

BOARD OF WATER RESOURCES AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Dennis E. Stowell

House Sponsor: Sylvia S. Andersen

LONG TITLE

General Description:

This bill amends provisions regarding the financing of a water project.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ allows the Board of Water Resources to:
 - accept a bond from private sponsors in lieu of taking title to a project;
 - give preference to a project that benefits the state or a political subdivision; and
 - consider market conditions and other factors when establishing an interest rate;

and

- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

73-10-26, as last amended by Laws of Utah 2007, Chapter 179

73-10-27, as last amended by Laws of Utah 2005, Chapter 25

73-10-28, as enacted by Laws of Utah 1978, Chapter 22

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

30 Section 1. Section **73-10-26** is amended to read:

31 **73-10-26. Construction of a project by board -- Ownership and operation --**
32 **Transfer of a water right -- Purchase of a bond from an Indian tribe.**

33 (1) As used in this section:

34 (a) "Board" means the Board of Water Resources created in Section 73-10-1.5.

35 (b) "Bond" means:

36 (i) a written obligation to repay borrowed money, whether denominated a bond, note,
37 warrant, certificate of indebtedness, or otherwise; and

38 (ii) a lease agreement, installment purchase agreement, or other agreement that includes
39 an obligation to pay money.

40 (c) "Division" means the Division of Water Resources created in Section 73-10-18.

41 (d) "Project" means a facility, works, or other real or personal property that:

42 (i) conserves or develops the water or hydroelectric power resources of the state; or

43 (ii) controls flooding.

44 ~~[(1)]~~ (2) (a) The board ~~[of Water Resources]~~, through the division ~~[of Water~~
45 ~~Resources]~~, may construct ~~[works and facilities, including hydroelectric generating works, that~~
46 ~~are necessary and desirable to conserve and develop the water and power resources of the state]~~
47 a project.

48 (b) An electric public utility or a municipality of the state may construct an electrical
49 ~~[facilities]~~ facility incidental to a ~~[hydroelectric]~~ project.

50 (c) If the state constructs the electrical ~~[facilities]~~ facility, the state must first offer the
51 power and energy derived from the hydroelectric generating ~~[plant]~~ project to an electric public
52 ~~[utilities or municipalities]~~ utility or municipality in the state for distribution to electric
53 consumers.

54 ~~[(2)]~~ (3) (a) The board ~~[of Water Resources]~~, through the division ~~[of Water~~
55 ~~Resources]~~, may consider ~~[any]~~ a flood control project ~~[provided for in Title 4, Chapter 18,~~
56 ~~Conservation Commission Act,]~~ in the same manner~~;~~ and apply the same procedures and
57 rules~~;~~ as the board would consider or apply to ~~[any other]~~ another project within its statutory

58 authority.

59 (b) If funds controlled by the board [~~of Water Resources~~] are to be used for the flood
60 control project, the planning [~~by the Conservation Commission~~] of the project is subject to the
61 review of the board.

62 (c) If the flood control project is authorized for construction, the plans, specifications,
63 and construction supervision shall be undertaken as prescribed by the board.

64 [~~(3)~~] (4) The board [~~of Water Resources~~] may enter into an agreement for the
65 construction or financing of [~~any~~] a project financed with monies from the Water Resources
66 [~~Construction~~] Conservation and Development Fund with another state, the federal government,
67 a political subdivision of the state, an Indian tribe, or a private corporation.

68 [~~(4) (a) (i) Title to all projects, including water rights;~~]

69 (5) (a) (i) Except as provided by Subsections (5)(a)(ii) and (b), title to a project,
70 including a water right, constructed or acquired with monies from the Water Resources
71 [~~Construction~~] Conservation and Development Fund is vested in the state.

72 [~~(ii) If an incorporated municipality, metropolitan water district, water conservancy~~
73 ~~district, improvement district, special improvement district, special service district, or any other~~
74 ~~political subdivision of the state sponsors a project, the Board of Water Resources may take~~
75 ~~revenue bonds, general obligation bonds, special assessment bonds, or other bonds or~~
76 ~~obligations]~~

77 (ii) The board may take a bond legally issued by the project sponsor in lieu of or in
78 addition to taking title to the project and water [~~rights~~] right.

79 (b) If an Indian tribe sponsors a project, the board [~~of Water Resources~~] may take
80 [~~revenue bonds, general obligation bonds, or other bonds or obligations]~~ a bond legally issued
81 by the tribe, to the extent that federal law allows the tribe to issue [~~bonds~~] a bond, in lieu of
82 taking title to the project and water [~~rights~~] right, if the tribe:

83 (i) waives the defense of sovereign immunity regarding the bond issue in [~~any~~] an action
84 arising out of the issuance or default under the bond; and

85 (ii) agrees in writing that it will not challenge state court jurisdiction over any litigation

86 resulting from default on its [~~obligations~~] obligation in the transaction.

87 (c) Before entering into [~~any~~] an agreement with or purchasing [~~any bonds or~~
88 ~~obligations~~] a bond from a tribe, the board [~~of Water Resources~~] shall:

89 (i) require that the tribe obtain the written approval of the Secretary of the United
90 States Department of the Interior or the secretary's designee to all aspects of the agreement[
91 ~~bonds, or obligations~~] or bond;

92 (ii) obtain a legal opinion from a recognized bond counsel certifying:

93 (A) that the tribe has legal authority to:

94 (I) enter into the agreement; or

95 (II) issue the [~~bonds or obligations~~] bond;

96 (B) that the pledge of [~~any assets or revenues~~] an asset or revenue by the tribe as
97 security for the payments under the agreement[~~, bonds, or obligations~~] or bond is a valid and
98 legally enforceable pledge; and

99 (C) that the agreement[~~, bonds, or obligations~~] or bond may be enforced in [~~any~~] a
100 court of general jurisdiction in the state; and

101 (iii) determine whether it has sufficient legal recourse against the tribe and against [~~any~~]
102 a security pledged by the tribe in the event of default.

103 [~~(5)~~] (6) (a) The board [~~of Water Resources~~] may own and operate [~~water conservation~~
104 ~~and development works and projects and flood control projects;~~] a project if:

105 (i) the [~~works and projects are~~] project is consistent with [~~plans~~] the plan adopted by
106 the board; and

107 (ii) in the opinion of the board the ownership and operation of the [~~projects~~] project by
108 the board is in the best interest of the state.

109 (b) In the ownership and operation of [~~the projects~~] a project referred to in Subsection
110 [~~(5)~~] (6)(a), the board shall use a water [~~rights~~] right held in its name under authority of Section
111 73-10-19.

112 (c) (i) The board may enter into [~~contracts~~] a contract with another state, the federal
113 government, a political subdivision of the state, an Indian tribe, or a private corporation for

114 operation, maintenance, and administration of the project.

115 (ii) The board may pay the contracting agency a reasonable sum for operation,
116 maintenance, and administration of the project.

117 ~~[(6)]~~ (7) (a) The board may also:

118 (i) enter into ~~[agreements]~~ an agreement in which title to ~~[projects may be]~~ a project is
119 conveyed to a cooperating ~~[sponsors]~~ project sponsor after charges assessed against the project
120 have been paid to the state in accordance with the terms of the construction ~~[agreements or~~
121 ~~amendments to those agreements]~~ agreement or amendment to the agreement;

122 (ii) make the water and power available ~~[for the use of]~~ to the state's citizens who are,
123 in ~~[its]~~ the board's opinion, best able to ~~[utilize it, all]~~ use the water and power:

124 (A) that is conserved by ~~[any of the projects]~~ the project; and

125 (B) to which the state ~~[may have]~~ has title;

126 (iii) enter into ~~[contracts]~~ a contract for the use of ~~[that]~~ the water and power with
127 ~~[individuals or with organizations]~~ an individual or an organization composed of the state's
128 citizens; and

129 (iv) assess a reasonable fee against ~~[any]~~ a person using water and power from a
130 project.

131 (b) ~~[Any]~~ The amount collected over the amount to be returned to the state for payment
132 of the principal, interest, and maintenance of the project shall ~~[become part of]~~ be deposited in
133 the Water Resources Conservation and Development Fund as established by Section 73-10-24.

134 ~~[(7)]~~ (8) The board ~~[of Water Resources]~~ shall retain ownership of a water ~~[rights]~~ right
135 used for ~~[projects]~~ a project owned and operated by the board unless:

136 (a) the water ~~[rights]~~ right originally held by a cooperating ~~[sponsors are]~~ project
137 sponsor is conveyed to the project sponsor upon payment to the state of charges assessed
138 against the project in accordance with the terms of the construction ~~[agreements or amendments~~
139 ~~to those agreements]~~ agreement or an amendment to the agreement; or

140 (b) the board transfers ~~[any]~~ an unperfected water right held by ~~[it]~~ the board that is not
141 being ~~[utilized]~~ used in a state-owned project to a political subdivision of the state, ~~[any]~~ an

142 agency of the federal government, or a nonprofit water company.

143 ~~[(8) Any]~~ (9) A transfer of the board's water ~~[rights]~~ right shall be made to the entity
144 that is best able to use the water ~~[rights]~~ right for the benefit of the state's citizens.

145 Section 2. Section **73-10-27** is amended to read:

146 **73-10-27. Project priorities -- Considerations -- Determinations of feasibility --**
147 **Bids and contracts -- Definitions -- Retainage.**

148 (1) As used in this section:

149 (a) "Board" means the Board of Water Resources created in Section 73-10-1.5.

150 (b) "Estimated cost" means the cost of the labor, material, and equipment necessary for
151 construction of the contemplated project.

152 (c) "Lowest responsible bidder" means a licensed contractor:

153 (i) who:

154 (A) submits the lowest bid; and

155 (B) furnishes a payment bond and a performance bond under Sections 14-1-18 and
156 63-56-504; and

157 (ii) whose bid:

158 (A) is in compliance with the invitation for a bid; and

159 (B) meets the plans and specifications.

160 ~~[(1)]~~ (2) In considering the ~~[priorities for projects]~~ priority for a project to be built or
161 financed with funds made available under Section 73-10-24, the board shall give preference to
162 ~~[those projects which]~~ a project that:

163 (a) ~~[are]~~ is sponsored by, or for the benefit of, the state or a political subdivision of the
164 state;

165 (b) ~~[meet]~~ meets a critical local need;

166 (c) ~~[have]~~ has greater economic feasibility;

167 (d) will yield revenue to the state within a reasonable time or will return a reasonable
168 rate of interest, based on financial feasibility; and

169 (e) ~~[meet]~~ meets other considerations deemed necessary by the board, including~~[-but~~

170 ~~not limited to,]~~ wildlife management and recreational needs.

171 ~~[(2)]~~ (3) (a) In determining the economic feasibility, the board shall establish a
172 benefit-to-cost ratio for each project, using a uniform standard of procedure for all projects.

173 (b) In considering whether a project should be built, the benefit-to-cost ratio for each
174 project shall be weighted based on the relative cost of the project.

175 (c) A project, when considered in total with all other projects constructed under this
176 chapter and still the subject of a repayment contract, may not cause the accumulative
177 benefit-to-cost ratio of the projects to be less than one to one.

178 ~~[(3) Under no circumstances may a project be built that is not]~~

179 (4) A project may not be built if the project is not:

180 (a) in the public interest, as determined by the board ~~[of Water Resources, and no~~
181 ~~project may be built which is not]; or~~

182 (b) adequately designed based on sound engineering and geologic considerations.

183 ~~[(4) The board in the preparation of]~~

184 (5) In preparing a project [for construction] constructed by the board, the board shall
185 [comply with the following]:

186 ~~[(a) All flood control projects involving cities and counties]~~

187 (a) based on a competitive bid, award a contract for:

188 (i) a flood control project:

189 (A) involving a city or county; and

190 (B) costing in excess of \$35,000[, and all contracts for];

191 (ii) the construction of a storage reservoir in excess of 100 acre-feet; or [for]

192 (iii) the construction of a hydroelectric generating facility[, shall be awarded on the
193 basis of competitive bid. Advertisement for competitive bids shall be published by the board];

194 (b) publish an advertisement for a competitive bid:

195 (i) at least once a week for three consecutive weeks in a newspaper with general
196 circulation in the state[. The advertisement shall indicate that the board], with the last date of
197 publication appearing at least five days before the schedule bid opening; and

198 (ii) indicating that the board:

199 (A) will award the contract to the lowest responsible bidder [but that it]; and

200 (B) reserves [to itself] the right to reject any and all bids[. The date of last publication
201 shall appear at least five days before the scheduled bid opening.];

202 [(b) If all initial bids on the project are rejected, the board shall]

203 (c) readvertise the project in the manner specified in Subsection [(4)(a). If no
204 satisfactory bid is received by the board upon the readvertisement of the project, it may proceed
205 to construct the project but only in accordance with the plans and specifications used to
206 calculate the estimated cost of the project.] (5)(b) if the board rejects all of the initial bids on the
207 project; and

208 [(c) The board shall] (d) keep an accurate record of all facts and representations relied
209 upon in preparing [its] the board's estimated cost for [any] a project [which] that is subject to
210 the competitive bidding requirements of this section.

211 [(d) For the purposes of this Subsection (4):]

212 [(i) "Estimated cost" means the cost of all labor, material, and equipment necessary for
213 construction of the contemplated project.]

214 [(ii) "Lowest responsible bidder" means any licensed contractor who submits the lowest
215 bid, whose bid is in compliance with the invitation for bids, whose bid meets the plans and
216 specifications, and who furnishes bonds under Sections 14-1-18 and 63-56-504.]

217 (6) If no satisfactory bid is received by the board upon the readvertisement of the
218 project in accordance with Subsection (5), the board may proceed to construct the project in
219 accordance with the plan and specifications used to calculate the estimated cost of the project.

220 [(5)] (7) If [any] a payment on a contract with a private contractor for construction of
221 [projects] a project under this section is retained or withheld, it shall be retained or withheld and
222 released as provided in Section 13-8-5.

223 Section 3. Section **73-10-28** is amended to read:

224 **73-10-28. Charges for use -- Interest.**

225 [Charges for use of water, power, or facilities shall be established on the basis of

226 contractual agreements]

227 (1) As used in this section, "board" means the Board of Water Resources created in
228 Section 73-10-1.5.

229 (2) The board shall establish:

230 (a) a charge for the use of water, power, or a facility based on:

231 (i) a contractual agreement approved by the board [~~of Water Resources for projects~~
232 for a project owned by the state [~~based on~~]; and

233 (ii) the ability of an individual project to return the investment to the state[~~—Where the~~
234 board intends to enter into a contract to finance a project or portion of a project sponsored by a
235 water conservancy district or other political subdivision of the state, the board shall establish a
236 rate of interest to be charged based on]; and

237 (b) an interest rate for the money the board lends to finance a project based on:

238 (i) market conditions;

239 (ii) the repayment ability of the project[~~-~~]; and

240 (iii) other factors considered relevant by the board.