

**WATER ENFORCEMENT PROCEDURES AND
PENALTIES**

2005 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David Ure

Senate Sponsor: Thomas V. Hatch

LONG TITLE

General Description:

This bill modifies the state engineer's enforcement and penalty processes.

Highlighted Provisions:

This bill:

- ▶ exempts certain enforcement proceedings conducted by the state engineer from Title 63, Chapter 46b, Administrative Procedures Act;
- ▶ authorizes the state engineer to issue cease and desist orders and notices of violation to violators of various provisions of Title 73, Water and Irrigation;
- ▶ establishes an enforcement process for resolving cease and desist orders and notices of violation;
- ▶ requires the state engineer to make any rules necessary for enforcing cease and desist orders and notices of violation;
- ▶ authorizes the state engineer to sue to enforce orders;
- ▶ establishes administrative penalties for violations of various provisions of Title 73, Water and Irrigation;
- ▶ requires the state engineer to consider certain factors before imposing administrative penalties;
- ▶ provides for the replacement of water ordered to be replaced in enforcement proceedings;
- ▶ allows the collection of costs and fees by the prevailing party in certain civil actions; and

- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

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

ENACTS:

73-2-25, Utah Code Annotated 1953

73-2-26, Utah Code Annotated 1953

73-2-27, Utah Code Annotated 1953

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

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

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

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

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

(b) judicial review of the action.

(2) This chapter does not govern:

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

(b) the issuance of a notice of a deficiency in the payment of a tax, the decision to waive a penalty or interest on taxes, the imposition of and penalty or interest on taxes, or the issuance of

a tax assessment, except that this chapter governs an agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of the action;

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

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

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

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

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

(h) state agency action under Title 7, Chapter 1, Article 3, Powers and Duties of Commissioner of Financial Institutions, Title 7, Chapter 2, Possession of Depository Institution

by Commissioner, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or Holding Companies, and Title 63, Chapter 30, Utah Governmental Immunity Act, or judicial review of the action;

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

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

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

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

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

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

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

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

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

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

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

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

(ii) an action taken by the Division of Securities pursuant to a hearing conducted under Section 61-1-11.1, including a determination regarding the fairness of an issuance or exchange of securities described in Subsection 61-1-11.1(1); and

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

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

- (a) compel an agency to take action; or
- (b) challenge an agency's rule.

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

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

- (i) encourage settlement;
- (ii) clarify the issues;
- (iii) simplify the evidence;
- (iv) facilitate discovery; or
- (v) expedite the proceeding; or

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

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

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

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

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

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

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

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

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

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

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

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

73-2-25. State engineer enforcement powers.

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

(a) a notice of violation; or

(b) a cease and desist order.

(2) (a) The state engineer may commence an enforcement action under this section if the

state engineer finds that a person:

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

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

(iii) violates Section 73-5-4;

(iv) violates Section 73-5-9;

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

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

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

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

(i) a description of the violation;

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

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

(c) The state engineer's issuance and enforcement of an initial order is exempt from Title 63, Chapter 46b, Administrative Procedures Act.

(3) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the state engineer shall make rules necessary to enforce an initial order, which shall include:

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

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

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

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

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

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

(5) After issuance of a final order under rules made pursuant to Subsection (3)(c), the state engineer shall serve a copy of the final order on the person against whom the order is issued by:

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

(b) certified mail.

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

(i) Salt Lake County; or

(ii) the county where the violation occurred.

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

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

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

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

73-2-26. Administrative penalties.

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

(i) pay an administrative fine not to exceed:

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

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

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

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

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

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

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

(ii) any private right of action.

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

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

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

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

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

(a) the value or quantity of water unlawfully taken, including the cost or difficulty of replacing the water;

(b) the gravity of the violation, including the economic injury or impact to others;

(c) whether the person subject to fine or replacement attempted to comply with the state engineer's orders; and

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

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

(i) a person fails to request judicial review of a final order issued under Section 73-2-25;

or

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

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

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

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

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

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

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

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

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

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

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

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

(1) under Section 73-1-14;

(2) under Section 73-1-15;

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

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

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