

28 actions; and
29 ▶ makes technical changes.

30 **Monies Appropriated in this Bill:**

31 None

32 **Other Special Clauses:**

33 None

34 **Utah Code Sections Affected:**

35 AMENDS:

36 **63-46b-1**, as last amended by Chapter 235, Laws of Utah 2004

37 **73-2-1.5**, as enacted by Chapter 161, Laws of Utah 1987

38 ENACTS:

39 **73-2-25**, Utah Code Annotated 1953

40 **73-2-26**, Utah Code Annotated 1953

41 **73-2-27**, Utah Code Annotated 1953



43 *Be it enacted by the Legislature of the state of Utah:*

44 Section 1. Section **63-46b-1** is amended to read:

45 **63-46b-1. Scope and applicability of chapter.**

46 (1) Except as set forth in Subsection (2), and except as otherwise provided by a statute
47 superseding provisions of this chapter by explicit reference to this chapter, the provisions of
48 this chapter apply to every agency of the state and govern:

49 (a) state agency action that determines the legal rights, duties, privileges, immunities,
50 or other legal interests of an identifiable person, including agency action to grant, deny, revoke,
51 suspend, modify, annul, withdraw, or amend an authority, right, or license; and

52 (b) judicial review of the action.

53 (2) This chapter does not govern:

54 (a) the procedure for making agency rules, or judicial review of the procedure or rules;

55 (b) the issuance of a notice of a deficiency in the payment of a tax, the decision to
56 waive a penalty or interest on taxes, the imposition of and penalty or interest on taxes, or the
57 issuance of a tax assessment, except that this chapter governs an agency action commenced by
58 a taxpayer or by another person authorized by law to contest the validity or correctness of the

59 action;

60 (c) state agency action relating to extradition, to the granting of a pardon or parole, a
61 commutation or termination of a sentence, or to the rescission, termination, or revocation of
62 parole or probation, to the discipline of, resolution of a grievance of, supervision of,
63 confinement of, or the treatment of an inmate or resident of a correctional facility, the Utah
64 State Hospital, the Utah State Developmental Center, or a person in the custody or jurisdiction
65 of the Division of Substance Abuse and Mental Health, or a person on probation or parole, or
66 judicial review of the action;

67 (d) state agency action to evaluate, discipline, employ, transfer, reassign, or promote a
68 student or teacher in a school or educational institution, or judicial review of the action;

69 (e) an application for employment and internal personnel action within an agency
70 concerning its own employees, or judicial review of the action;

71 (f) the issuance of a citation or assessment under Title 34A, Chapter 6, Utah
72 Occupational Safety and Health Act, and Title 58, Chapter 3a, [~~Architect~~] Architects Licensing
73 Act, Chapter 11a, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician
74 Licensing Act, Chapter 17b, Pharmacy Practice Act, Chapter 22, Professional Engineers and
75 Professional Land [~~Surveyor~~] Surveyors Licensing Act, Chapter 53, Landscape Architects
76 Licensing Act, Chapter 55, Utah Construction Trades Licensing Act, Chapter 63, Security
77 Personnel Licensing Act, and Chapter 76, Professional Geologist Licensing Act, except that
78 this chapter governs an agency action commenced by the employer, licensee, or other person
79 authorized by law to contest the validity or correctness of the citation or assessment;

80 (g) state agency action relating to management of state funds, the management and
81 disposal of school and institutional trust land assets, and contracts for the purchase or sale of
82 products, real property, supplies, goods, or services by or for the state, or by or for an agency of
83 the state, except as provided in those contracts, or judicial review of the action;

84 (h) state agency action under Title 7, Chapter 1, Article 3, Powers and Duties of
85 Commissioner of Financial Institutions, Title 7, Chapter 2, Possession of Depository Institution
86 by Commissioner, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or
87 Holding Companies, and Title 63, Chapter 30, Utah Governmental Immunity Act, or judicial
88 review of the action;

89 (i) the initial determination of a person's eligibility for unemployment benefits, the

90 initial determination of a person's eligibility for benefits under Title 34A, Chapter 2, Workers'
91 Compensation Act, and Title 34A, Chapter 3, Utah Occupational Disease Act, or the initial
92 determination of a person's unemployment tax liability;

93 (j) state agency action relating to the distribution or award of a monetary grant to or
94 between governmental units, or for research, development, or the arts, or judicial review of the
95 action;

96 (k) the issuance of a notice of violation or order under Title 26, Chapter 8a, Utah
97 Emergency Medical Services System Act, Title 19, Chapter 2, Air Conservation Act, Title 19,
98 Chapter 3, Radiation Control Act, Title 19, Chapter 4, Safe Drinking Water Act, Title 19,
99 Chapter 5, Water Quality Act, Title 19, Chapter 6, Part 1, Solid and Hazardous Waste Act,
100 Title 19, Chapter 6, Part 4, Underground Storage Tank Act, or Title 19, Chapter 6, Part 7, Used
101 Oil Management Act, except that this chapter governs an agency action commenced by a
102 person authorized by law to contest the validity or correctness of the notice or order;

103 (l) state agency action, to the extent required by federal statute or regulation, to be
104 conducted according to federal procedures;

105 (m) the initial determination of a person's eligibility for government or public
106 assistance benefits;

107 (n) state agency action relating to wildlife licenses, permits, tags, and certificates of
108 registration;

109 (o) a license for use of state recreational facilities;

110 (p) state agency action under Title 63, Chapter 2, Government Records Access and
111 Management Act, except as provided in Section 63-2-603;

112 (q) state agency action relating to the collection of water commissioner fees and
113 delinquency penalties, or judicial review of the action;

114 (r) state agency action relating to the installation, maintenance, and repair of headgates,
115 caps, valves, or other water controlling works and weirs, flumes, meters, or other water
116 measuring devices, or judicial review of the action;

117 (s) the issuance and enforcement of an initial order under Section 73-2-25;

118 [~~(s)~~] (t) (i) a hearing conducted by the Division of Securities under Section 61-1-11.1;
119 and

120 (ii) an action taken by the Division of Securities pursuant to a hearing conducted under

121 Section 61-1-11.1, including a determination regarding the fairness of an issuance or exchange
122 of securities described in Subsection 61-1-11.1(1); and

123 [~~(t)~~] (u) state agency action relating to water well driller licenses, water well drilling
124 permits, water well driller registration, or water well drilling construction standards, or judicial
125 review of the action.

126 (3) This chapter does not affect a legal remedy otherwise available to:

127 (a) compel an agency to take action; or

128 (b) challenge an agency's rule.

129 (4) This chapter does not preclude an agency, prior to the beginning of an adjudicative
130 proceeding, or the presiding officer during an adjudicative proceeding from:

131 (a) requesting or ordering a conference with parties and interested persons to:

132 (i) encourage settlement;

133 (ii) clarify the issues;

134 (iii) simplify the evidence;

135 (iv) facilitate discovery; or

136 (v) expedite the proceeding; or

137 (b) granting a timely motion to dismiss or for summary judgment if the requirements of
138 Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party,
139 except to the extent that the requirements of those rules are modified by this chapter.

140 (5) (a) A declaratory proceeding authorized by Section 63-46b-21 is not governed by
141 this chapter, except as explicitly provided in that section.

142 (b) Judicial review of a declaratory proceeding authorized by Section 63-46b-21 is
143 governed by this chapter.

144 (6) This chapter does not preclude an agency from enacting a rule affecting or
145 governing an adjudicative proceeding or from following the rule, if the rule is enacted
146 according to the procedures outlined in Title 63, Chapter 46a, Utah Administrative Rulemaking
147 Act, and if the rule conforms to the requirements of this chapter.

148 (7) (a) If the attorney general issues a written determination that a provision of this
149 chapter would result in the denial of funds or services to an agency of the state from the federal
150 government, the applicability of the provision to that agency shall be suspended to the extent
151 necessary to prevent the denial.

152 (b) The attorney general shall report the suspension to the Legislature at its next
153 session.

154 (8) Nothing in this chapter may be interpreted to provide an independent basis for
155 jurisdiction to review final agency action.

156 (9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good
157 cause shown, from lengthening or shortening a time period prescribed in this chapter, except
158 the time period established for judicial review.

159 Section 2. Section **73-2-1.5** is amended to read:

160 **73-2-1.5. Procedures -- Adjudicative proceedings.**

161 ~~[The]~~ Except as provided in Sections 63-46b-1 and 73-2-25, the state engineer and the
162 Division of Water Rights shall comply with the procedures and requirements of Title 63,
163 Chapter 46b, Administrative Procedures Act, in their adjudicative proceedings.

164 Section 3. Section **73-2-25** is enacted to read:

165 **73-2-25. State engineer enforcement powers.**

166 (1) For purposes of this section, "initial order" means one of the following issued by
167 the state engineer:

168 (a) a notice of violation; or

169 (b) a cease and desist order.

170 (2) (a) The state engineer may commence an enforcement action under this section if
171 the state engineer finds that a person:

172 (i) is diverting water for which no water right has been established;

173 (ii) is diverting water in violation of an existing water right;

174 (iii) violates Section 73-5-4;

175 (iv) violates Section 73-5-9;

176 (v) violates a written distribution order from the state engineer;

177 (vi) violates an order issued under Section 73-3-29 regarding the alteration of the bed
178 or bank of a natural stream channel; or

179 (vii) violates a notice or order regarding dam safety issued under Chapter 5a, Dam
180 Safety.

181 (b) To commence an enforcement action under this section, the state engineer shall
182 issue an initial order, which shall include:

183 (i) a description of the violation;

184 (ii) notice of any penalties to which a person may be subject under Section 73-2-26;

185 and

186 (iii) notice that the state engineer may treat each day's violation of the provisions listed

187 in Subsection (2)(a) as a separate violation under Subsection 73-2-26(1)(c).

188 (c) The state engineer's issuance and enforcement of an initial order is exempt from

189 Title 63, Chapter 46b, Administrative Procedures Act.

190 (3) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the

191 state engineer shall make rules necessary to enforce an initial order, which shall include:

192 (a) provisions ~~H~~→ consistent with this Section ~~S~~→ [73-3-25] 73-2-25 ←~~S~~ and Section

192a 73-2-26 ←~~H~~ for

192a enforcement of the initial order if a person to whom an initial order is

193 issued fails to respond to the order or abate the violation;

194 (b) the right to a hearing, upon request by a person against whom an initial order is

195 issued; and

196 (c) provisions for timely issuance of a final order after:

197 (i) the person to whom the initial order is issued fails to respond to the order or abate

198 the violation; or

199 (ii) a hearing held under Subsection (3)(b).

200 (4) A person may not intervene in an enforcement action commenced under this

201 section.

202 (5) After issuance of a final order under rules made pursuant to Subsection (3)(c), the

203 state engineer shall serve a copy of the final order on the person against whom the order is

204 issued by:

205 (a) personal service under Utah Rules of Civil Procedure 5; or

206 (b) certified mail.

207 (6) (a) The state engineer's final order may be reviewed ~~H~~→ by trial de novo ←~~H~~ by the

207a district court in:

208 (i) Salt Lake County; or

209 (ii) the county where the violation occurred.

210 (b) A person shall file a petition for judicial review of the state engineer's final order

211 issued under this section within 20 days from the day on which the final order was served on

212 that person.

213 (7) The state engineer may bring suit in a court of competent jurisdiction to enforce a

214 final order issued under this section.

215 ~~(8) If a final order is upheld, in~~ ~~§~~ ~~→~~ ~~[In]~~ If the state engineer prevails in ~~←~~ ~~§~~ ~~←~~ ~~§~~ an
 215a1 action brought under Subsection
 215a ~~§~~ ~~→~~ (6)(b) or ~~←~~ ~~§~~ (7), the ~~§~~ ~~→~~ [person]
 216 [against whom enforcement is sought shall be liable for] ~~§~~ ~~→~~ [prevailing party] the state ~~←~~ ~~§~~ may
 216a1 recover ~~←~~ ~~§~~ all court
 216a costs and a reasonable attorney
 217 fee.

218 Section 4. Section **73-2-26** is enacted to read:

219 **73-2-26. Administrative penalties.**

220 (1) (a) As part of a final order issued under Section 73-2-25, the state engineer may
 221 order that a person to whom an order is issued:

222 (i) pay an administrative fine not to exceed:

223 (A) \$5,000 for each knowing violation; or

224 (B) \$1,000 for each violation that is not knowing;

225 (ii) replace up to 200% of water taken; and

226 (iii) be liable for any expense incurred by the state engineer or division in investigating
 227 and stopping the violation.

228 (b) The definition of "knowingly" under Subsection 76-2-103(2) shall apply to
 229 determinations under Subsection (1)(a)(i).

230 (c) The penalties described in Subsection (1)(a) shall be in addition to:

231 (i) any criminal penalty established for a violation described in Subsection (1); and

232 (ii) any private right of action.

233 (d) ~~§~~ ~~→~~ (i) ~~←~~ ~~§~~ Each day of a continuing violation of the provisions described in Subsection
 234 73-2-25(2)(a) or an initial or final order issued under Section 73-2-25 is a separate violation.

234a ~~§~~ ~~→~~ (ii) A penalty may not be imposed for a violation of the provisions listed in Subsection
 234b 73-2-25(2)(a) or an initial or a final order issued under Section 73-2-25 for a violation
 234c occurring more than 12 months before the day on which a notice of violation is issued. ~~←~~ ~~§~~

235 (e) Separate violations under Subsection (1)(d) may be consolidated for resolution in
 236 one enforcement proceeding under Section 73-2-25.

237 (f) The state engineer has discretion to pursue an administrative fine, order requiring
 238 replacement, or both.

239 (2) Before imposing a fine or ordering replacement under Subsection (1), the state
 240 engineer shall consider:

Senate 3rd Reading Amendments 2-25-2005 sm/crp
 Senate 2nd Reading Amendments 2-16-2005 rd/crp
 Senate Committee Amendments 2-9-2005 sm/crp
 House Floor Amendments 2-3-2005 dd/crp

- 241 (a) the value or quantity of water unlawfully taken, including the cost or difficulty of
- 242 replacing the water;
- 243 (b) the gravity of the violation, including the economic injury or impact to others;
- 244 (c) whether the person subject to fine or replacement attempted to comply with the

245 state engineer's orders; and

246 (d) the violator's economic benefit from the violation.

247 (3) (a) The state engineer may require that the water unlawfully taken be replaced after:

248 (i) a person fails to request judicial review of a final order issued under Section

249 73-2-25; or

250 (ii) the completion of judicial review, including any appeals.

251 (b) The state engineer's order shall require that replacement of water begin within one
252 year of the day on which:

253 (i) the time period for requesting judicial review of a final order issued under Section
254 73-2-25 expires without a person requesting judicial review of the final order; or

255 (ii) the completion of judicial review, including any appeals.

256 (4) Water replaced under Subsection (3) shall be taken from water that the person
257 subject to the order requiring replacement would be entitled to use during the replacement
258 period.

259 (5) (a) If the state engineer issues an order requiring replacement, a copy of the order
260 shall be placed in the Division of Water Rights' water rights records.

261 (b) The order requiring replacement shall constitute a lien upon the water right affected
262 if the state engineer files a notice of lien in the office of the county recorder in the county
263 where the place of use of the water right is located.

264 (c) A notice of lien under Subsection (5)(b) shall include a legal description of the
265 place of use of the water right.

266 (6) Any monies collected under this section shall be deposited into the General Fund.

267 Section 5. Section **73-2-27** is enacted to read:

268 **73-2-27. Costs and fees in civil actions.**

269 The prevailing party in a civil action is entitled to collect reasonable costs and attorney
270 fees, if that action is brought:

271 (1) under Section 73-1-14;

272 (2) under Section 73-1-15;

273 (3) for injuries caused by a diversion of water for which no water right has been
274 established;

275 (4) for injuries caused by a diversion of water in violation of an existing water right; or

276 (5) for injuries caused by a violation of a written distribution order from the state
277 engineer.

Legislative Review Note
as of 12-20-04 2:47 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

State Impact

The implementation of this bill will require \$52,000 for 0.5 FTE attorney from the Attorney General's Office and \$40,000 for 0.5 FTE Engineer.

	<u>FY 2006</u> <u>Approp.</u>	<u>FY 2007</u> <u>Approp.</u>	<u>FY 2006</u> <u>Revenue</u>	<u>FY 2007</u> <u>Revenue</u>
General Fund	\$92,000	\$92,000	\$0	\$0
TOTAL	\$92,000	\$92,000	\$0	\$0

Individual and Business Impact

No fiscal impact.
