

**Effective 5/3/2023**

## **Part 4 Compensation**

### **73-3d-401 Definitions.**

As used in this part:

- (1) "Arbitration" means a private hearing before a neutral or panel of neutrals from the department who hear the evidence, consider the contentions of the parties, and enters a written award to resolve the issues presented.
- (2) "Commission" means the Conservation Commission created in Section 4-18-104.
- (3) "Consequential damages" means the losses or injuries from the exercise of a preference under this chapter that result in material losses to an interrupted user and that are reasonably foreseeable to someone familiar with the industry where use is being made of the water at the time the preference is exercised, including:
  - (a) loss of sales or operating revenue;
  - (b) damage to equipment; or
  - (c) damage to capital facilities or operational assets.
- (4) "Department" means the Department of Agriculture and Food.
- (5) "Fund" means the Agriculture Resource Development Fund created in Section 4-18-106.
- (6) "Interrupted user" means a person whose beneficial use of water is interrupted by the preferential use of water under this chapter, and is:
  - (a) the holder or lessee of an approved application to appropriate water that is interrupted;
  - (b) the record or equitable holder or lessee of a perfected water right that is interrupted; or
  - (c) the owner, lessor, or lessee of a right to use water that is represented by shares of stock in a mutual water company whose water rights are interrupted.
- (7) "Mediation" means a private forum in which one or more impartial persons from the department facilitate communication between the interrupted user and the preferential user to promote a mutually acceptable resolution or settlement.
- (8) "Preferential user" means a person specified in the executive order declaring a temporary water shortage emergency who uses water preferentially during the temporary water shortage emergency.

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### **73-3d-402 Payment of compensation.**

- (1)
  - (a) A preferential user shall pay an interrupted user an amount equal to the total of the following:
    - (i) the reasonable value of the water interrupted by the preferential use;
    - (ii) applicable crop losses;
    - (iii) other consequential damages incurred as a result of the interruption; and
    - (iv) interest on the amounts described in Subsections (1)(a)(i), (ii), and (iii) in the amount of 8% per annum.
  - (b) Interest described in Subsection (1)(a)(iv) shall start the day on which the preferential user first begins to take water preferentially.
  - (c) A preferential user shall pay an interrupted user the amount described in Subsection (1)(a) by the later of 30 days from the day on which:
    - (i) the preferential user stops diverting water preferentially under this chapter; or

- (ii) mediation or arbitration under Subsection (2) is complete.
- (d)
  - (i) Once an interrupted user informs the preferential user of the amount owed under Subsection (1)(a), the preferential user has the burden of proof to prove, by a preponderance of the evidence, that an amount different from that asserted by the interrupted user is owed under Subsection (1)(a).
  - (ii) The burden of proof described in this Subsection (1)(d) applies throughout the process of paying compensation, including during mediation, arbitration, or a court action.
- (2)
  - (a)
    - (i) If the interrupted user or the preferential user requests mediation, the department shall mediate a dispute over the application of this section.
    - (ii) If the interrupted user and the preferential user jointly request arbitration, the department shall arbitrate a dispute over the application of this section.
  - (b) In conducting mediation under this Subsection (2), Title 78B, Chapter 10, Utah Uniform Mediation Act, applies.
  - (c)
    - (i) In conducting arbitration under this Subsection (2), the department shall follow the Title 78B, Chapter 11, Utah Uniform Arbitration Act.
    - (ii) In applying Title 78B, Chapter 11, Utah Uniform Arbitration Act, the arbitrator and parties shall treat the matter as if:
      - (A) the arbitration was ordered by a court; and
      - (B) the department was appointed as arbitrator by the court.
    - (iii) For the purpose of an arbitration conducted under this section, if the dispute to be arbitrated is not already the subject of legal action, the district court having jurisdiction over the county where the preferential use of water involved in the dispute is located is the court referred to in Title 78B, Chapter 11, Utah Uniform Arbitration Act.
    - (iv) Arbitration by the department is not necessary before bringing legal action to adjudicate a claim under this section. The lack of arbitration by the department does not constitute, and may not be interpreted as constituting, a failure to exhaust available administrative remedies or as a bar to bringing legal action.
    - (v) Arbitration under this section is not subject to Title 63G, Chapter 4, Administrative Procedures Act, or Title 78B, Chapter 6, Part 2, Alternative Dispute Resolution Act.
    - (vi) Within 30 days after an arbitrator issues a final award, any party to the arbitration may submit the dispute, the award, or any issue upon which the award is based, to the district court for review by trial de novo unless the parties agree in advance of arbitration that the arbitration is binding and that no de novo review may occur.
- (3)
  - (a) If the persons described in Subsection (2) participate in mediation or arbitration under Subsection (2), at the conclusion of the mediation or arbitration, the preferential user shall pay the interrupted user an amount equal to the lesser of:
    - (i) the amount of actual attorney fees incurred; or
    - (ii) \$15,000.
  - (b) An interrupted user or preferential user may not seek mediation or arbitration by the Office of the Property Rights Ombudsman under Title 13, Chapter 43, Property Rights Ombudsman Act.
- (4) In an action when the court is asked to determine the amount described in Subsection (1), the court shall award costs and reasonable attorney fees:

- (a) to the interrupted user if the preferential user declines to participate in mediation or arbitration under Subsection (2);
  - (b) to the preferential user if the interrupted user declines to participate in mediation or arbitration under Subsection (2);
  - (c) to the interrupted user if the amount determined by the court is 85% or more of:
    - (i) the final amount offered by the interrupted user as part of the mediation described in Subsection (2)(a); or
    - (ii) the final amount determined by the department as a result of arbitration described in Subsection (2); and
  - (d) to the preferential user if the amount determined by the court is less than 85% of:
    - (i) the final amount offered by the interrupted user as part of the mediation described in Subsection (2)(a); or
    - (ii) the final amount determined by the department as a result of arbitration described in Subsection (2).
- (5)
- (a) In accordance with this Subsection (5), an interrupted user may apply for one or more 0% interest loans from the commission to compensate the interrupted user while the interrupted user is waiting to be compensated by the preferential user under this section.
  - (b) Before the commission may make a loan under this Subsection (5) to an interrupted user, the interrupted user shall apply for the loan by:
    - (i) providing information sufficient to establish to the satisfaction of the commission:
      - (A) the basis by which the person is entitled to use of the water;
      - (B) the use of water that would have been made by the person without the interruption;
      - (C) the length of the interruption;
      - (D) a good faith estimate of the amount of water the person entitled to the use of water would otherwise have made;
      - (E) the losses and consequential damages incurred as a result of the interruption; and
      - (F) whether the interrupted user has previously received a loan under this Subsection (5) for the same interruption of water use;
    - (ii) agreeing in writing to repay the amount of a loan within 30 days of the day on which the interrupted user is paid in full by the preferential user; and
    - (iii) providing any other information required by rules made by the department in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
  - (c)
    - (i) Once the commission obtains a complete application under Subsection (5)(b), the commission shall determine whether the interrupted user is eligible for a loan and the amount to be loaned using reliable third-party market and producer information, when available, as close as possible to the beginning date of the water delivery interruption, except that a single loan may not exceed \$150,000.
    - (ii) For agriculture commodities, the commission may determine unit prices and base adjustments by using:
      - (A) applicable United States Department of Agriculture crop pricing data sets;
      - (B) Utah State University Extension data sets; and
      - (C) publications, fact sheets, and enterprise budgets data sets published by a university.
    - (iii) For agriculture commodities, the commission may consider documents filed under Subsection (5)(b) to establish historical production records provided by the interrupted user.
    - (iv) For nonagricultural products or services, the commission may determine the loan amount using information from:

- (A) other state agencies;
  - (B) federal agencies; and
  - (C) industry leaders within the state associated with the goods or service forgone by the interrupted user.
- (v) For nonagricultural products or services, the commission shall determine the quantity of units of nonagricultural good and services during the temporary water shortage emergency by using:
- (A) industry standards, if available; or
  - (B) recent product or service records.
- (d) The commission may issue a loan to an interrupted user only to the extent that there is money in the fund and the limit on outstanding loans from the fund under Subsection 4-18-106(6) has not been met. The commission shall issue loans from the fund in the order that an interrupted user submits a completed application for the loan.
- (e) An interrupted user who receives a loan under this Subsection (5) shall repay the amount of the loan within 30 days of the day on which the interrupted user is paid in full by the preferential user.
- (6)
- (a) If the department determines that the preferential user fails to comply with Subsection (1), the department may bring suit in a court of competent jurisdiction to require a preferential user to reimburse the fund for a loan issued under Subsection (5) that is based on the use of the water by the preferential user.
  - (b) If the department determines that an interrupted user fails to repay a loan in accordance with Subsection (5), the department may bring suit in a court of competent jurisdiction to require repayment of the loan.
  - (c) If the department prevails in an action brought under this Subsection (6), the department may recover amounts owed, court costs, and reasonable attorney fees.
- (7) The department shall establish by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, procedures to:
- (a) request mediation or arbitration under this section;
  - (b) apply for a loan under Subsection (5);
  - (c) determine the amount to be loaned to an interrupted user under Subsection (5); and
  - (d) provide for the repayment of a loan issued under Subsection (5).

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**73-3d-403 Security requirements.**

- (1) As a condition of participating in mediation or arbitration under Section 73-3d-402, a person specified in the executive order declaring a temporary water shortage emergency shall post with the department a corporate surety bond, irrevocable letter of credit, trust fund agreement, or any other security agreement considered reasonable in an amount not less than \$100,000.
- (2) The bond or other security posted shall be conditioned upon:
  - (a) the faithful performance in mediation or arbitration; and
  - (b) the payment of amounts owed under Section 73-3d-402.
- (3) If the department determines that the conditions of Subsection (2) are not met, the commissioner of the department shall bring an action upon the bond or other security.

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