in 2013 quitclaimed the water right to Deseret Generation and Transmission Co-Operative (DGT), a wholesale electrical cooperative that owns the Bonanza power plant. A few months later, DGT filed a request under section 73-3-12(4)(b) to extend beyond 50 years the deadline to put the water right to beneficial use. That statute allows such an extension only for wholesale electrical cooperatives that need the water right to provide electricity to the public at a planned power generation project. The Division of Water Rights (DWR) approved DGT's extension request expressly 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.

Yet well before it sought the extension, DGT entered into a contract entitling Enefit to the exclusive use of the full amount of the water right for oil shale development for the more than 30-year life of Enefit's planned mine and processing facility. That contract foreclosed DGT from using the water right to generate electricity at the Bonanza plant. Moreover, according to the public record, DGT has no plans to build any new coal-fired generating units at the Bonanza plant, let alone use the water right at those generating units, for DGT plans to retire the power plant by about 2030. For these reasons, DGT is not diligently working to use the water right for electricity generation at Bonanza.

PVR Inc. and the Grand Canyon Trust therefore respectfully request that you declare water right 49-258 to be forfeited under section 73-3-13.

I. Legal Background

To perfect a water right—that is, to complete an appropriation—an applicant must construct any necessary water works, apply the water to beneficial use, and file proof with the state engineer.¹ A water right that is not perfected within 50 years of its application date “shall lapse and have no further force or effect.”²

Section 73-3-12(4)(b) affords a limited exception to the 50-year deadline. That provision states that the state engineer “may extend the time” to perfect a water right to “a date after 50 years” only if the applicant is a “wholesale electrical cooperative” that “provides information that shows the water applied for in the application is needed to meet the reasonable future requirements of the public.”³ To demonstrate its need, the statute requires the cooperative to provide a report to DWR forecasting both “the need for the water to produce power” and “the power output of the project for the wholesale electrical cooperative within the next 40 years.”⁴

This exception thus is narrow: Only a water right needed by an electrical cooperative for the beneficial use of electricity generation at a planned power generation project is eligible to survive the 50-year deadline. And as a corollary, a water right extended beyond 50 years under section 73-3-12(4)(b) can be perfected based only on the beneficial use of electricity generation, for the water right would have lapsed but for the cooperative’s need for the right to produce power at a planned generation project. If types of uses other than electricity generation could result in the perfection of the water right, then the exception under section 73-3-12(4)(b) would swallow the 50-year rule.

¹ Utah Code § 73-3-12(2)(a); *Little v. Greene & Weed Inv.*, 839 P.2d 791, 795 (Utah 1992) (“complet[ing] the appropriation” means “completion of the water works and ... beneficial use under the application”).

² Utah Code § 73-3-12(3).

³ *Id.* § 73-3-12(4)(b)(i). Section 73-3-12(4)(b) also provides an exception to the 50-year deadline for “public water suppliers,” but that provision does not apply here.

⁴ *Id.* § 73-3-12(4)(b)(iii).

An extension of time remains “effective so long as the applicant continues to exercise reasonable and due diligence in completing the appropriation.”⁵ Because the appropriation of an electrical cooperative’s water right that was extended beyond 50 years under section 73-3-12(4)(b) can only be completed by being put to the beneficial use of electricity generation, the cooperative therefore must diligently work towards putting the water right to that beneficial use. The Utah Supreme Court has held that the “criterion” for establishing due diligence is “the bona fides of the attempt to appropriate which must be pursued with all the expedition and constant effort to accomplish the undertaking which is usual in men engaged in like enterprises, and who desire a speedy accomplishment of their designs.”⁶

Under section 73-3-13, any water right “applicant,” or “any user of water from any river system or water source,” who believes that another applicant is not “diligently prosecut[ing] to completion” the “work” required to put the water to beneficial use may file “a request for agency action,” known as a protest, “with the state engineer.”⁷ The Utah Supreme Court has confirmed that section 73-3-13 grants “the right to protest the lack of diligence ... in the application of water to beneficial use.”⁸ If “diligence is not shown by the applicant, the state engineer may declare the application and all rights under it forfeited.”⁹

II. Protesting Parties

PVR Inc., is a Utah corporation located at HC 64 Box 1803, Moab, Utah, 84532. PVR owns three water rights: 05-2674 (a21501), 05-565, and 05-825 (a20533). PVR has standing to

⁵ *Id.* § 73-3-12(2)(g).

⁶ *Carbon Canal Co. v. Sanpete Water Users Ass’n*, 353 P.2d 916, 917 (Utah 1960) (internal quotation marks and citation omitted). Diligence must be “proved ... by that high type of convincing evidence demanded in water development cases.” *Carbon Canal Co. v. Sanpete Water Users Ass’n*, 425 P.2d 405, 407 (Utah 1967).

⁷ Utah Code § 73-3-13(1).

⁸ *Bonham v. Morgan*, 788 P.2d 497, 502 (Utah 1989).

⁹ Utah Code § 73-3-13(3).

file this protest under section 73-3-13 because it is a “user of water from any river system or water source” within the state of Utah.¹⁰

The Grand Canyon Trust is a nonprofit corporation with offices in Salt Lake City, Heber City, and Torrey, Utah, and is headquartered in Flagstaff, Arizona. PVR is a member of the Trust. As an association, the Trust has standing to file this protest because its member PVR has standing.¹¹ Likewise, the Trust also has standing because the more than 230 other members and employees of the Trust who reside in Utah have standing to file this protest, for they are “user[s] of water from any river system or water source” within the state of Utah.¹²

III. History of Water Right 49-258

The application for water right 49-258 was filed in 1965 by Sohio Petroleum Co. for 15 cfs from the White River for mining, retorting, irrigation, and domestic use.¹³ Over the next four decades, the water right was bought and sold by various energy companies looking to develop the Uinta Basin’s oil shale deposits. Through 2003, DWR granted nine extensions of time to file proof of beneficial use of the right. In 2008, OSEC Skyline Property Corp., a subsidiary of the Oil Shale Exploration Company (OSEC), purchased the right.¹⁴ OSEC planned to develop a massive oil shale mine and processing facility on its landholdings in the Uinta Basin, and the water right was “crucial to its ... development plan.”¹⁵

¹⁰ *See id.*

¹¹ *See Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 967 (Utah 2006) (“An association ... has standing if its individual members have standing”).

¹² *See Utah Code* § 73-3-13(3).

¹³ Application to Appropriate Water (Feb 15, 1965), available at <https://www.waterrights.utah.gov/docImport/0586/05862817.PDF>

¹⁴ OSEC, Report of Conveyance (Oct. 29, 2008), available at <https://www.waterrights.utah.gov/docImport/0586/05862950.pdf>.

¹⁵ OSEC, Request for Extension of Time, PDF p. 2 (May 22, 2008), available at <https://www.waterrights.utah.gov/docImport/0586/05862947.PDF>.

A few years later, in 2011, Enefit American Oil Co. acquired OSEC and all its assets.¹⁶ Enefit's wholly owned subsidiary EAO Real Estate Corp. became the legal owner of the water right.¹⁷ Enefit is owned by Eesti Energia, an Estonian state-owned company and the largest oil shale processing company in the world.¹⁸ Like OSEC before it, Enefit plans to build a commercial-scale oil shale mine and processing facility in the Uinta Basin.¹⁹ Just upstream from the confluence of the Green and White rivers, on the eastern bank of Evacuation Creek, Enefit intends to construct a half-square mile processing plant, strip mine up to 9,000 acres of surrounding land, and run the mined oil shale through the plant to produce 50,000 barrels of processed crude oil every day for more than 30 years.²⁰ Enefit's planned oil shale mine and processing plant are collectively known as the "South Project."²¹

Oil shale mining and processing are thirsty endeavors, requiring constant inputs of water. The South Project will consume up to 15 cfs, or about 10,867 acre-feet of water per year.²² According to Enefit, that's about as much water as is consumed by all existing municipal and industrial sources in the Uinta Basin combined.

Because the South Project is surrounded by federal public land, Enefit needed rights-of-way from the Bureau of Land Management (BLM) to run utilities to the oil shale complex,

¹⁶ Enefit Preliminary Plan of Development, p. 4 (Nov. 26, 2012), excerpts attached as **Exhibit 1**. This exhibit, and all other exhibits attached to this protest that are Bates numbered on the top left corner with "ENEFIT AR _____", are part of the publicly available administrative record in *Living Rivers et al. v. Bernhardt et al.*, 19-cv-00041 (D. Utah 2019).

¹⁷ EAO Real Estate Corp., Report of Conveyance, (Nov. 23, 2011), available at <https://waterrights.utah.gov/docImport/0544/05449176.pdf> (water right conveyed from OSEC to EAO Real Estate Corp.).

¹⁸ Enefit Preliminary Plan of Development, Exhibit 1, p. 1.

¹⁹ *Id.*

²⁰ *Id.* at 4, 15-16, 19; Bureau of Land Management (BLM), Final Environmental Impact Statement for the Enefit American Oil Utility Corridor Project, pp. 1-3 (map), 4-159 to 4-160 (May 2018), available at https://eplanning.blm.gov/public_projects/nepa/37462/145046/178753/2_Volume_I.pdf (hereafter "BLM Utility Corridor EIS").

²¹ Enefit Preliminary Plan of Development, Exhibit 1, p. 1.

²² *Id.* at 13 (relevant language highlighted); BLM Utility Corridor EIS, *supra* note 19, p. 4-111.

including a water supply pipeline.²³ In May 2012, before filing its application for the rights-of-way, Enefit provided BLM an overview of its plans for the South Project.²⁴ As it was for OSEC, the water right was, and remains, crucial to Enefit’s development plans. Enefit informed BLM that it intends to use water right 49-258, its “15-cubic-feet-per-second (cfs) water right on the White River,” to “meet [South] Project demands.”²⁵ Enefit explained that Deseret Generation and Transmission Co-Operative (DGT), which owns and operates the nearby Bonanza power plant, “owns an existing water transmission pipeline which begins at the Green River approximately 25 miles north of the [South] Project which has available throughput capacity.”²⁶ Enefit planned to add points of diversion on the Green River to its water right and was “negotiating with DGT” to move the water “on DGT’s pipeline” from the Green River to the Bonanza plant and then onto “a new interconnecting water pipeline that will be constructed to the [South] Project.”²⁷ That new pipeline to transport water right 49-258 from the Bonanza plant to the South Project would be the subject of the right-of-way application Enefit planned to file with BLM.

Enefit, however, had a problem. With a 1965 priority, the water right would have lapsed by law unless Enefit was able to beneficially use the water by its 50-year proof due date in 2015. But BLM’s approval of the rights-of-way necessary to build the South Project was still many years away, let alone construction of the facility and eventual use of the water for oil shale development.

²³ Enefit Preliminary Plan of Development, Exhibit 1, pp. 2, 13.

²⁴ Enefit, Project Overview (May 2012), attached as **Exhibit 2**.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Id.*

To solve this problem, in October 2012, Enefit quitclaimed the water right to DGT for ten dollars.²⁸ DGT then filed a change application to add points of diversion on the Green River, add power generation as a type of use, and add the Bonanza plant site as a place of use.²⁹ A few months later, in July 2013, DGT filed a request for an extension beyond 50 years to file proof of beneficial use.³⁰ DGT sought the extension as a “wholesale electrical cooperative” under section 73-3-12(4)(b) of the Utah Code.³¹ As discussed above, that statute provides a narrow exception to the 50-year deadline, under which the state engineer may extend beyond 50 years the time to complete an appropriation only if the applicant is a wholesale electrical cooperative that needs the water right to generate electricity at a planned power generating project.³²

In its July 2013 extension request, DGT swore that it “recently acquired Water Right 49-258 in order to secure sufficient water rights for the expansion of its Bonanza Power Plant to meet the reasonable future electrical requirements of its customers.”³³ DGT explained that Bonanza “currently consists of a single, 500 MW coal-fired generating unit (“Unit 1”).”³⁴ That generating unit, DGT asserted, “require[s]” “15 cfs of water,” which is currently supplied by a separate 15 cfs water right, number 49-225.³⁵ In order to meet “growing demand for electricity,”

²⁸ DGT, Report of Conveyance, PDF p. 7 (Jan. 15, 2013), *available at* <https://waterrights.utah.gov/docImport/0554/05544067.pdf> (quitclaim deed executed October 11, 2012).

²⁹ DGT, Application for Permanent Change of Water (Feb. 13, 2013), *available at* <https://waterrights.utah.gov/docImport/0559/05594900.pdf>. DWR approved DGT’s change application in March 2014, adding points of diversion on the Green River (in addition to the White River), adding the Bonanza site as a place of use, and changing the type of use to power generation. DWR, Order of the State Engineer for Permanent Change Application Number 49-258 (Mar. 27, 2014), *available at* <https://waterrights.utah.gov/docImport/0562/05628603.pdf>.

³⁰ DWR, Request for Extension of Time to File Proof of Beneficial Use (July 17, 2013), *available at* <https://waterrights.utah.gov/docImport/0558/05582564.pdf> (hereafter “DGT’s Extension Request”), and attached as **Exhibit 3**.

³¹ *Id.* See also DGT’s Request for Reconsideration (Apr. 7, 2014), *available at* <https://waterrights.utah.gov/docImport/0563/05631366.pdf>.

³² Utah Code § 73-3-12(4)(b). As noted above, section 73-3-12(4)(b) also provides an exception to the 50-year deadline for “public water suppliers,” but that provision does not apply here.

³³ DGT’s Extension Request, Exhibit 3, PDF p. 4.

³⁴ *Id.*

³⁵ *Id.*

DGT stated 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 will thereafter be needed within the next 15 to 25 years,” each of which “will require” an “additional 15 cfs of water.”³⁶ DGT attested that it needed the 15 cfs of water right 49-258 to produce electricity at those new units over the next 25-plus years.³⁷

DWR approved DGT’s extension request in April 2014, extending the water right’s proof due date to 2025.³⁸ In its order, DWR stated that it extended the water right beyond 50 years under section 73-3-12(4)(b) expressly based on DGT’s sworn statement that it “needed” the 15 cfs right to generate electricity at a new “500 MW generating unit” to be built at the Bonanza plant “within the next 5 to 15 years” and at a “third unit” to be built “within the next 15 to 25 years.”³⁹ Water right 49-258 would have lapsed in 2015 but for DGT’s assertion that it needed the right’s full 15 cfs at the two new planned generating units.

IV. DGT’s Failure to Diligently Work to Put the Water Right to Beneficial Use

Because the proof due date for the water right was extended beyond 50 years under section 73-3-12(4)(b), DGT must diligently work to use the water right for electricity generation

³⁶ *Id.*

³⁷ *Id.* DGT also noted that “any remaining water” from right 49-258 after “direct water usage” at Bonanza’s two new generating units may be used by “natural resources and industrial operations in the vicinity of the Bonanza Plant site.” *Id.*

³⁸ DWR, Amended Order of the State Engineer on Extension of Time Request (Apr. 21, 2014), *available at* <https://waterrights.utah.gov/docImport/0563/05632590.pdf>. DWR originally approved DGT’s extension request only until July 30, 2015, which was 50 years after the 1965 application date. DWR, Order of the State Engineer on Extension of Time Request (Mar. 27, 2014), *available at* <https://waterrights.utah.gov/docImport/0562/05628602.pdf>. Subsequently, DGT emailed DWR seeking reconsideration, explaining that the company sought an extension *beyond* 50 years as a wholesale electrical cooperative under section 73-3-12(4)(b). DGT’s Request for Reconsideration (Apr. 7, 2014), *available at* <https://waterrights.utah.gov/docImport/0563/05631366.pdf>. DWR then issued an amended order on April 21, 2014, granting DGT an extension for the water right beyond 50 years until 2025. DWR, Amended Order of the State Engineer on Extension of Time Request (Apr. 21, 2014), *available at* <https://waterrights.utah.gov/docImport/0563/05632590.pdf>.

³⁹ DWR, Amended Order of the State Engineer on Extension of Time Request (Apr. 21, 2014), *available at* <https://waterrights.utah.gov/docImport/0563/05632590.pdf>. DWR’s order also noted that “Change Application Number 49-258 (a38730) ... changed the use of water under this water right to power generation by the applicant.” *Id.*

at the Bonanza plant. DGT is not doing so, however, for two reasons. First, based on Enefit's statements to BLM and to the federal district court in Utah, at least eight months *before* DGT asserted in its July 2013 extension request that it needed the water right's full 15 cfs to generate electricity in two new generating units to be built at the Bonanza plant within the next 25 years, DGT entered into a contract entitling Enefit to the *exclusive use* of the right's *full 15 cfs* for oil shale development for the more than 30-year life of the South Project mine and processing plant. That contract prevents DGT from diligently working to use the water right to generate electricity at Bonanza. Second, according to the public record, DGT plans to retire the Bonanza plant around 2030.

1. DGT is precluded from using the water right to generate electricity at Bonanza because it granted to Enefit the exclusive contractual entitlement to use the full amount of the water right at the South Project.

The contract between DGT and Enefit likely was executed in October 2012, when Enefit quitclaimed the water right to DGT.⁴⁰ But at the latest, the contract was executed by the following month, when Enefit in November 2012 submitted to BLM its Right-of-Way Application and Preliminary Plan of Development.⁴¹ In that application, Enefit certified that it “has agreed with DGT” on conveyance of “the 15 cfs water right” from the Green River, “through the DGT system,” to the “Bonanza Power Plant (BPP).”⁴² From there, the 15 cfs would flow through “a new pipeline”—the subject of Enefit's right-of-way application—“that would be constructed from the DGT system termination point at the BPP to the South Project plant site.”⁴³ “Enefit would construct and own the new pipeline from BPP to the Enefit [South

⁴⁰ See DGT, Report of Conveyance, PDF p. 7 (Jan. 15, 2013), *available at* <https://waterrights.utah.gov/docImport/0554/05544067.pdf> (quitclaim deed executed October 11, 2012).

⁴¹ Enefit Preliminary Plan of Development, attached as Exhibit 1 (Nov. 26, 2012).

⁴² *Id.* at 13 (relevant language highlighted).

⁴³ *Id.*

Project] plant,” while “DGT would operate and maintain the new pipeline, . . . the withdrawal and pumping facility [at the Green River point of diversion,] and the existing pipeline from the diversion point to the BPP.”⁴⁴ Enefit reiterated that the “water supply system” to “withdraw[,]” “pump[,]” and “convey the 15 cfs of water” from the Green River to the South Project “would be operated and maintained by DGT on behalf of Enefit.”⁴⁵

During BLM’s environmental review of the right-of-way application in the ensuing years, Enefit fleshed out the contours of its contract with DGT and the oil shale company’s intention to use the full amount of the water right at the South Project. Enefit informed BLM that it “has access to a senior 15-cfs water right 49-258 under legal agreement with Deseret Generation and Transmission,”⁴⁶ for use during the “30-year operating life” of the South Project.⁴⁷ Specifically, Enefit explained that although the water right “is held in another corporate entity’s name”—that is, DGT—Enefit nonetheless “has an *exclusive contractual right* to use said water for the intended industrial use” of oil shale development at the South Project “in the amount indicated” of 15 cfs.⁴⁸ Highlighting the critical importance of the water right to its plans, Enefit noted that “[n]o other water rights would be used” at the South Project other than the “15-cfs water right 49-258.”⁴⁹

⁴⁴ *Id.*

⁴⁵ *Id.* at 13, 18-19.

⁴⁶ Email from R. Clerico, Enefit, to S. Howard et al., BLM (Aug. 12, 2013), excerpts attached as **Exhibit 4** (relevant language highlighted in light yellow, darker yellow highlighting in original). *See also* Enefit Data Gap Responses to BLM (Oct. 10, 2014), excerpt attached as **Exhibit 5**, (EAO [Enefit American Oil] has an agreement with DGT for access and transport of up to 15 cfs of an existing water right from the Green River to the South Project location.”).

⁴⁷ Email from R. Clerico, Enefit to S. Howard et al., BLM (July 27, 2015), attached as **Exhibit 6** (relevant language highlighted).

⁴⁸ Letter transmitting Enefit’s comments on BLM’s Draft EIS, from R. Clerico, Enefit, to S. Howard, BLM (June 10, 2016) (emphasis added), excerpts attached as **Exhibit 7** (relevant language highlighted).

⁴⁹ Email from R. Clerico, Enefit, to S. Howard et al., BLM (Aug. 12, 2013), attached as Exhibit 4 (relevant language highlighted in light yellow, darker yellow highlighting in original).

Moreover, Enefit has left no doubt that it has the exclusive contractual right to use the *full amount* of the water right, informing BLM that “the *full 15 cfs* [is] available under the water right and agreement with DGT” for use at the South Project.⁵⁰ Indeed, Enefit “has designed the collector well and pipeline delivery system to transport the 15 cfs available under the water right to ensure *the full amount is available for the South Project if needed.*”⁵¹ Adding more detail, Enefit explained that because “[t]he existing water withdrawal facilities at Deseret Generation and Transmission’s (DG&T) Green River station near Jensen, Utah ... are not adequate to deliver the necessary water for the South Project[,] ... EAO [Enefit American Oil] would expand [DGT’s] existing RCW [Ranney Collector Well] field with the addition of two to three new RCWs ... on adjacent private land owned by EAO, in order to deliver the 15 cubic feet per second (cfs) water right” to the South Project.⁵²

Underscoring Enefit’s control over the DGT-owned water right, the oil shale company claimed to BLM that it would use the water right even if BLM rejected the pipeline right-of-way from the Bonanza plant to the South Project, explaining that Enefit would simply bypass the Bonanza plant altogether. Without the pipeline right-of-way, rather than piping the water right through the Bonanza plant’s existing water supply infrastructure down to the South Project, “EAO [Enefit American Oil] would pursue conversion from a surface water point of diversion to a groundwater point of diversion for all or a portion of water right No. 49-258” to pump the 15 cfs from groundwater wells “wholly located within the Enefit South [Project] private

⁵⁰ Enefit, Data Gap Responses to BLM (Oct. 10, 2014) (emphasis added), attached as Exhibit 5 (relevant language highlighted).

⁵¹ Email from R. Clerico, Enefit, to S. Howard et al., BLM, transmitting EAO Response to Data Gaps (July 1, 2015) (emphasis added), excerpts attached as **Exhibit 8** (relevant language highlighted).

⁵² *Id.*

property.”⁵³ From there, Enefit would convey the water right through “gathering pipelines” directly “routed to the South Project plant site,” about 20 miles away from the Bonanza plant.⁵⁴

In fact, if Enefit opts to pump the 15 cfs from groundwater wells on the South Project property—which would make it impossible for DGT to use the water right for electricity generation at Bonanza—DGT is contractually obligated to pursue the necessary change of the right’s point of diversion at Enefit’s behest. In a lawsuit challenging BLM’s approval of the rights-of-way, Enefit explained to the U.S. District Court in Utah that although DGT is, on paper, the “designated holder” of the water right, “Enefit has a contractual right to it, which obligates [DGT as] the holder”—in what appears to be a quote from the contract—“to undertake all other actions reasonabl[y] necessary to preserve and develop WRN 49-258 for use by the [South] Project.”⁵⁵

All told, Enefit has repeatedly stated that it plans to use up to the full 15 cfs of water right 49-258 for oil shale development at the South Project for the more than 30-year life of the facility, and that it is contractually entitled to do so. The contract thus forecloses DGT from using the water right for electricity production at new generating units at the Bonanza plant. Put differently, DGT is not making a “bona fide[] ... attempt” to use the water right for power production because it is contractually prevented from doing so.⁵⁶ Indeed, that DGT contractually granted to Enefit the exclusive use of the full 15 cfs right for oil shale development at the South Project is fundamentally inconsistent with making an “expeditio[us] and constant effort” to use the water right for electricity production at new generating units “which is usual in men engaged

⁵³ Ltr. from R. Clerico, Enefit, to G. Torres, BLM (Feb. 28, 2017), excerpts attached as **Exhibit 9** (relevant language highlighted).

⁵⁴ *Id.*

⁵⁵ Enefit Answer Brief, filed Aug. 19, 2020, *Living Rivers et al. v. Bernhardt et al.*, 19-cv-00041, pp. 13-14 (D. Utah), excerpt attached as **Exhibit 10** (relevant language highlighted).

⁵⁶ *See Carbon Canal Co.*, 353 P.2d at 917.

in like enterprises, and who desire a speedy accomplishment of their designs.”⁵⁷ Therefore, DGT is not diligently working to use the water right.

2. DGT plans to retire the Bonanza power plant around 2030.

Additionally, DGT is not diligently working to use the water right for electricity generation at the Bonanza plant because, according to the public record, DGT has no plans to build new generating units and intends to retire the plant’s only generating unit—if not the entire power plant—by about 2030.

It has been widely reported for several years that DGT plans to shutter the Bonanza plant by 2030.⁵⁸ And in legally required information disclosures for the past few years, DGT has informed the U.S. Energy Information Administration that it will retire Bonanza’s only generating unit, known as Unit 1, by December 2030.⁵⁹ The planned retirement is a result of unfavorable market conditions for coal-fired power plants and a 2015 settlement agreement between DGT, the U.S. Environmental Protection Agency (EPA), and conservation organizations stemming from violations of the Clean Air Act at the Bonanza plant.⁶⁰ The settlement agreement imposed emissions limits at the power plant and capped the total amount of

⁵⁷ See *id.* (internal quotation marks and citation omitted).

⁵⁸ See, e.g., B. Maffly, *Poll says Utahns support closing coal-fired plants early*, The Salt Lake Tribune (Mar. 2, 2020), available at <https://www.sltrib.com/news/environment/2020/03/02/poll-says-utahns-support/> (“Bonanza Power Plant near Vernal, is set to retire in 2030”); University of Utah, Kem C. Gardner Policy Institute, *The Utah Roadmap: Positive Solutions on Climate and Air Quality*, (Jan. 31, 2020), available at <https://gardner.utah.edu/wp-content/uploads/AOCC-FAQs-Feb-2020.pdf> (“Bonanza Power Plant near Vernal is set to shut down by 2030”); S. Nelson, *Energy Blend: Coal production is high, but death and fire plague Deserado Mine*, Craig Press (Oct. 30, 2017), available at <https://www.craigdailynews.com/news/energy-blend-coal-production-is-high-but-death-and-fire-plague-deserado-mine/> (“Deseret Power’s Bonanza Power Plant ... is slated to close about 20[3]0 as a result of legal settlements concluded in October 2016”).

⁵⁹ U.S. Energy Information Administration, Form 860m Database (Apr. 2021), available at <https://www.eia.gov/electricity/data/eia860m> (under EIA 860M on right side of webpage, click April 2021 database, then look under “Operating” tab in Excel spreadsheet), screenshot of database attached as **Exhibit 11**. See also U.S. Energy Information Administration, Form 860 Database (2019), available at <https://www.eia.gov/electricity/data/eia860> (download 2019 data on right side of webpage). The Energy Information Administration under 15 U.S.C. § 772(b) requires owners and operators of electricity generation facilities to make such information disclosures.

⁶⁰ B. Maffly, *Will deal mean ‘early retirement’ for Utah power plant?*, The Salt Lake Tribune (Oct. 7, 2015), available at <https://www.sltrib.com/news/2015/10/07/will-deal-mean-early-retirement-for-utah-power-plant/>.

coal that can be consumed over the remaining operating life of Unit 1.⁶¹ While DGT recently indicated to the Energy Information Administration that it may have enough coal remaining under the consumption cap to operate Unit 1 for a few years past 2030, DGT disclosed to the agency that it will retire Bonanza’s generating unit no later than 2033.⁶²

Although the Energy Information Administration under 15 U.S.C. § 772(b) requires electrical generators to report proposed generation sources, DGT has yet to report any plans to build a new generating unit at Bonanza.⁶³ Nor has DGT applied to the EPA for the Clean Air Act permit that would be required to operate new generating units, even though such permits can take years to obtain.⁶⁴ Moreover, the EPA is not aware of any plans to construct new generating units at the Bonanza plant.⁶⁵ And indeed, constructing new coal-fired units would run counter to the trend of coal-fired power plant closures across the country.

All publicly available evidence indicates that DGT has no plans to build new generating units at the Bonanza plant and instead intends to retire the plant’s only generating unit—if not the entire power plant—within about a decade. DGT therefore is not diligently working to use the water right for electricity generation at the Bonanza plant.

⁶¹ U.S. EPA, Environment Appeals Board, Settlement Agreement, CAA 15-01, 15-02 (Oct. 05, 2015), *available at* http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2015/20151005_docket-15-01-15-02_settlement-agreement-1.pdf.

⁶² U.S. Energy Information Administration, Form 860m Database (Aug. 2021), *available at* <https://www.eia.gov/electricity/data/eia860m> (under EIA 860M on right side of webpage, click August 2021 database, then look under “Operating” tab in Excel spreadsheet), screenshot of database attached as **Exhibit 12**.

⁶³ U.S. Energy Information Administration, Form 860m Database (Aug. 2021), *available at* <https://www.eia.gov/electricity/data/eia860m> (under August 2021 database, Bonanza not listed under “Planned” tab in Excel spreadsheet).

⁶⁴ Email from D. Law, EPA Permit Program Oversight Lead, to M. Toll, Grand Canyon Trust (Aug. 10, 2021).

⁶⁵ *Id.*

V. Request for Relief

Because DGT is not exercising diligence in completing the appropriation of water right 49-258, the Protesting Parties respectfully request that the State Engineer “declare the application and all rights under it forfeited.”⁶⁶

VI. Request for Documents

In proceedings before DWR, the agency “may issue subpoenas or other orders to compel production of necessary evidence.”⁶⁷ “All parties shall have access ... to all materials and information gathered in any investigation.”⁶⁸

To determine the full scope of Enefit’s contractual right to use water right 49-258 for oil shale development at the South Project, the Protesting Parties respectfully request that DWR compel DGT to produce all contracts with Enefit concerning the water right and any other materials relating to Enefit’s use of the water right.

Additionally, the Protesting Parties respectfully request that DWR compel DGT to produce evidence demonstrating its intention to construct new generating units at the Bonanza plant (e.g., plans submitted to utility regulators, permit applications submitted to the EPA or the state of Utah, or the like).

VII. Request for Hearing

Pursuant to Utah Administrative Code R655-6-7(B), the Protesting Parties request a hearing in this matter.

⁶⁶ Utah Code § 73-3-13(3).

⁶⁷ Utah Admin. Code § R655-6-14(A).

⁶⁸ *Id.* § R655-6-14(B).

Sincerely,



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