

**TRUST REQUIREMENT FOR DIVISION OF
SHARED GROUNDWATER**

2007 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Jackie Biskupski

Senate Sponsor: _____

LONG TITLE

General Description:

This bill establishes the requirements for an agreement to divide groundwater with another state.

Highlighted Provisions:

This bill:

- ▶ defines terms; and
- ▶ requires an agreement dividing groundwater with another state to include:
 - a monitoring program;
 - an agreement to manage the aquifer at safe yield;
 - provisions specifying an incremental withdrawal of water;
 - provisions specifying mitigation measures if adverse impacts occur;
 - provisions to reduce or cease withdrawal if certain adverse impacts are discovered; and
 - a requirement for the other state to deposit money into a trust fund to mitigate and compensate for the withdrawal's adverse impacts.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None



Utah Code Sections Affected:

ENACTS:

73-29-101, Utah Code Annotated 1953

73-29-102, Utah Code Annotated 1953

73-29-103, Utah Code Annotated 1953

73-29-104, Utah Code Annotated 1953

73-29-105, Utah Code Annotated 1953

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

Section 1. Section **73-29-101** is enacted to read:

CHAPTER 29. INTERSTATE GROUNDWATER ACT

73-29-101. Title.

This chapter is known as the "Interstate Groundwater Act."

Section 2. Section **73-29-102** is enacted to read:

73-29-102. Definitions.

As used in this chapter:

(1) "Adverse impact" means the threshold level of degradation, established in the agreement, to Utah's water resources, water users, and ecosystem.

(2) "Agreement" means the agreement between Utah and Nevada to divide the water resources of an interstate groundwater flow system required by the Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424.

(3) "Ecosystem" means the air, land, plants, animals, and sensitive or endangered species affected directly or indirectly by the interstate groundwater flow systems.

(4) "Phreatophytes" means deep-rooted plants that obtain water from the water table or the layer of soil just above it.

(5) "Project" means the withdrawal and transbasin diversion of water from the interstate groundwater flow system.

(6) "Safe yield" means the amount of groundwater that can be withdrawn from a groundwater flow system over a period of time without:

(a) exceeding the annual recharge of the system; or

(b) lowering the level of the groundwater flow system to the extent that the

phreatophytes will be adversely affected.

Section 3. Section **73-29-103** is enacted to read:

73-29-103. Contents of agreement.

(1) The agreement shall include provisions for:

(a) a groundwater monitoring program that measures the affect the project has on:

(i) water resources, including:

(A) groundwater and well levels; and

(B) surface water, including rivers, streams, springs, seeps, wet meadows, and wetlands;

(ii) agricultural interests, including water used for irrigation and livestock; and

(iii) the ecosystem;

(b) the limitation of water withdrawals from the interstate groundwater system to the safe yield of the system;

(c) Nevada to implement and enforce an incremental withdrawal of water from the interstate groundwater flow system over an adequate, specified period of time to ensure that there is no adverse impact;

(d) Nevada to order the reduction or cessation of withdrawal of water from the interstate groundwater flow system if an adverse impact is discovered or the monitoring program indicates that an adverse impact is likely to occur;

(e) Nevada to undertake specific mitigation measures if an adverse impact occurs; and

(f) Nevada to establish a trust as required by Section 73-29-104.

(2) The Department of Natural Resources shall post and update monthly the results of the monitoring program required by Subsection (1).

Section 4. Section **73-29-104** is enacted to read:

73-29-104. Trust required.

(1) (a) The agreement shall require Nevada to deposit money in a trust fund at a bank located in Utah.

(b) Nevada is encouraged to acquire the money from the owners and operators of the project.

(2) The agreement shall establish:

(a) a Board of Trustees;

90 (b) a trust administrator; and

91 (c) qualification criteria for beneficiaries.

92 (3) The agreement shall specify the amount, which shall be sufficient to cover the costs
93 associated with:

94 (a) the monitoring program;

95 (b) the legal costs incurred by Utah in enforcing or litigating the agreement; and

96 (c) mitigating any adverse impact of the project, including:

97 (i) increasing a well's depth and the power required to lift the water from a deeper well;

98 (ii) revegetating the land adversely affected by the project;

99 (iii) blowing dust;

100 (iv) lost water rights;

101 (v) lost income and the costs of relocation for agricultural producers and other business
102 owners in the area;

103 (vi) damage to real property; and

104 (vii) reduced water quality.

105 (4) The Board of Trustees may authorize the trust administrator to make payments to
106 any person adversely impacted by the project, including:

107 (a) the state;

108 (b) an agricultural producer;

109 (c) an owner of a water right;

110 (d) a business owner; and

111 (e) a real property owner.

112 Section 5. Section **73-29-105** is enacted to read:

113 **73-29-105. Severability.**

114 If any provision of this chapter, or the application of a provision of this chapter to any
115 person or circumstance is held to be invalid, the remainder of this chapter shall be given effect
116 without the invalid provision or application.

Legislative Review Note
as of 2-5-07 12:17 PM

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This legislation requires any agreement with Nevada dividing interstate groundwater to include provisions requiring Nevada to (1) limit water withdrawal to safe yield, as defined in the legislation; (2) deposit an amount of money into a trust fund to mitigate any adverse impact; (3) only allow the incremental withdrawal of water; and (4) limit or stop water withdrawal if certain adverse impacts occur. The United States Constitution declares the laws of the United States to be the supreme law of the land. The United States Supreme Court has interpreted this to mean that federal law preempts state law to the extent that state law actually conflicts with federal law. Conflict exists when compliance with both the federal and state law is a physical impossibility or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The Lincoln County Conservation, Recreation, and Development Act of 2004 requires Utah and Nevada to reach an agreement dividing the water resources of the interstate groundwater flow system from which water will be diverted in a transbasin pipeline to southern Nevada. The federal law requires the agreement to allow for the maximum sustainable beneficial use of the water resources and protect existing water rights. To the extent that the provisions of this legislation prevent the maximum sustainable beneficial use of the water, curtail existing water rights, or prevent Nevada from agreeing to the provisions because compliance with the provisions would require Nevada to violate its own state water law, compliance with both the federal and state law could be a physical impossibility. Furthermore, to the extent that requiring Nevada to deposit in a Utah trust fund an amount of money sufficient to mitigate any adverse impact prevents Nevada from entering into the agreement, the legislation frustrates the objective of Congress that an agreement be reached. There is a high probability that a federal court would determine that this legislation conflicts with the Lincoln County Conservation, Recreation, and Development Act of 2004 and therefore may be held unconstitutional as preempted by federal law.

Office of Legislative Research and General Counsel