

1 **WATER FORFEITURE AMENDMENTS**

2 2020 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Joel Ferry**

5 Senate Sponsor: Ralph Okerlund

7 **LONG TITLE**

8 **General Description:**

9 This bill addresses issues related to forfeiture of water.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ modifies exemption related to a lease;
- 13 ▶ modifies exemption for a water right in a surface reservoir if storage is limited by
- 14 safety, regulatory, or engineering restraints;
- 15 ▶ addresses the requirement that a public water supplier meets the reasonable future
- 16 water requirement;
- 17 ▶ requires rulemaking by the state engineer; and
- 18 ▶ makes technical changes.

19 **Money Appropriated in this Bill:**

20 None

21 **Other Special Clauses:**

22 None

23 **Utah Code Sections Affected:**

24 AMENDS:

25 **73-1-4**, as last amended by Laws of Utah 2017, Chapter 132

26 **73-2-1**, as last amended by Laws of Utah 2017, Chapter 60

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

29 Section 1. Section **73-1-4** is amended to read:

30 **73-1-4. Reversion to the public by abandonment or forfeiture for nonuse within**
31 **seven years -- Nonuse application.**

32 (1) As used in this section:

33 (a) "Public entity" means:

34 (i) the United States;

35 (ii) an agency of the United States;

36 (iii) the state;

37 (iv) a state agency;

38 (v) a political subdivision of the state; or

39 (vi) an agency of a political subdivision of the state.

40 (b) "Public water supplier" means an entity that:

41 (i) supplies water, directly or indirectly, to the public for municipal, domestic, or
42 industrial use; and

43 (ii) is:

44 (A) a public entity;

45 (B) a water corporation, as defined in Section [54-2-1](#), that is regulated by the Public
46 Service Commission;

47 (C) a community water system:

48 (I) that:

49 (Aa) supplies water to at least 100 service connections used by year-round residents; or

50 (Bb) regularly serves at least 200 year-round residents; and

51 (II) whose voting members:

52 (Aa) own a share in the community water system;

53 (Bb) receive water from the community water system in proportion to the member's
54 share in the community water system; and

55 (Cc) pay the rate set by the community water system based on the water the member
56 receives; or

57 (D) a water users association:

58 (I) in which one or more public entities own at least 70% of the outstanding shares; and
59 (II) that is a local sponsor of a water project constructed by the United States Bureau of
60 Reclamation.

61 (c) "Shareholder" means the same as that term is defined in Section 73-3-3.5.

62 (d) "Water company" means the same as that term is defined in Section 73-3-3.5.

63 (e) "Water supply entity" means an entity that supplies water as a utility service or for
64 irrigation purposes and is also:

65 (i) a municipality, water conservancy district, metropolitan water district, irrigation
66 district, or other public agency;

67 (ii) a water company regulated by the Public Service Commission; or

68 (iii) any other owner of a community water system.

69 (2) (a) Except as provided in Subsection (2)(b) or (e), when an appropriator or the
70 appropriator's successor in interest abandons or ceases to beneficially use all or a portion of a
71 water right for a period of at least seven years, the water right or the unused portion of that
72 water right is subject to forfeiture in accordance with Subsection (2)(c).

73 (b) (i) An appropriator or the appropriator's successor in interest may file an
74 application for nonuse with the state engineer.

75 (ii) A nonuse application may be filed on all or a portion of the water right, including
76 water rights held by a water company.

77 (iii) After giving written notice to the water company, a shareholder may file a nonuse
78 application with the state engineer on the water represented by the stock.

79 (iv) (A) The approval of a nonuse application excuses the requirement of beneficial use
80 of water from the date of filing.

81 (B) The time during which an approved nonuse application is in effect does not count
82 toward the seven-year period described in Subsection (2)(a).

83 (v) The filing or approval of a nonuse application or a series of nonuse applications
84 under Subsection (3) does not:

85 (A) constitute beneficial use of a water right;

86 (B) protect a water right that is already subject to forfeiture under this section; or

87 (C) bar a water right owner from:

88 (I) using the water under the water right as permitted under the water right; or

89 (II) claiming the benefit of Subsection (2)(e) or any other forfeiture defense provided

90 by law.

91 (c) (i) Except as provided in Subsection (2)(c)(ii), a water right or a portion of the

92 water right may not be forfeited unless a judicial action to declare the right forfeited is

93 commenced:

94 (A) within 15 years from the end of the latest period of nonuse of at least seven years;

95 or

96 (B) within the combined time of 15 years from the end of the most recent period of

97 nonuse of at least seven years and the time the water right was subject to one or more nonuse

98 applications.

99 (ii) (A) The state engineer, in a proposed determination of rights filed with the court

100 and prepared in accordance with Section 73-4-11, may not assert that a water right was

101 forfeited unless the most recent period of nonuse of seven years ends or occurs:

102 (I) during the 15 years immediately preceding the day on which the state engineer files

103 the proposed determination of rights with the court; or

104 (II) during the combined time immediately preceding the day on which the state

105 engineer files the proposed determination of rights consisting of 15 years and the time the

106 water right was subject to one or more approved nonuse applications.

107 (B) After the day on which a proposed determination of rights is filed with the court a

108 person may not assert that a water right subject to that determination was forfeited before the

109 issuance of the proposed determination, unless the state engineer asserts forfeiture in the

110 proposed determination, or a person, in accordance with Section 73-4-11, makes an objection

111 to the proposed determination that asserts forfeiture.

112 (iii) A water right, found to be valid in a decree entered in an action for general

113 determination of rights under Chapter 4, Determination of Water Rights, is subject to a claim

114 of forfeiture based on a seven-year period of nonuse that begins after the day on which the state
115 engineer filed the related proposed determination of rights with the court, unless the decree
116 provides otherwise.

117 (iv) If in a judicial action a court declares a water right forfeited, on the date on which
118 the water right is forfeited:

119 (A) the right to beneficially use the water reverts to the public; and

120 (B) the water made available by the forfeiture:

121 (I) first, satisfies other water rights in the hydrologic system in order of priority date;

122 and

123 (II) second, may be appropriated as provided in this title.

124 (d) Except as provided in Subsection (2)(e), this section applies whether the unused or
125 abandoned water or a portion of the water is:

126 (i) permitted to run to waste; or

127 (ii) beneficially used by others without right with the knowledge of the water right
128 holder.

129 (e) This section does not apply to:

130 (i) the beneficial use of water according to a written, terminable lease or other
131 agreement with the appropriator or the appropriator's successor in interest;

132 (ii) a water right if its place of use is contracted under an approved state agreement or
133 federal conservation fallowing program;

134 (iii) those periods of time when a surface water or groundwater source fails to yield
135 sufficient water to satisfy the water right;

136 (iv) a water right when water is unavailable because of the water right's priority date;

137 (v) a water right to store water in a surface reservoir or an aquifer, in accordance with
138 Title 73, Chapter 3b, Groundwater Recharge and Recovery Act, if[:(A)] the water is stored for
139 present or future beneficial use; [or]

140 [~~(B) storage is limited by a safety, regulatory, or engineering restraint that the~~
141 ~~appropriator or the appropriator's successor in interest cannot reasonably correct;]~~

142 (vi) a water right if a water user has beneficially used substantially all of the water right
143 within a seven-year period, provided that this exemption does not apply to the adjudication of a
144 water right in a general determination of water rights under Chapter 4, Determination of Water
145 Rights;

146 (vii) except as provided by Subsection (2)(g), a water right:

147 (A) (I) owned by a public water supplier;

148 (II) represented by a public water supplier's ownership interest in a water company; or

149 (III) to which a public water supplier owns the right of beneficial use; and

150 (B) conserved or held for the reasonable future water requirement of the public, which
151 is determined according to Subsection (2)(f);

152 (viii) a supplemental water right during a period of time when another water right
153 available to the appropriator or the appropriator's successor in interest provides sufficient water
154 so as to not require beneficial use of the supplemental water right; [~~or~~]

155 (ix) a period of nonuse of a water right during the time the water right is subject to an
156 approved change application where the applicant is diligently pursuing certification[:]; or

157 (x) a water right to store water in a surface reservoir if:

158 (A) storage is limited by a safety, regulatory, or engineering restraint that the
159 appropriator or the appropriator's successor in interest cannot reasonably correct; and

160 (B) not longer than seven years have elapsed since the limitation described in
161 Subsection (2)(e)(x)(A) is imposed.

162 (f) (i) The reasonable future water requirement of the public is the amount of water
163 needed in the next 40 years by:

164 (A) the persons within the public water supplier's reasonably anticipated service area
165 based on reasonably anticipated population growth; or

166 (B) other water use demand.

167 (ii) For purposes of Subsection (2)(f)(i), a community water system's reasonably
168 anticipated service area:

169 (A) is the area served by the community water system's distribution facilities; and

170 (B) expands as the community water system expands the distribution facilities in
171 accordance with Title 19, Chapter 4, Safe Drinking Water Act.

172 (iii) The state engineer shall by rule made in accordance with Subsection 73-2-1(4)
173 establish standards for a written plan that may be presented as evidence in conformance with
174 this Subsection (2)(f), except that before a rule establishing standards for a written plan under
175 this Subsection (2)(f) takes effect, in addition to complying with Title 63G, Chapter 3, Utah
176 Administrative Rulemaking Act, the state engineer shall present the rule to:

177 (A) if the Legislature is not in session, the Natural Resources, Agriculture, and
178 Environment Interim Committee; or

179 (B) if the Legislature is in session, the House of Representatives and Senate Natural
180 Resources, Agriculture, and Environment standing committees.

181 (g) For a water right acquired by a public water supplier on or after May 5, 2008,
182 Subsection (2)(e)(vii) applies if:

183 (i) the public water supplier submits a change application under Section 73-3-3; and
184 (ii) the state engineer approves the change application.

185 (3) (a) The state engineer shall furnish a nonuse application form requiring the
186 following information:

187 (i) the name and address of the applicant;

188 (ii) a description of the water right or a portion of the water right, including the point of
189 diversion, place of use, and priority;

190 (iii) the quantity of water;

191 (iv) the period of use;

192 (v) the extension of time applied for;

193 (vi) a statement of the reason for the nonuse of the water; and

194 (vii) any other information that the state engineer requires.

195 (b) (i) Upon receipt of the application, the state engineer shall publish a notice of the
196 application once a week for two successive weeks:

197 (A) in a newspaper of general circulation in the county in which the source of the water

198 supply is located and where the water is to be beneficially used; and

199 (B) as required in Section 45-1-101.

200 (ii) The notice shall:

201 (A) state that an application has been made; and

202 (B) specify where the interested party may obtain additional information relating to the
203 application.

204 (c) ~~Any~~ An interested person may file a written protest with the state engineer against
205 the granting of the application:

206 (i) within 20 days after the notice is published, if the adjudicative proceeding is
207 informal; and

208 (ii) within 30 days after the notice is published, if the adjudicative proceeding is
209 formal.

210 (d) In ~~any proceedings~~ a proceeding to determine whether the nonuse application
211 should be approved or rejected, the state engineer shall follow ~~the procedures and~~
212 ~~requirements of~~ Title 63G, Chapter 4, Administrative Procedures Act.

213 (e) After further investigation, the state engineer may approve or reject the application.

214 (4) (a) The state engineer shall grant a nonuse application on all or a portion of a water
215 right for a period of time not exceeding seven years if the applicant shows a reasonable cause
216 for nonuse.

217 (b) A reasonable cause for nonuse includes:

218 (i) a demonstrable financial hardship or economic depression;

219 (ii) physical causes or changes that render use beyond the reasonable control of the
220 water right owner so long as the water right owner acts with reasonable diligence to resume or
221 restore the use;

222 (iii) the initiation of water conservation or efficiency practices, or the operation of a
223 groundwater recharge recovery program approved by the state engineer;

224 (iv) operation of legal proceedings;

225 (v) the holding of a water right or stock in a mutual water company without use by

226 [any] a water supply entity to meet the reasonable future requirements of the public;

227 (vi) situations where, in the opinion of the state engineer, the nonuse would assist in
228 implementing an existing, approved water management plan; or

229 (vii) the loss of capacity caused by deterioration of the water supply or delivery
230 equipment if the applicant submits, with the application, a specific plan to resume full use of
231 the water right by replacing, restoring, or improving the equipment.

232 (5) (a) Sixty days before the expiration of a nonuse application, the state engineer shall
233 notify the applicant by mail or by [any] a form of electronic communication through which
234 receipt is verifiable, of the date when the nonuse application will expire.

235 (b) An applicant may file a subsequent nonuse application in accordance with this
236 section.

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

238 **73-2-1. State engineer -- Term -- Powers and duties -- Qualification for duties.**

239 (1) There shall be a state engineer.

240 (2) The state engineer shall:

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

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

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

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

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

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

253 (a) reports of water right conveyances;

- 254 (b) the construction of water wells and the licensing of water well drillers;
- 255 (c) dam construction and safety;
- 256 (d) the alteration of natural streams;
- 257 (e) geothermal resource conservation;
- 258 (f) enforcement orders and the imposition of fines and penalties; [~~and~~]
- 259 (g) the duty of water[-:]; and
- 260 (h) standards for written plans of a public water supplier that may be presented as
- 261 evidence of reasonable future water requirements under Subsection 73-1-4(2)(f).

262 (5) The state engineer may make rules, in accordance with Title 63G, Chapter 3, Utah
263 Administrative Rulemaking Act, consistent with the purposes and provisions of this title,
264 governing:

- 265 (a) water distribution systems and water commissioners;
- 266 (b) water measurement and reporting;
- 267 (c) groundwater recharge and recovery;
- 268 (d) wastewater reuse;
- 269 (e) the form, content, and processing procedure for a claim under Section 73-5-13 to
- 270 surface or underground water that is not represented by a certificate of appropriation;
- 271 (f) the form and content of a proof submitted to the state engineer under Section
- 272 73-3-16;
- 273 (g) the determination of water rights; or
- 274 (h) the form and content of applications and related documents, maps, and reports.
- 275 (6) The state engineer may bring suit in courts of competent jurisdiction to:
- 276 (a) enjoin the unlawful appropriation, diversion, and use of surface and underground
- 277 water without first seeking redress through the administrative process;
- 278 (b) prevent theft, waste, loss, or pollution of [~~those~~] surface and underground waters;
- 279 (c) enable [~~him~~] the state engineer to carry out the duties of the state engineer's office;
- 280 and
- 281 (d) enforce administrative orders and collect fines and penalties.

- 282 (7) The state engineer may:
- 283 (a) upon request from the board of trustees of an irrigation district under Title 17B,
284 Chapter 2a, Part 5, Irrigation District Act, or another local district under Title 17B, Limited
285 Purpose Local Government Entities - Local Districts, or a special service district under Title
286 17D, Chapter 1, Special Service District Act, that operates an irrigation water system, cause a
287 water survey to be made of ~~an~~ the lands proposed to be annexed to the district in order to
288 determine and allot the maximum amount of water that could be beneficially used on the land,
289 with a separate survey and allotment being made for each 40-acre or smaller tract in separate
290 ownership; and
- 291 (b) upon completion of the survey and allotment under Subsection (7)(a), file with the
292 district board a return of the survey and report of the allotment.
- 293 (8) (a) The state engineer may establish water distribution systems and define ~~their~~
294 the water distribution systems' boundaries.
- 295 (b) The water distribution systems shall be formed in a manner that:
- 296 (i) secures the best protection to the water claimants; and
- 297 (ii) is the most economical for the state to supervise.