

WATER AND IRRIGATION AMENDMENTS

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Margaret Dayton

House Sponsor: Keith Grover

LONG TITLE

Committee Note:

The Natural Resources, Agriculture, and Environment Interim Committee recommended this bill.

General Description:

This bill amends Title 73, Chapter 2, State Engineer - Division of Water Rights, Chapter 3, Appropriation, and Chapter 5, Administration and Distribution, by modifying provisions relating to the appropriation and distribution of water.

Highlighted Provisions:

This bill:

- ▶ expands the enforcement powers of the state engineer;
- ▶ amends requirements relating to the recording of an instrument transferring or assigning a water right;
- ▶ modifies provisions relating to engaging in well drilling without a license;
- ▶ modifies provisions relating to the relocation or alteration of a natural stream; and
- ▶ amends provisions relating to the duties of the state engineer in the division and distribution of water.

Money Appropriated in this Bill:

None

Other Special Clauses:

None



28 **Utah Code Sections Affected:**

29 AMENDS:

30 **73-2-25**, as last amended by Laws of Utah 2013, Chapter 260

31 **73-3-18**, as last amended by Laws of Utah 2013, Chapter 429

32 **73-3-26**, as last amended by Laws of Utah 2005, Chapter 215

33 **73-3-29**, as last amended by Laws of Utah 2008, Chapter 382

34 **73-5-3**, Utah Code Annotated 1953

35

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

37 Section 1. Section **73-2-25** is amended to read:

38 **73-2-25. State engineer enforcement powers.**

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

41 (a) a notice of violation; or

42 (b) a cease and desist order.

43 (2) (a) Except as provided in Subsection (2)(b), the state engineer may commence an
44 enforcement action under this section if the state engineer finds that a person:

45 (i) is diverting, impounding, or using water for which no water right has been
46 established;

47 (ii) is diverting, impounding, or using water in violation of an existing water right;

48 (iii) violates Section **73-5-4**;

49 (iv) violates Section **73-5-9**;

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

51 (vi) violates [~~an order issued under~~] Section **73-3-29** [~~regarding the alteration of the~~
52 ~~bed or bank of a natural stream channel~~];

53 (vii) violates a notice or order regarding dam safety issued under Chapter 5a, Dam
54 Safety;

55 (viii) fails to submit a report required by Section **73-3-25**; or

56 (ix) engages in well drilling without a license required by Section **73-3-25**.

57 (b) The state engineer may not commence an enforcement action against a person
58 under Subsection (2)(a)(i), if the person directly captures, or stores, precipitation on the surface

59 of, or under, a parcel owned or leased by the person, including in a catch basin, storm drain
60 pipe, swell, or pond, if the collection or storage:

- 61 (i) is consistent with local laws and ordinances;
- 62 (ii) does not interfere with an existing water right; and
- 63 (iii) is designed to slow, detain, or retain storm water or protect watersheds from
64 pollution with the intention that the precipitation:

- 65 (A) absorbs into the ground or is released for discharge; and
- 66 (B) is not put to beneficial use.

67 (c) To commence an enforcement action under this section, the state engineer shall
68 issue an initial order, which shall include:

- 69 (i) a description of the violation;
- 70 (ii) notice of any penalties to which a person may be subject under Section 73-2-26;

71 and

- 72 (iii) notice that the state engineer may treat each day's violation of the provisions listed
73 in Subsection (2)(a) as a separate violation under Subsection 73-2-26(1)(d).

74 (d) The state engineer's issuance and enforcement of an initial order is exempt from
75 Title 63G, Chapter 4, Administrative Procedures Act.

76 (3) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
77 state engineer shall make rules necessary to enforce an initial order, which shall include:

- 78 (a) provisions consistent with this section and Section 73-2-26 for enforcement of the
79 initial order if a person to whom an initial order is issued fails to respond to the order or abate
80 the violation;

- 81 (b) the right to a hearing, upon request by a person against whom an initial order is
82 issued; and

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

- 84 (i) the person to whom the initial order is issued fails to respond to the order or abate
85 the violation; or
- 86 (ii) a hearing held under Subsection (3)(b).

87 (4) A person may not intervene in an enforcement action commenced under this
88 section.

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

90 state engineer shall serve a copy of the final order on the person against whom the order is
91 issued by:

- 92 (a) personal service under Utah Rules of Civil Procedure 5; or
- 93 (b) certified mail.

94 (6) (a) The state engineer's final order may be reviewed by trial de novo by the district
95 court in:

- 96 (i) Salt Lake County; or
- 97 (ii) the county where the violation occurred.

98 (b) A person shall file a petition for judicial review of the state engineer's final order
99 issued under this section within 20 days from the day on which the final order was served on
100 that person.

101 (7) The state engineer may bring suit in a court of competent jurisdiction to enforce a
102 final order issued under this section.

103 (8) If the state engineer prevails in an action brought under Subsection (6)(b) or (7), the
104 state may recover all court costs and a reasonable attorney fee.

105 Section 2. Section 73-3-18 is amended to read:

106 **73-3-18. Lapse of application -- Notice -- Reinstatement -- Priorities --**

107 **Assignment of application -- Filing and recording -- Constructive notice -- Effect of**
108 **failure to record.**

109 (1) ~~[When]~~ If an application lapses for failure of the applicant to comply with ~~[this~~
110 ~~title's provisions or the state engineer's order]~~ a provision of this title or an order of the state
111 engineer, the state engineer shall promptly give notice of the lapse to the applicant by regular
112 mail.

113 (2) Within 60 days after notice of a lapse described in Subsection (1), the state engineer
114 may, upon a showing of reasonable cause, reinstate the application with the date of priority
115 changed to the date of reinstatement.

116 (3) The original priority date of a lapsed application may not be reinstated, except upon
117 a showing of fraud or mistake of the state engineer.

118 (4) Except as provided in Section 73-3-5.6, Section 73-3-12, Section 73-3-20, or
119 Subsection (2), the priority of an application is determined by the day on which the state
120 engineer's office receives the written application.

121 (5) Before the state engineer issues a certificate of appropriation, a right claimed under
122 an application for the appropriation of water may be transferred or assigned by a written
123 instrument.

124 (6) An instrument transferring or assigning a right described in Subsection (5)~~[, when~~
125 ~~acknowledged or proved and certified in the manner provided by law for the acknowledgment~~
126 ~~or proving of conveyances of real estate, may be filed in the office of the state engineer and~~
127 ~~shall from time of filing impart notice to all persons]~~ shall be recorded in the office of the
128 applicable county recorder to provide notice of the instrument's contents [thereof].

129 (7) An instrument described in Subsection (6) that is not ~~[filed]~~ recorded as described
130 in Subsection (6) is void against any subsequent assignee in good faith and for valuable
131 consideration of the same application or any portion of the same application, if the subsequent
132 assignee's own assignment is ~~[filed]~~ recorded as described in Subsection (6) first.

133 Section 3. Section **73-3-26** is amended to read:

134 **73-3-26. Violations -- Penalty.**

135 (1) ~~[Any] A person [drilling a well or wells in the state or who advertises or holds~~
136 ~~himself out as a well driller, or who follows such business, without first having obtained a~~
137 ~~license as provided by this act or who drills a well or wells after revocation or expiration of his~~
138 ~~a license theretofore issued, is guilty of a crime punishable under Section 73-2-27]~~ engaged in
139 well drilling, as described in Subsection 73-3-25(1)(c), is guilty of a crime punishable under
140 Section 73-2-27 if the person does not have a current license to engage in well drilling, as
141 provided by this title.

142 (2) Each day that a violation under Subsection (1) continues is a separate offense.

143 Section 4. Section **73-3-29** is amended to read:

144 **73-3-29. Relocation of natural streams -- Written permit required -- Emergency**
145 **work -- Violations.**

146 (1) Except as provided in Subsection (2), a state agency, county, city, corporation, or
147 person may not relocate any natural stream channel or alter the beds and banks of any natural
148 stream without first obtaining the written approval of the state engineer.

149 (2) (a) The state engineer may issue an emergency permit or order to relocate a natural
150 stream channel or alter the beds and banks of a natural stream as provided by this Subsection
151 (2) and Section [63G-4-502](#).

152 (b) ~~[H]~~ Subject to the requirements of this section, a person may take steps reasonably
153 necessary to alleviate or mitigate a threat before a written permit is issued if an emergency
154 situation arises which involves:

155 (i) immediate or actual flooding ~~[and]; or~~

156 (ii) threatens ~~[injury or damage to persons or property, steps reasonably necessary to~~
157 ~~alleviate or mitigate the threat may be taken before a written permit is issued subject to the~~
158 ~~requirements of this section]~~ the health or well-being of a person.

159 (c) (i) If ~~[the]~~ a threat described in Subsection (2)(b) occurs during normal working
160 hours, the state engineer or the state engineer's representative must be notified immediately of
161 the threat. After receiving notification of the threat, the state engineer or the state engineer's
162 representative may orally approve action to alleviate or mitigate the threat.

163 (ii) If ~~[the]~~ a threat described in Subsection (2)(b) does not occur during normal
164 working hours, action may be taken to alleviate or mitigate the threat and the state engineer or
165 the state engineer's representative shall be notified of the action taken on the first working day
166 following the ~~[work]~~ action.

167 (d) A written application outlining the action taken or the action proposed to be taken
168 to alleviate or mitigate ~~[the]~~ a threat described in Subsection (2)(b) shall be submitted to the
169 state engineer within two working days following notification of the threat to the state engineer
170 or the state engineer's representative.

171 (e) (i) The state engineer shall inspect in a timely manner the site where the emergency
172 action was taken.

173 (ii) After inspection, the state engineer may impose additional requirements, including
174 mitigation measures~~[- may be imposed].~~

175 (f) Adjudicative proceedings following the emergency work shall be informal unless
176 otherwise designated by the state engineer.

177 (3) An application to relocate any natural stream channel or alter the beds and banks of
178 any natural stream shall be in writing and shall contain the following:

179 (a) the name and address of the applicant;

180 (b) a complete and detailed statement of the location, nature, and type of relocation or
181 alteration;

182 (c) the methods ~~[to be employed]~~ of construction;

183 (d) the purposes of the application; and

184 (e) any additional information that the state engineer considers necessary, including[;
185 ~~but not limited to,~~] plans and specifications [~~of~~ for] the [~~proposed~~] construction of works.

186 (4) (a) The state engineer shall, without undue delay, conduct investigations that may
187 be reasonably necessary to determine whether the [~~proposed~~] relocation or alteration will:

188 (i) impair vested water rights;

189 (ii) unreasonably or unnecessarily affect [~~any~~] a recreational use or the natural stream
190 environment;

191 (iii) unreasonably or unnecessarily endanger aquatic wildlife; or

192 (iv) unreasonably or unnecessarily diminish the natural channel's ability to conduct
193 high flows.

194 (b) The [~~application shall be approved~~] state engineer shall approve the application
195 unless the [~~proposed~~] relocation or alteration will:

196 (i) impair vested water rights;

197 (ii) unreasonably or unnecessarily adversely affect [~~any~~] a public recreational use or the
198 natural stream environment;

199 (iii) unreasonably or unnecessarily endanger aquatic wildlife; or

200 (iv) unreasonably or unnecessarily diminish the natural channel's ability to conduct
201 high flows.

202 (c) The state engineer may approve the application, in whole or in part, with any
203 reasonable terms to protect vested water rights, [~~any~~] a public recreational use, the natural
204 stream environment, or aquatic wildlife.

205 (5) No cost incurred by the applicant, including any cost incurred to comply with the
206 terms imposed by the state engineer, is reimbursable by the Division of Water Rights.

207 (6) Except as provided in Subsection (2), a person who knowingly or intentionally
208 relocates [~~any~~] a natural stream channel, or alters the bed or bank of [~~any~~] a natural stream
209 channel without first obtaining the written approval of the state engineer is guilty of a crime
210 punishable under Section [73-2-27](#).

211 (7) The state engineer may issue an order for the repair and restoration of the bed and
212 banks of a natural stream channel altered contrary to, or without, a permit issued for that
213 purpose.

214 Section 5. Section 73-5-3 is amended to read:

215 **73-5-3. Control by engineer of division and distribution under judgments.**

216 (1) The state engineer [and his duly authorized assistants shall carry into effect the
217 judgments of the courts] or the state engineer's designee shall carry into effect a judgment of a
218 court in relation to the division, distribution, or use of water under the provisions of this title.

219 (2) The state engineer shall [divide, or cause to be divided, the water within any district
220 created under the provisions of this title among the several appropriators entitled thereto in
221 accordance with the right of each respectively, and shall regulate and control, or cause to be
222 regulated and controlled, the use of such water by such closing or partial closing of the head
223 gates, caps, valves or other controlling works of any ditch, canal, pipe, flume, well or tunnel or
224 other means of diversion as will prevent the waste of water or its use in excess of the quantity
225 to which any appropriator is lawfully entitled, and shall regulate, or cause to be regulated, the
226 controlling works of reservoirs in accordance with the provisions of this title. Whenever in
227 pursuance of his duties the state engineer regulates or causes to be regulated any head gate, cap,
228 valve or other controlling works of any ditch, canal, pipe, flume, well or tunnel or other means
229 of diversion or the controlling works of any reservoir, he may attach to such controlling works
230 a written notice, properly dated and signed, setting forth that such controlling works have been
231 properly regulated and are wholly under his control, and such notice shall be a legal notice as to
232 the facts therein contained to all parties interested in the division and distribution of the water
233 of such ditch, canal, pipe, flume, well or tunnel or other means of diversion or reservoir.

234 Whenever the state engineer is required to enter upon private property in order to carry out the
235 provisions of this title and is refused by the owner or possessor of such property such right of
236 entry, he may petition the district court for an order granting such right, and after notice and
237 hearing the court may grant such permission, on security being given to pay all damage caused
238 thereby to the owner of such property.]:

239 (a) divide water among several appropriators entitled to the water in accordance with
240 the right of each appropriator;

241 (b) regulate and control the use of the water by closing or partially closing a head gate,
242 cap, valve, or other controlling work of a ditch, canal, pipe, flume, well or tunnel, or other
243 means of diversion to prevent the waste of water or its use in excess of the quantity to which an
244 appropriator is lawfully entitled; and

245 (c) regulate a controlling work of reservoirs in accordance with the provisions of this
246 title.

247 (2) (a) If the state engineer regulates a head gate, cap, valve, or other controlling work
248 of a ditch, canal, pipe, flume, well or tunnel, or other means of diversion, or the controlling
249 work of a reservoir, the state engineer may attach to the controlling work a written notice,
250 properly dated and signed, setting forth that the controlling work has been properly regulated
251 and is wholly under the state engineer's control.

252 (b) The notice provided under Subsection (2)(a) shall be a legal notice, as to the facts
253 contained in the notice, to all parties interested in the division and distribution of the water of
254 the ditch, canal, pipe, flume, well or tunnel, or other means of diversion, or reservoir.

255 (3) (a) If the state engineer is required to enter upon private property to carry out the
256 provisions of this title and is refused by the owner or possessor of the property the right of
257 entry, the state engineer may petition the district court for an order granting a right of entry.

258 (b) After notice and hearing the court may grant the state engineer a right of entry, on
259 security given by the state engineer to pay the owner of the property for all damage caused by
260 the entry.

Legislative Review Note
as of 11-22-13 10:10 AM

Office of Legislative Research and General Counsel