

WATER AND IRRIGATION AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Neal B. Hendrickson

Senate Sponsor: Margaret Dayton

LONG TITLE

General Description:

This bill amends Title 73, Water and Irrigation, relating to rulemaking authority of the state engineer, application for an extension of time to prove beneficial use, and how an engineer or land surveyor provides information for certain claims.

Highlighted Provisions:

This bill:

- ▶ changes some of the state engineer's mandatory rulemaking authority to permissive rulemaking authority;
 - ▶ requires a wholesale electrical cooperative to provide certain information upon applying for an extension of time to prove beneficial use;
 - ▶ removes the requirement that an engineer or land surveyor verify by oath certain information in a claim to surface or underground water not otherwise appropriated;
- and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



73-2-1, as last amended by Laws of Utah 2008, Chapters 360 and 382

73-2-22, as enacted by Laws of Utah 1984, Chapter 33

73-3-12, as last amended by Laws of Utah 2009, Chapters 247 and 388

73-3-16, as last amended by Laws of Utah 2010, Chapter 108

73-5-13, as last amended by Laws of Utah 2001, Chapter 136

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

Section 1. Section 73-2-1 is amended to read:

73-2-1. State engineer -- Term -- Powers and duties -- Qualification for duties.

(1) There shall be a state engineer.

(2) The state engineer shall:

(a) be appointed by the governor with the consent of the Senate;

(b) hold office for the term of four years and until a successor is appointed; and

(c) have five years experience as a practical engineer or the theoretical knowledge, practical experience, and skill necessary for the position.

(3) (a) The state engineer shall be responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.

(b) The state engineer may secure the equitable apportionment and distribution of the water according to the respective rights of appropriators.

(4) The state engineer shall make rules, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, regarding:

(a) reports of water right conveyances;

(b) the construction of water wells and the licensing of water well drillers;

(c) dam construction and safety;

(d) the alteration of natural streams;

~~[(e) sewage effluent reuse;]~~

~~[(f)]~~ (e) geothermal resource conservation; and

~~[(g)]~~ (f) enforcement orders and the imposition of fines and penalties.

(5) The state engineer may make rules, in accordance with Title 63G, Chapter 3, Utah

Administrative Rulemaking Act, consistent with the purposes and provisions of this title, governing:

(a) water distribution systems and water commissioners;

(b) water measurement and reporting;

(c) ground-water recharge and recovery;

(d) wastewater reuse;

(e) the form, content, and processing procedure for a claim under Section 73-5-13 to surface or underground water that is not represented by a certificate of appropriation;

(f) the form and content of a proof submitted to the state engineer under Section 73-3-16;

~~[(d)]~~ (g) the determination of water rights; ~~[and]~~ or

~~[(e)]~~ (h) the form and content of applications and related documents, maps, and reports.

(6) The state engineer may bring suit in courts of competent jurisdiction to:

(a) enjoin the unlawful appropriation, diversion, and use of surface and underground water without first seeking redress through the administrative process;

(b) prevent theft, waste, loss, or pollution of those waters;

(c) enable him to carry out the duties of the state engineer's office; and

(d) enforce administrative orders and collect fines and penalties.

(7) The state engineer may:

(a) upon request from the board of trustees of an irrigation district under Title 17B, Chapter 2a, Part 5, Irrigation District Act, or another local district under Title 17B, Limited Purpose Local Government Entities - Local Districts, or a special service district under Title 17D, Chapter 1, Special Service District Act, that operates an irrigation water system, cause a water survey to be made of all lands proposed to be annexed to the district in order to determine and allot the maximum amount of water that could be beneficially used on the land, with a separate survey and allotment being made for each 40-acre or smaller tract in separate ownership; and

(b) upon completion of the survey and allotment under Subsection (7)(a), file with the district board a return of the survey and report of the allotment.

(8) (a) The state engineer may establish water distribution systems and define their boundaries.

(b) The water distribution systems shall be formed in a manner that:

(i) secures the best protection to the water claimants; and

(ii) is the most economical for the state to supervise.

Section 2. Section 73-2-22 is amended to read:

73-2-22. Emergency flood powers -- Action to enforce orders -- Access rights to private and public property -- Injunctive relief against state engineer's decisions -- Judicial review provisions not applicable.

Whenever the state engineer, with approval of the ~~[chairman]~~ chair of the ~~[Disaster Emergency Advisory Council,]~~ Emergency Management Administration Council described in Section 63K-3-201, makes a written finding that any reservoir or stream has reached or will reach during the current water year a level far enough above average and in excess of capacity that public safety is or is likely to be endangered or that substantial property damage is occurring or is likely to occur, he shall have emergency powers until the danger to the public and property is abated. Emergency powers shall consist of the authority to control stream flow and reservoir storage or release. The state engineer must protect existing water rights to the maximum extent possible when exercising emergency powers. Any action taken by the state engineer under this section shall be by written order.

If any person refuses or neglects to comply with any order of the state engineer issued pursuant to his emergency powers, the state engineer may bring action in the name of the state in the district court to enforce them. In carrying out his emergency powers, the state engineer shall have rights of access to private and public property.

Any person affected by a decision of the state engineer made under his emergency powers shall have the right to seek injunctive relief, including temporary restraining orders and temporary injunctions in any district court of the county where that person resides. No order of the state engineer shall be enjoined or set aside unless shown by clear and convincing evidence that an emergency does not in fact exist or that the order of the state engineer is arbitrary or capricious. The provisions of Sections 73-3-14 and 73-3-15 shall not be applicable to any order of the state engineer issued pursuant to this section.

Section 3. Section 73-3-12 is amended to read:

73-3-12. Time limit on construction and application to beneficial use -- Extensions -- Procedures and criteria.

- 121 (1) As used in this section:
- 122 (a) "Public water supplier" is as defined in Section 73-1-4.
- 123 (b) "Wholesale electrical cooperative" is as defined in Section 54-2-1.
- 124 (2) (a) Within the time set by the state engineer under Subsection 73-3-10(5), an
- 125 applicant shall:
- 126 (i) construct works, if necessary;
- 127 (ii) apply the water to beneficial use; and
- 128 (iii) file proof with the state engineer in accordance with Section 73-3-16.
- 129 (b) Except as provided by Subsection (4), the state engineer shall extend the time in
- 130 which an applicant shall comply with Subsection (2)(a) if:
- 131 (i) the date set by the state engineer is not after 50 years from the day on which the
- 132 application is approved; and
- 133 (ii) the applicant shows:
- 134 (A) reasonable and due diligence in completing the appropriation; or
- 135 (B) a reasonable cause for delay in completing the appropriation.
- 136 (c) An applicant shall file a request for an extension of time with the state engineer on
- 137 or before the date set for filing proof.
- 138 (d) The state engineer may grant an extension of time authorized by Subsection (2)(b)
- 139 if the state engineer sets a date:
- 140 (i) no later than 14 years from the day on which the application is approved if the
- 141 applicant meets the requirements of Subsection (2)(b); and
- 142 (ii) after 14 years from the day on which the application is approved if:
- 143 (A) the applicant meets the requirements of Subsection (2)(b); and
- 144 (B) the state engineer publishes notice as provided in Subsection (2)(e).
- 145 (e) (i) The state engineer shall publish a notice of the request for an extension of time:
- 146 (A) once a week for two successive weeks, in a newspaper of general circulation, in the
- 147 county:
- 148 (I) in which the water source is located; and
- 149 (II) where the water will be used; and
- 150 (B) in accordance with Section 45-1-101 for two weeks.
- 151 (ii) The notice shall:

- 152 (A) state that a request for an extension of time has been made; and
- 153 (B) specify where an interested party may obtain additional information relating to the
- 154 request.
- 155 (f) A person who owns a water right or holds an application from the water source
- 156 referred to in Subsection (2)(e) may file a protest with the state engineer:
- 157 (i) within 20 days after the notice is published, if the adjudicative proceeding is
- 158 informal; and
- 159 (ii) within 30 days after the notice is published, if the adjudicative proceeding is
- 160 formal.
- 161 (g) The approved extension of time is effective so long as the applicant continues to
- 162 exercise reasonable and due diligence in completing the appropriation.
- 163 (h) The state engineer shall consider the holding of an approved application by a public
- 164 water supplier or a wholesale electrical cooperative to meet the reasonable future water or
- 165 electricity requirements of the public to be reasonable and due diligence in completing the
- 166 appropriation for the purposes of this section for 50 years from the date on which the
- 167 application is approved.
- 168 (i) If the state engineer finds unreasonable delay or lack of reasonable and due
- 169 diligence in completing the appropriation, the state engineer may:
- 170 (i) deny the extension of time; or
- 171 (ii) grant the request in part or upon conditions, including a reduction of the priority of
- 172 all or part of the application.
- 173 (3) Except as provided by Subsection (4), an application upon which proof has not
- 174 been filed shall lapse and have no further force or effect after 50 years from the date on which
- 175 the application is approved.
- 176 (4) (a) If the works are constructed with which to make beneficial use of the water
- 177 applied for, the state engineer may, upon showing of that fact, extend the time in which to file
- 178 proof by setting a date after 50 years from the day on which the application is approved.
- 179 (b) (i) The state engineer may extend the time in which the applicant shall comply with
- 180 Subsection (2)(a) by setting a date after 50 years from the day on which the application is
- 181 approved if the applicant:
- 182 (A) is~~[-(f)]~~ a public water supplier~~[-]~~ or ~~[(f)]~~ a wholesale electrical cooperative; and

(B) provides information that shows the water applied for in the application is needed to meet the reasonable future requirements of the public.

(ii) The information provided by a public water supplier shall be in accordance with the criteria listed in Subsection 73-1-4(2)(f).

(iii) A wholesale electrical cooperative shall provide the information described in Subsection (4)(b)(i)(B) in a report that forecasts:

(A) the need for the water to produce power; and

(B) the ~~the~~ ~~economic viability~~ power output ~~of~~ of the project for the wholesale electrical cooperative within the next 40 years.

(c) The state engineer shall extend the time in which to file proof by setting a reasonable date after 50 years from the day on which the application is approved if the applicant:

(i) meets the requirements in Subsection (4)(b); and

(ii) has:

(A) constructed works to apply the water to beneficial use; or

(B) made substantial expenditures to construct the works.

Section 4. Section 73-3-16 is amended to read:

73-3-16. Proof of appropriation or permanent change -- Notice -- Manner of proof -- Statements -- Maps, profiles, and drawings -- Verification -- Waiver of filing -- Statement in lieu of proof of appropriation or change.

(1) Sixty days before the date set for the proof of appropriation or proof of change to be made, the state engineer shall notify the applicant by mail when proof of completion of the works and application of the water to a beneficial use is due.

(2) On or before the date set for completing the proof in accordance with the application, the applicant shall file proof with the state engineer on forms furnished by the state engineer.

(3) Except as provided in Subsection (4), the applicant shall submit the following information:

(a) a description of the works constructed;

(b) the quantity of water in acre-feet or the flow in second-feet diverted, or both;

(c) the method of applying the water to beneficial use; and

214 (d) (i) detailed measurements of water put to beneficial use;

215 (ii) the date the measurements were made; and

216 (iii) the name of the person making the measurements.

217 (4) (a) (i) On applications filed for appropriation or permanent change of use of water
218 to provide a water supply for state projects constructed pursuant to Title 73, Chapter 10, Board
219 of Water Resources - Division of Water Resources, or for federal projects constructed by the
220 United States Bureau of Reclamation for the use and benefit of the state, any of its agencies, its
221 political subdivisions, public and quasi-municipal corporations, or water users' associations of
222 which the state, its agencies, political subdivisions, or public and quasi-municipal corporations
223 are stockholders, the proof shall include:

224 (A) a statement indicating construction of the project works has been completed;

225 (B) a description of the major features with appropriate maps, profiles, drawings, and
226 reservoir area-capacity curves;

227 (C) a description of the point or points of diversion and rediversion;

228 (D) project operation data;

229 (E) a map showing the place of use of water and a statement of the purpose and method
230 of use;

231 (F) the project plan for beneficial use of water under the applications and the quantity
232 of water required; and

233 (G) a statement indicating what type of measuring devices have been installed.

234 (ii) The director of the Division of Water Resources shall sign proofs for the state
235 projects and an authorized official of the Bureau of Reclamation shall sign proofs for the
236 federal projects specified in Subsection (4)(a).

237 (b) Proof on an application for appropriation or permanent change for a surface storage
238 facility in excess of 1,000 acre-feet constructed by a public water supplier to provide a water
239 supply for the reasonable requirements of the public shall include:

240 (i) a description of the completed water storage facility;

241 (ii) a description of the major project features and appropriate maps, profiles, drawings,
242 and reservoir area-capacity curves as required by the state engineer;

243 (iii) the quantity of water stored in acre-feet;

244 (iv) a description of the water distribution facility for the delivery of the water; and

(v) the project plan for beneficial use of water including any existing contracts for water delivery.

~~[(c) The completed proof shall conform to rules established by the state engineer.]~~

(5) The proof on all applications shall be sworn to by the applicant or the applicant's appointed representative ~~[and proof engineer]~~.

(6) (a) Except as provided in Subsection (6)(b), when filing proof, the applicant shall submit maps, profiles, and drawings made by a Utah licensed land surveyor or Utah licensed professional engineer that show:

(i) the location of the completed works;

(ii) the nature and extent of the completed works;

(iii) the natural stream or source from which and the point where the water is diverted and, in the case of a nonconsumptive use, the point where the water is returned; and

(iv) the place of use.

(b) The state engineer may waive the filing of maps, profiles, and drawings if in the state engineer's opinion the written proof adequately describes the works and the nature and extent of beneficial use.

(7) The completed proof shall conform to rules and standards established by the state engineer.

(8) In those areas in which general determination proceedings are pending, or have been concluded, under Title 73, Chapter 4, Determination of Water Rights, the state engineer may petition the district court for permission to:

(a) waive the requirements of this section and Section 73-3-17; and

(b) permit each owner of an application to file a verified statement to the effect that the applicant has completed the appropriation or change and elects to file a statement of water users claim in the proposed determination of water rights or any supplement to it in accordance with Title 73, Chapter 4, Determination of Water Rights, in lieu of proof of appropriation or proof of change.

(9) This section does not apply to an instream flow water right authorized by Section 73-3-30.

Section 5. Section **73-5-13** is amended to read:

73-5-13. Claim to surface or underground water not otherwise represented --

**Information required -- Corrections -- Filing -- Investigation -- Publication -- Judicial
action to determine validity -- Rules.**

(1) (a) All claimants to the right to the use of water, including both surface and underground, whose rights are not represented by certificates of appropriation issued by the state engineer, by applications filed with the state engineer, by court decrees, or by notice of claim filed pursuant to law, shall submit the claim to the state engineer.

(b) Subsections (2) through (7) shall only apply to claims submitted to the state engineer pursuant to this section after May 4, 1997.

(2) (a) Each claim submitted under this section shall be verified under oath by the claimant or the claimant's duly appointed representative and submitted on forms furnished by the state engineer setting forth any information the state engineer requires, including:

(i) the name and post office address of the person making the claim;

(ii) the quantity of water claimed in acre-feet or rate of flow in second-feet, or both, where appropriate;

(iii) the source of supply;

(iv) the priority date of the right;

(v) the location of the point of diversion with reference to a United States land survey corner;

(vi) the place of use;

(vii) the nature and extent of use;

(viii) the time during which the water has been used each year; and

(ix) the date when the water was first used.

(b) The claim shall also include the following information [~~verified under oath by a registered engineer or land surveyor~~], prepared by a Utah licensed engineer or a Utah licensed land surveyor:

(i) measurements of the amount of water diverted;

(ii) a statement that the quantity of water claimed either in acre-feet or cubic feet per second is consistent with the beneficial use claimed and the supply which the source is capable of producing; and

(iii) a map showing the original diversion and conveyance works and where the water was placed to beneficial use, including irrigated lands, if irrigation is the claimed beneficial

307 use.

308 (c) The state engineer may require additional information as necessary to evaluate any
309 claim including:

- 310 (i) affidavits setting forth facts of which the affiant has personal knowledge;
- 311 (ii) authenticated or historic photographs, plat or survey maps, or surveyors' notes;
- 312 (iii) authenticated copies of original diaries, personal histories, or other historical
313 documents which document the claimed use of water; and
- 314 (iv) other relevant records on file with any county recorder's, surveyor's, or assessor's
315 office.

316 (3) (a) A claim may be corrected by submitting to the state engineer a verified
317 corrected claim designated as such and bearing the same number as the original claim.

318 (b) No fee shall be charged for submitting a corrected claim.

319 (4) (a) Upon submission by a claimant of a claim that is acceptably complete under
320 Subsection (2) and the deposit of money by a claimant with the state engineer sufficient to pay
321 the expenses of conducting a field investigation and publishing a notice of the claim, the state
322 engineer shall:

- 323 (i) file the claim;
- 324 (ii) endorse the date of its receipt;
- 325 (iii) assign the claim a water right number; and
- 326 (iv) publish a notice of the claim following the same procedures as provided in Section
327 73-3-6.

328 (b) Any claim not acceptably complete under Subsection (2) shall be returned to the
329 claimant.

330 (c) The acceptance of any claim filed under this section by the state engineer may not
331 be considered to be an adjudication by the state engineer of the validity of the claimed water
332 right.

333 (5) (a) The state engineer shall:

- 334 (i) conduct a field investigation of each claim filed; and
- 335 (ii) prepare a report of the investigation.

336 (b) The report of the investigation shall:

- 337 (i) become part of the file on the claim; and

338 (ii) be admissible in any administrative or judicial proceeding on the validity of the
339 claim.

340 (6) (a) Any person who may be damaged by a diversion and use of water as described
341 in a claim submitted pursuant to this section may file an action in district court to determine the
342 validity of the claim, whether or not the claim has been accepted for filing by the state
343 engineer.

344 (b) Venue for the action shall be in the county in which the point of diversion listed in
345 the claim is located, or in a county where the place of use, or some part of it, is located.

346 (c) The action shall be brought against the claimant to the use of water or the claimant's
347 successor in interest.

348 (d) In any action brought to determine the validity of a claim to the use of water under
349 this section, the claimant shall have the initial burden of proof as to the validity of the claimed
350 right.

351 (e) Any person filing an action challenging the validity of a claim to the use of water
352 under this section shall notify the state engineer of the pendency of the action in a manner
353 prescribed by the state engineer. Upon receipt of the notice, the state engineer may take no
354 action on any change or exchange applications founded on the claim that is the subject of the
355 pending litigation, until the court adjudicates the matter.

356 (f) Upon the entering of any final order or decree in any judicial action to determine the
357 validity of a claim under this section, the prevailing party shall file a certified copy of the order
358 or decree with the state engineer, which shall become part of the state engineer's file on the
359 claim.

360 ~~[(7) The state engineer may make rules consistent with this section specifying~~
361 ~~information required to be included in a claim and claim procedures.]~~

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Office of Legislative Research and General Counsel