



BEAR RIVER COMMISSION

106 West 500 South, Suite 101
Bountiful, UT 84010-6232
(801) 292-4662
(801) 524-6320 (fax)

MINUTES

BEAR RIVER COMMISSION ANNUAL MEETING ONE-HUNDRED SIXTH COMMISSION MEETING

April 19, 2005

COMMISSION MEMBERS

Chair

Dee C. Hansen

Idaho Members

Karl J. Dreher
Rodney Wallentine
Dean M. Mathews

Utah Members

D. Larry Anderson
Blair Francis
Charles W. Holmgren

Wyoming Members

Patrick T. Tyrrell
Sam Lowham
Gordon Thornock

ENGINEER-MANAGER

Jack A. Barnett
Suite 101
106 West 500 South
Bountiful, UT 84010

The annual meeting of the Bear River Commission was called to order by Chair Dee Hansen at 1:00 p.m. on Tuesday, April 19, 2005 at the Utah State Capitol Complex in Salt Lake City, Utah. This was the one-hundred and sixth meeting of the Commission. Hansen welcomed everyone to the meeting and asked all in the room to introduce themselves. An attendance roster is attached as Appendix A. It was noted that Commissioner Dean Mathews was not in attendance due to poor health. Randy Budge was designated as Mathews' alternate. Commissioner Karl Dreher was unable to attend the meeting and Hal Anderson was designated as Dreher's alternate.

Chairman Hansen presented the proposed agenda for the meeting. It was noted that the Utah State Engineer, Jerry Olds, had requested time on the agenda and would give a presentation upon his arrival. A copy of the approved agenda is attached as Appendix B. The Commission then moved to agenda item II and considered the draft minutes of the November 16, 2004 Commission meeting. There were a few grammatical changes suggested by Commissioner Tyrrell. There was a motion to approve the minutes with the few changes to be made. The motion was seconded and carried.

The time was then turned to Commissioner Larry Anderson for the Secretary-Treasurer's report under agenda item III. Anderson asked Randy Staker to review the budget information. Staker distributed handouts and reviewed the financial information with the Commission. A copy of the handouts is attached as Appendix C. Staker pointed out that the income from the U.S. Fish & Wildlife Service (\$12,400) is for the FY 04 and FY 05 payments. There was a check lost in the mail and there was a bank charge of \$25 to stop payment on the check. Staker further reported that an additional checking account was set up for the Environmental Protection Agency (EPA) water quality grant and the Commission transferred \$100 to create this account. The money will be transferred back to the Commission account. To date, there is a balance of \$103,224.07 in the savings and checking accounts. There were no questions for Staker.

Anderson then discussed the Commission's budget and projected income (see Appendix C, page three). The state dues will remain the same. Anderson requested approval of the FY 06 budget which is \$117,675. The Commission has already signed the contract with the U.S. Geological Survey (USGS) for stream gaging for \$52,825 and the Commission will be billed for this in the fall of 2006 due to the fact that the fiscal year differs for the USGS and the Commission. There was a motion to accept the FY 2006 budget. The motion was seconded and carried. Anderson then indicated he has projected the budget for FY 2007 will be \$118,900. Anderson asked for approval to sign the contract with the USGS for stream gaging for \$53,750. There was a motion to allow Anderson to sign the USGS stream gaging contract. The motion was seconded and carried. There were no questions for Commissioner Anderson.

Chair Hansen then moved to agenda item IV, the election of officers. Charles Holmgren was nominated to become vice chairman and there was a motion that the Commission elect Holmgren as vice chairman. The motion was seconded and carried. Commissioner Larry Anderson was then nominated to continue as Secretary-Treasurer and there was a motion that Anderson continue as the Secretary-Treasurer. The motion was seconded and carried.

The Commission then turned to agenda item V, an overview of the water supply by Randy Julander. Julander reported that the water situation has improved slightly this year. He used a Power Point presentation to review the conditions in the Upper, Central and Lower Divisions. In the Upper Division, the snowpack is 15%-20% higher; in the Central Division, the snowpack is 5%-10% higher; in the Lower Division, the snowpack is almost 20% higher than the same time last year. He then reviewed many graphs showing conditions throughout the Basin. Julander indicated that Woodruff Narrows is approaching 50% of capacity and Bear Lake is down to 4%-5% of capacity. With regard to the drought monitor, everything seems to be improving. The drought seems to be shifting to the north.

Chair Hansen then turned the time to Jerry Olds, the Utah State Engineer. Olds distributed a handout and a copy of his materials is attached to these minutes as Appendix D. He discussed the litigation that Utah has had on the Bear River with regard to the distribution of water last summer. Mr. Simmonds was thanked for pursuing this matter. Olds then discussed the water rights enforcement legislation (a copy of the bills is included in Appendix D). The real intent of HB 29 was to give the State Engineer the authority to enforce and assess penalties. HB 38 defines the criminal penalties for individuals diverting water without a right. HB 157 deals with the powers and duties of the State Engineer and the procedure under which the State Engineer will operate. The legislation allows the State Engineer to issue a notice of violation for a system to cease and desist. The clock starts the date the notice is issued and each day is a separate violation. This legislation also allows the State Engineer to require replacement water. Rules are now being drafted to implement this legislation.

Olds then reported that because Terry Gnehm, the Utah River Commissioner, has some health problems the decision was made to provide him some help for the coming season and Jim Watterson will be the Deputy River Commissioner. Olds discussed the measuring devices on the

Lower Bear River stating that a request was submitted to the Utah legislature and \$100,000 of supplemental appropriation was received. The money needs to be spent before June 30, 2005. Real time measuring devices are being installed on the Lower Bear River system. This system will have five repeater stations and there will be a base station in the Logan office. It is hoped to have the system online by July 1, 2005. Olds recognized many who have been instrumental in bringing about this project. Commissioner Holmgren thanked Olds for the work that has been done.

The Commission then heard a report by Connely Baldwin regarding PacifiCorp issues. Baldwin distributed a handout and a copy of this handout is attached to these minutes as Appendix E. Baldwin reviewed with the Commission the information on the handouts regarding the 2004 Bear Lake operations and the 2005 Bear Lake operations and allocation.

Chair Hansen then asked Carly Burton to report on the activities of the Bear River Water Users Association (BRWUA) under agenda item VII. Burton reported that the BRWUA held its annual meeting on April 6, 2005 and his official title is the Executive Director of the BRWUA. Gale Moser was elected president and Charles Holmgren was elected as vice president. Burton distributed and reviewed a handout which is his independent analysis showing a comparison of snowpack, runoff and lake elevations. A copy of his handout is attached to these minutes as Appendix F. Burton indicated he felt that Bear Lake will not rise to the 1980 level and the releases won't be as high. He pointed out an error on the handout under the Outlet Canal indication. The dates are reversed and so in 1980 the releases began on July 11 and in 1993 the releases began on July 2. The estimated 141,000 af of allocation is somewhat conservative. The actual demand for storage is probably going to be less than the allocation based on the present conditions. With regard to other activities of the BRWUA, they are working with the U.S. Bureau of Reclamation on a coordinated effort to get realtime data loggers installed on the major diversions. Equipment will be installed over the next two or three weeks. The BRWUA continues to work with PacifiCorp and other groups on monitoring new water applications and protection of all the rights on the river.

Noting that Jerry Kinghorn was not present, Chair Hansen turned the time to Jack Barnett for a status report of the Utah Pumpers Association. First Barnett reiterated that there has been an allocation of 141,000 af and there may be more water than that released from Bear Lake as there may be some losses not charged to the users. Of the 141,000 af released, PacifiCorp first allocates a certain amount of that water to the Idaho pumpers and to the Utah pumpers. Then there is a reduced number below the 141,000 af (130,000 af). The BRWUA has agreed upon a formula as to how it splits the 130,000 af. Each of those users will take an additional cut depending on how far they are down the river and what their losses are as set forth. Jerry Kinghorn is the attorney for the Utah Pumpers Association and this organization is functioning with a board. They are also in the process of trying to allocate the water that the Small Pumpers Association allocates. The Utah Pumpers Association has signed an agreement with PacifiCorp. This group consists of the small pumpers in Cache Valley who are pumping water out of the Bear River directly. PacifiCorp has worked long and hard to get the structure to this point where there could be an allocation to the pumpers as a group.

Chair Hansen then asked Jody Williams to report on the Idaho pumpers under agenda item IX. Williams indicated that the Idaho pumpers are not far behind the Utah pumpers. They have incorporated as the Bear River Small Irrigators of Idaho. Stephen Meek feels their bylaws will be enacted soon. They have a 10-day notice requirement for meetings. As soon as they have bylaws, they will be in a position to vote on the contract PacifiCorp has offered. The Idaho pumpers have been very cooperative. Jack Barnett pointed out there is one thing that is different about the Idaho group and that is there are two canals in the group. The Gentile Canal has a fairly good natural flow right and has a fair amount of storage water. When you watch how much the Idaho pumpers are taking of their allocation, they have been slow to take their allocation and then when the canals kick in the allocated storage goes rapidly. There are large draws late in the season. Williams then reported that when the Restated and Amended Bear Lake Settlement Agreement was signed, provision was made in that agreement for the Idaho pumpers and the Utah pumpers to subsequently join the BRWUA.

Chair Hansen then called for a brief break. When the Commission meeting was reconvened, the time was turned to Commissioner Gordon Thornock for the report of the Records & Public Involvement Committee. Thornock reported that he had been elected as chair of the Records & Public Involvement Committee. At the committee meeting held earlier in the morning, Pat Lambert of the USGS gave an update on the stream gaging network in the Bear River and a new function on the USGS website for estimating flow at ungaged sites. The committee discussed the automation of collection of realtime data. Several diversions are already equipped with realtime collection and more will be added this season in the Upper and Central Divisions. The BRWUA is also working with the Bureau of Reclamation on diversions automation. Bob Fotheringham reported that the pumpers will be equipped with meters or on/off monitors. Claudia Cottle reported on available websites of interest. A listing of these websites is attached to these minutes as Appendix G. The committee discussed publications of interest and a possible website for the Commission. The biennial report will be mailed out within the next few months.

The Commission then heard a report of the Operations Committee under agenda item XI. Commissioner Rod Wallentine indicated he was elected chairman of the committee. The committee met earlier in the morning and received a report from Don Barnett on the Upper Division. Don reported to the committee that Woodruff Narrows reached the mark assigned to it on about April 7 and that level is trying to be maintained. Jack Barnett reported on the Central Division and indicated that the division is not yet in regulation. The Lower Division had already been discussed at length by Baldwin and Burton so Wallentine had nothing further to report on this division. The Operations Committee discussed the status of the Delivery Schedule for the Lower Division and assigned the TAC to come to the committee a month in advance of the November Commission meeting with an updated delivery schedule.

Chair Hansen recognized Walt Baker who has officially been appointed as Director of the Utah Division of Water Quality. Hansen then turned the time to Baker for a report of the Water Quality Committee under agenda item XII. Baker, the chair of the committee, reported that the Water Quality Committee met on Monday, April 18. Serving on the committee is Barry Burnell,

the Administrator for Water Programs for the State of Idaho, and John Wagner, the Administrator of the Water Quality Division for the State of Wyoming. Representatives from the NRCS were at the meeting to discuss issues relative to the coordination of efforts with regard to the funding through the Environmental Quality Incentives Program (EQIP) and through nonpoint source funding. The committee identified the activities in the three states and the amounts of money going into specific projects. It is important to note that the committee has been very good in identifying activity levels. There is increasingly more emphasis being placed on how the water is doing and measuring the results in water quality improvement. The committee feels an accountability to the users within the three states, as well as to funding sources such as the federal EQIP. There is stiff competition for funds.

Baker indicated that in all three states the problems are set forth in the TMDL process. He explained that when a water body becomes impaired, it is a requirement of the Clean Water Act to do what is called a Total Maximum Daily Load and this lays out the roadmap for the improvement of that water. Each state is working on projects and performing TMDLs. The State of Wyoming has a watershed plan being developed for the Evanston area. The State of Idaho has recently gone out for public comment on a TMDL for the Bear River. This leads to the idea of looking at regionalization as a way for some municipalities to deal with nutrient limits that may be in a permit. Three questions came out of the committee meeting yesterday that the committee will attempt to answer before November when the committee meets again. The first question is whether dollars transcend state lines. States get parochial when given grants and perhaps the blinders need to be taken off in order to look at the greater good of the area and erase the state lines. The second question was regarding the EPA and Baker indicated Jack Barnett will discuss this issue. The third question deals with how to document the pollution projects. The committee is also going to identify trends in water quality in the Bear River area. The committee will focus on cooperative monitoring and pooling state resources. It was pointed out there has been great cooperation by the water quality leads and the NRCS State Conservationists.

The time was then turned to Jack Barnett to discuss the EPA grant. Barnett pointed out that the EPA issued a grant to the Bear River Commission. The Commission delegated to the Water Quality Committee the oversight of this grant and Barnett is the grant administrator. The Commission has entered into a contract with Utah State University. There is now a Steering Committee which meets monthly. There are four categories to the grant: 1) gathering together and making readily available all the information that can be compiled on the water quality of the Bear River; 2) examination of the opportunity for pollution trading on the Bear River; 3) creation of a computer model that will allow the analyzation of the pollution trading; 4) creation of a public outreach program. The Water Quality Committee, the Steering Committee and Barnett have not been pleased with the progress of getting a contract for the modeling effort. When the grant was submitted to the EPA, the Idaho National Laboratory (INL) out of Idaho Falls was identified as the entity to do the modeling. In an action yesterday, the Water Quality Committee instructed Barnett to advise the INL that the Commission is going to look at the opportunity of contracting with some entity other than the INL to do the modeling.

Chair Hansen then asked Jeff Horsburgh, a research engineer at the Water Research Lab at Utah State University, to give a report on the WIS effort. Horsburgh indicated he is representing a group of researchers working on this project. This is the second year of the EPA's targeted watershed grant program. The Commission submitted a proposal the first year and was unsuccessful. This year another proposal was submitted and the Commission was successful in obtaining a grant. There are three objectives this year for the watershed grant program. The first is to encourage successful community-based approaches and management techniques to protect and restore the nation's water. The second objective was to have partnerships with a wide variety of support. This proposal required a lot of matching funds. The third objective was to have creative socioeconomic approaches. Horsburgh pointed out that perhaps the grant was issued because the Bear River Basin is a microcosm for the rest of the nation in terms of water resource, science and policy issues. This watershed crosses three states and two EPA regions and there are a lot of administrative boundaries and jurisdictions. There is a need to bring everything together. The objectives of the proposal which was submitted to the EPA involved an integrated, internet-based Watershed Information System (WIS), a water quality trading program and a water quality model that will support the water quality trading program.

Horsburgh indicated they are trying to provide a community resource where there will be data and information available on a variety of technical levels. They want to support science and management questions and provide a resource that is ignorant of state or political boundaries. There is existing a Bear River WIS. The website is www.bearriverinfo.org. Horsburgh then discussed the components of the WIS. In the data warehouse there will be visualization and statistical tools. There will be an integration of the project components and a resource guide. The profiles will be based on USGS boundaries. There will be an online resource guide that will be moderated by the Steering Committee. There will be time series data, a document warehouse, data analysis and visualization tools, and integration of real time monitoring data. There will be an informational component for the trading program. With regard to outreach and education, Nancy Mesner is working in this area and through the internet information will be easily obtained. There will be training materials and training on the watershed.

Chair Hansen then moved to agenda item XIII and indicated that at the last Commission meeting Eulalie Langford brought before the Commission a request to look at additional storage on the Bear River. Commissioner Tyrrell reported that Wyoming got copied on the resolution supporting storage in the Bear River basin. The resolution was reworked to fit the Wyoming perspective and it was sent to the Wyoming legislature. The resolution passed the general session as Joint Resolution #1 House of Representatives. It originally started as House Joint Resolution #11. Sue Lowry reported that the people working on Smith's Fork in Wyoming were interested in having the Wyoming legislature also pass support for a flood control study. The primary change made to the Idaho resolution was to make clear that while Wyoming would be supportive of examining flood control, certainly storage going to Wyoming would be used for beneficial uses in Wyoming. Another provision was the ability to use money that has already been spent. The U.S. Army Corps of Engineers has fairly stringent cost-share requirements on their different projects and

so the resolution does lay out the amounts of money that have already been expended through the state dollars.

Hal Anderson then reported on the actions in Idaho. The resolution that was passed in the recent Idaho legislative session is on the legislative website and is House Joint Memorial #1. The issue of storage in the Bear River has continued to be one that generates a lot of public interest. In 2002, some of the issues associated with storage were brought before the Idaho Water Resource Board. That board is the state agency that has responsibility for water development in Idaho. The board is responsible for both funding and developing plans to determine the most appropriate use of the unallocated waters of the state. They develop basin plans and statewide policies associated with water resource development. Questions about the Bear River were brought forth in 2002 when the Board was in the Montpelier area. Out of this came a letter, as requested from the Bear Lake Regional Commission, regarding additional storage and additional feasibility studies in the Bear River.

Randy Budge then indicated, speaking on behalf of the Idaho delegation, there is no question that they do support the additional study of storage on the Bear River system. The concern comes in looking at the specific language of the resolutions that were passed by both the Idaho and Wyoming legislatures. The body of the resolution or the action being requested for appropriating funds for feasibility studies is something Idaho supports but there are some things in the recitals that are troubling and are not entirely accurate. The topic of additional upstream storage, particularly upstream from Bear Lake, is something that has been addressed by the Idaho Water Resource Board. The Idaho delegation looked at the policy of the Idaho Water Resource Board and feels it is appropriate and something they can support. The Idaho Water Resource Board sent a letter on December 13, 2002 to the Bear Lake Regional Commission addressing specifically the point of funding of a comprehensive feasibility study at the Rocky Point Dam site. The Board made the following statement: "The Idaho Water Resource Board strongly supports the development of water storage projects to meet the needs of Idaho citizens for future economic development, flood protection, hydropower and other vital uses. Storage reservoirs can play an important role in future water resource management and the Board has identified a number of potential reservoir sites worthy of protection in the Idaho State Water Plan. In your area, the Caribou site on the Bear River near Soda Springs is included in the State Water Plan protected sites list. Specifically regarding the Rocky Point Reservoir site, the Board would support a study to determine the feasibility of a dam and reservoir at the site. The study, however, should evaluate the water needs in the Basin and then rate all potential sites based on priority."

Budge then stated that Idaho supports the effect of additional study but it should be broadened to include all feasible storage sites on the Bear River in Idaho, not limited to one or two or only those upstream to Bear Lake. Budge felt that because of some of the language in the introduction to the resolution itself, some of the statements do not accurately reflect the facts and they raise points that would be subject to considerable debate and argument. The Idaho delegation cannot support the resolutions outright even though they were passed by the two legislatures.

Jack Barnett briefly reported that a prominent weatherman in Salt Lake keeps reporting the Bear Lake Reservoir is 80% full. He wrote a letter to explain that the reservoir is only that storage between 5902 or 5904 and full at 5923. The TAC is going to look at the very top part of the reservoir from 5918 where PacifiCorp has a policy of deciding this is the trigger point for changing the reservoir management from storage to flood release. There will be a general interrogation as to how much storage is lost by that decision and if there is any practical policy that would allow one to pick up storage by being more liberal in how one approaches flood control. This is an assignment for the TAC.

Eulalie Langford then complimented the members of the Bear River Commission for their untiring effort to work in the best interest of all individuals up and down the entire river. In that regard, Langford referred the Commission to Article I of the Bear River Compact. She read from one provision of Article I: "... to provide for efficient use of water for multiple purposes; to permit additional development of the water resources of Bear River..." Langford pointed out this is the reason she came to the Commission last November. This is an opportunity to have a study of the benefits of flood control above Bear River. Water runs downhill and so the only way we can benefit is to have flood control above Bear Lake. Bear Lake is the key that operates the entire system. The Commission has an opportunity to be loyal to the Compact, to the oath it has taken to provide for the efficient use of water for multiple purposes and to permit the additional development of water resources on the Bear River. Langford pled with the Commission to take this opportunity. Congress is being asked to fund the study. Through the Army Corps of Engineers, the study can be done. Langford indicated she didn't care if it was called flood control or storage. The legislatures of Wyoming and Idaho have been wise enough to see this and to ask for the study. Langford asked Commissioner Anderson if there is a proposal before the Utah legislature and Anderson indicated he was not aware of any proposal. Langford indicated she hoped the Utah legislature would follow suit. She then asked the Commission to take a close look at its responsibility.

Chair Hansen asked for direction from the Commission. Commissioner Tyrrell expressed appreciation for Ms. Langford's comments. He indicated the fact that the Commission has not taken the opportunity to make a motion on this issue is not saying it does not agree with what Ms. Langford would like to do. He then stated that as a Compact Commission, the Commission's number one role is the administration of the Compact. Once the Commission delves into the area of becoming an advocate for individual users or user groups, it loses the purity of purpose in regulating the river. There are other forums that are well suited for the efforts of getting such a study funded. The legislatures are the appropriate groups to approach. The Commission has a very defined administrative task that should not be tainted by becoming what might be perceived five or ten years from now as being an advocacy group or a lobbying group. Tyrrell stated that he personally does not feel this is in the realm of the Commission.

Commissioner Anderson stated that the responsibility for water development lies with the individual states. The Compact allocates the water among the states. Therefore, it is the responsibility of each state to determine how it will best develop water for its respective state. There would certainly be some benefits to filling Bear Lake to capacity if there was a flood control reservoir some place that

could benefit PacifiCorp. This may be possible to do but as far as the efforts to develop the water resources that remain to each of the Bear River Basin states, this is the responsibility of each state.

Hal Anderson indicated his agreement with the comments of Commissioner Anderson and Commissioner Tyrrell with regard to water development being up to the individual states. The Idaho Water Resource Board and Idaho Bear River Commissioners very much support looking at multipurpose storage reservoirs as one way of providing needed water supplies. This is why the Idaho Water Resource Board adopted a position and sent a letter to the Bear River Commission. Hal Anderson stated that Idaho would like to make a motion in regard to Ms. Langford's request. Randy Budge stated that it does appear appropriate that the Commission address the issue in some fashion so as not to leave uncertainty regarding Ms. Langford's proposal. Budge made a motion that the Bear River Commission go on record as supporting studies to determine the feasibility of storage on the Bear River, including sites upstream from Bear Lake. The motion was seconded for the purpose of discussion.

Commissioner Tyrrell indicated the language in Article VII of the Compact is as follows: "It is the policy of the signatory States to encourage additional projects for the development of the water resources of the Bear River to obtain the maximum beneficial use of water with a minimum of waste, and in furtherance of such policy, authority is granted within the limitations provided by this Compact, to investigate, plan, construct, and operate such projects without regard to State boundaries" There is a general acknowledgment that encouraging the study of development of storage in the Basin without limiting it to a specific user or user group or beneficial use type or location is far more palatable than something that may be one single focus direction that in ten years may not be in the best interest of the Commission.

Budge indicated the intent of the motion was essentially to reiterate exactly the policy referred to in Article VII. The motion was restated that the Commission go on record as supporting studies to determine the feasibility of storage on the Bear River, including those sites upstream from Bear Lake.

Commissioner Anderson then commented that the State of Utah, in the last 25 years, has spent approximately \$3 million studying reservoir sites on the Bear River and its tributaries. He stated that personally he feels this is a waste of money. What is available for storage on the Bear River is known and to ask the Army Corps of Engineer to recreate the wheel is a bad use of taxpayer money.

Commissioner Tyrrell stated that before the Commission passes a motion, the wording needs to be acceptable to everyone. Tyrrell indicated there has been a verbal presentation put in front of the Commission. If it is something as simple as that the Commission can endorse the study of storage projects in accordance with Article VII of the Compact, that is as far as he can go. He stated he does not want to endorse funding or nonfunding. Tyrrell felt that if the Commission goes with anything other than the language in Article VII of the Compact, there should be written language prepared, distributed and reviewed among the states.

Budge stated that in Article VII it says that the Commission supports policies encouraging additional projects. The motion is not intended to encourage any particular project. It simply asks that the Commission go on record to support studies of the feasibility of the projects. This is consistent with Article VII. It was then determined to have a roll call vote by Commissioner. Commissioner Lowham abstained. Commissioner Tyrrell voted no and explained that it is important enough to have firm language in front of the Commission to agree upon and if the language is so close to the language in Article VII the Commission has this ability and the motion gives nothing more. Commissioner Thornock voted yes. Commissioner Holmgren voted no. Commissioner Anderson voted no. Commissioner Francis voted yes. Commissioner Wallentine voted yes. Hal Anderson voted yes in behalf of Commissioner Dreher. Randy Budge voted yes in behalf of Commissioner Mathews. There were five affirmative votes, three negative votes and one abstained vote. The Commission reviewed Article IV, paragraphed 8 of the bylaws and it was determined that a two-thirds vote is necessary for a motion to pass. As there was not a two-thirds affirmative vote, the motion failed.

Chair Hansen then moved to agenda item XIV and asked for a report from the Engineer-Manager. Barnett indicated that the Commission staff is prepared for the irrigation season. He pointed out that it is not the prerogative of a state to call for a water emergency. It has to come from a water user. The staff is looking at preparing a draft of the biennial report. The TAC will meet on June 23 in the Bear Lake area and will be looking at: 1) the feasibility of a website for the Commission; 2) the water rights in the delivery schedule in the Lower Division; 3) the storage in Bear Lake above 5918; 4) other items brought to the attention of the TAC.

Commissioner Anderson then gave a report on the Management Committee. Anderson indicated that all items had been discussed with the exception of the date for the next Commission meeting. This will be discussed under agenda item XVIII.

Chair Hansen moved to agenda item XVI and the state reports. Commissioner Tyrrell reported on the drought condition in Wyoming, identifying that part of the state is doing okay but the further north and east one goes the conditions worsen. In the North Platte Basin, Wyoming is in an allocation year which is the equivalent of a water emergency on the Bear River. They have been in a call for regulation since February based on water supply prospects and this is the fourth year in a row for this to occur. Within the past 40 years, this has happened only 6 or 7 times but never for more than two years in a row. Tyrrell then reported that Wyoming and Utah are somewhat involved in discussions on the Colorado River Basin regarding the operation of Lake Powell for water year 2005. This is an area of great debate. Tyrrell indicated that briefly at the November 2004 Commission meeting he reported Wyoming had some statutory items sent to the legislature. One of these items was for an increase in penalties for water theft and this legislation passed. The fine limit is not quite as high as the limit in Utah as reported by Jerry Olds earlier in the meeting. The categories of offenses changed a little. Wyoming saw success in a statute that will allow the Wyoming State Engineer's office to do business electronically.

Hal Anderson then reported on the activities in Idaho. Anderson reported this was a very busy legislative session with regard to water resources. There was a resolution prepared to deal with the

problems Idaho is facing in conjunctive administration in the Eastern Snake River Plain. Commissioner Dreher was not able to attend the Commission meeting because he was finishing a very difficult order he has been working on for some time. The order is in response to calls made by senior surface water users against junior ground water appropriators who have indicated their diversion of ground water has impacted their senior surface water rights. Dreher issued a preliminary order that asked for additional information. After the April 1 forecast of streamflow and projected reservoir fill, he will be making a determination on how to move forward. Dreher is working with his technical people to get everything quantified. The order should be released today. Anderson stated this will probably end up in the Idaho Supreme Court.

Anderson then reported the Idaho legislature identified how the state needs to move forward on redistributing about 600,000 to 900,000 acre-feet of water, changing the water budget, so to speak, by either supply increases or demand reductions. One of the components of this is the acquisition of consumptive water rights and retiring them or putting them in the water bank and making them available for mitigation. The legislature appropriated about \$24 million to acquire the water rights for the Bell Rapids high lift pumping project below Milner Dam. The funding came to the Idaho Water Resource Board and \$21.3 million must be paid back with 3 percent interest in 2006. The revenue stream to pay back the \$21.3 million to the general fund is the rentals from the Bureau of Reclamation. Reclamation is renting water on a 30-year lease arrangement to provide flow augmentation for salmon. There is interest in moving toward the idea of demand reduction and supply enhancement. Since the water is natural flow that is below the last major diversion point, Idaho can exchange storage use that may need to be released or acquired by Reclamation for flow augmentation for salmon. Idaho can use the natural flow water instead of storage water and the storage water can then be made available for diversion by senior surface water users.

Anderson indicated there were changes to ground water district legislation. There is now mandatory membership but there are exceptions for cities. New authorities were established for the Department of Water Resources. One issue the department has struggled with is how to make sure it is real water and not paper water. Authorities were given to the department to work with districts to determine a fee that will be assessed to the water districts and the fee will help fund studies, measurements and model enhancements that will be put in place to make sure the actions taken for the redistribution of water are occurring. Two joint resolutions passed regarding the Interim Legislative Committee, one being that the committee will continue and the second that the committee will specifically look at the issue of implementing a large scale management charge program to help facilitate some of the distribution.

Hal Anderson then reported that the Nez Pierce agreement was signed by the State of Idaho and the tribe. The agreement provided settlement in Indian claims in the Snake River Basin Adjudication for basically all the waters of the state. In a mediated process that happened over a period of eight years, a settlement was reached.

Chair Hansen then turned the time to Commissioner Larry Anderson for the report from the State of Utah. Anderson reported that there were three bills passed by the legislature and there is a

legislative group that is meeting to look at water right issues. One item that the group wants to look at is the over-allocation of ground water basins in the State of Utah. There are three or four basins that fall into this category and the group will look at what to do to the basins that are being drawn down because of over-allocation. There will possibly be some legislation this year to address this and to better define the authority of the State Engineer. The legislative group will also look at sewage effluent and who really owns the water. An additional task force was created, the Water Delivery Funding Task Force. This task force is looking at how the State of Utah will fund the Bear River Development Project and the Lake Powell Pipeline Project. This task force is charged with submitting a report to the Governor by July of 2005 on how the state will fund these two large water projects. The state share of the Bear River Project is about \$300 million. There would be another \$300 million required by local entities to move the water to the Wasatch Front. The estimated cost for the Lake Powell Pipeline Project to move water from Lake Powell to the St. George area (about 120 miles) is approaching \$400 million. The state is looking at mechanisms to fund these projects. It is not expected that the state will receive any funding from the federal government for these projects.

Commissioner Anderson further reported the water supply outlook is extremely good across the State of Utah. The worst area is in the north in the Bear River Basin but this is above average. The second worst area is the Colorado River Basin as a whole. There will be flooding in Southern Utah and in the Uinta Basin. Anderson then indicated there have been thoughts about holding a Bear River symposium in the next few years. He suggested there be some thought about a symposium on water development where water development agencies in the states of Wyoming, Idaho and Utah could be invited to report on past studies. Someone could explain how the Bear River Compact allocates water, and there could be a discussion on what is left to be developed in the three divisions of the Bear River Basin. The states could report on current efforts in development of the Bear River. PacifiCorp could report on how the development would impact Bear Lake.

The Commission then moved to agenda item XVII, other items. There being no other items brought before the Commission, the discussion was moved to agenda item XVIII and a discussion about the date for the next Commission meeting. The Commission meeting would normally be held on November 16. Because of various conflicts in schedules, it was determined that the next Bear River Commission meeting will be held on Tuesday, November 1. There was then a motion to adjourn the meeting. The motion was seconded and carried. The meeting was adjourned at 4:02 p.m.

ATTENDANCE ROSTER

BEAR RIVER COMMISSION ANNUAL MEETING

Utah State Capitol
Salt Lake City, Utah
April 19, 2005

IDAHO COMMISSIONERS

Rodney Wallentine

WYOMING COMMISSIONERS

Patrick T. Tyrrell

Sam Lowham

Gordon Thornock

Sue Lowry (Alternate)

Jade Henderson (Alternate)

FEDERAL CHAIR

Dee C. Hansen

UTAH COMMISSIONERS

D. Larry Anderson

Blair R. Francis

Charles Holmgren

Norman Weston

ENGINEER-MANAGER & STAFF

Jack A. Barnett

Don A. Barnett

Nola Peterson

OTHERS IN ATTENDANCE

IDAHO

Hal Anderson, Department of Water Resources

Pete Peterson, Water Master

Liz Robbins, Department of Water Resources

UTAH

Will Atkin, Division of Water Rights

Walt Baker, Department of Environmental Quality

Boyd Clayton, Division of Water Rights

Bob Fotheringham, Division of Water Rights

Ron Hoffman, Water Commissioner

Ken Short, Division of Water Resources

Randy Staker, Division of Water Resources

WYOMING

Kevin Payne, State Engineer's Office

Kevin Wilde, State Engineer's Office

Erick Esterholdt, State of Wyoming

OTHERS

Connely Baldwin, PacifiCorp

Randy Budge, Bear River Water Users Association

Carly Burton, Bear River Water Users Association

Claudia Cottle, Bear Lake Watch

Dave Cottle, Bear Lake Watch

Dan Davidson, Bear River Canal Company

APPENDIX A
PAGE TWO

Allen Harrison, Bear Lake Regional Commission
Steve Hicks, Bear River Bird Refuge
Jeff Horsburgh, Utah State University
Ron Jensen, Bear Lake Regional Commission
Voneene Jorgensen, Bear River Water Conservancy District
Randy Julander, Natural Resources Conservation Service
Eulalie Langford, Idaho Legislature
Patrick Lambert, U.S. Geological Survey
Don Riches, Emerald Beach HOA
Theresa Selfa, Utah State University
Al Trout, Bear River Bird Refuge
Jody Williams, PacifiCorp

**PROPOSED
AGENDA**

Bear River Commission Annual Meeting
April 19, 2005

Utah State Capitol West State Office Building
Room W130
Salt Lake City, Utah

COMMISSION AND ASSOCIATED MEETINGS

April 18

10:00 a.m. Water Quality Committee Meeting, Room 314
Utah Department of Water Resources Building

April 19

| | | |
|------------|--|---------------------------------|
| 9:00 a.m. | Records & Public Involvement Committee Mtg, Room W130 | Chair |
| 10:00 a.m. | Operations Committee Meeting, Room W130 | Francis |
| 11:30 a.m. | Informal Meeting of Commission, Room W130 | Barnett |
| 11:45 a.m. | State Caucuses and Lunch East State Office Building | H. Anderson/Tyrrell/L. Anderson |
| 1:00 p.m. | Commission Meeting, Room W130 | Hansen |

ANNUAL COMMISSION MEETING

April 19, 2005

Convene Meeting: 1:00 p.m., Chair Dee Hansen

| | | |
|------|---|-------------|
| I. | Call to order | Hansen |
| | A. Welcome of guests and overview of meeting | |
| | B. Approval of agenda | |
| II. | Approval of minutes of last Commission meeting (November 16, 2004) | Hansen |
| III. | Report of Secretary/Treasurer | L. Anderson |
| IV. | Election of officers | Hansen |
| V. | Overview of water supply | Julander |
| VI. | PacifiCorp issues | Baldwin |

**APPENDIX B
PAGE TWO**

- | | | |
|-------|--|----------|
| VII. | Activities of the Bear River Water Users Association | Burton |
| VIII. | Status of the Utah Pumpers Association | Kinghorn |
| IX. | Idaho Pumpers | Williams |

BREAK

- | | | |
|--------|--|-------------|
| X. | Report of the Records & Public Involvement Committee | Chair |
| XI. | Report of the Operations Committee | Chair |
| XII. | Report of the Water Quality Committee | |
| | A. Activities of Water Quality Committee | Baker |
| | B. EPA Grant Administration | Barnett |
| | C. Demonstration of EPA Grant WIS effort | Horsburgh |
| XIII. | Review of additional storage inquiries | |
| | A. Actions in Wyoming | Tyrrell |
| | B. Actions in Idaho | H. Anderson |
| | C. Efforts of the TAC | Barnett |
| XIV. | Engineer-Manager and TAC report | Barnett |
| XV. | Items from the Management Committee | L. Anderson |
| XVI. | State Reports | |
| | A. Wyoming | Tyrrell |
| | B. Idaho | H. Anderson |
| | C. Utah | L. Anderson |
| XVII. | Other Items | Hansen |
| XVIII. | Next Commission Meeting | Hansen |
| | (It was proposed at the November 16, 2004 meeting that the regular Commission meeting be held on Tuesday, November 8, 2005) | |

Anticipated adjournment: 3:30 p.m.

BEAR RIVER COMMISSION

STATEMENT OF INCOME AND EXPENDITURES

FOR THE PERIOD OF JULY 1, 2004 THRU APRIL 15, 2005

| INCOME | CASH ON HAND | OTHER INCOME | FROM STATES | TOTAL REVENUE |
|-------------------------------------|-----------------|-----------------|----------------|------------------|
| Cash Balance 07-01-04 | 80,445.86 | | | 80,445.86 |
| State of Idaho | | | 35,000.00 | 35,000.00 |
| State of Utah | | | 35,000.00 | 35,000.00 |
| State of Wyoming | | | 35,000.00 | 35,000.00 |
| US Fish & Wildlife | | 12,400.00 | | 12,400.00 |
| Interest on Savings | | 2,139.72 | | 966.90 |
| TOTAL INCOME TO APR 15, 2005 | 80,445.86 | 14,539.72 | 105,000.00 | 199,985.58 |

DEDUCT OPERATING EXPENSES

| | APPROVED BUDGET | UNEXPENDED BALANCE | EXPENDITURES TO DATE |
|---------------------------------|--------------------|-----------------------|-------------------------|
| Stream Gaging/USGS Contract | 51,100.00 | 0.00 | 51,100.00 |
| SUBTOTAL | 51,100.00 | 0.00 | 51,100.00 |
| EXPENDED THROUGH COMMISSION | | | |
| Personal Services Jack | 50,777.00 | 8,629.50 | 42,147.50 |
| Travel (Eng-Mgr) | 1,200.00 | 163.58 | 1,036.42 |
| Office Expenses | 1,600.00 | 296.84 | 1,303.16 |
| Printing Biennial Report | 2,000.00 | 2,000.00 | 0.00 |
| Treasurer Bond & Audit | 1,400.00 | 1,300.00 | 100.00 |
| Printing | 1,600.00 | 525.51 | 1,074.49 |
| Contingency | 5,000.00 | 5,000.00 | 0.00 |
| SUBTOTAL | 63,577.00 | 17,915.43 | 45,661.57 |
| EPA WATER QUALITY GRANT | 0.00 | 0.00 | 0.00 |
| TOTAL EXPENSES | 114,677.00 | 17,915.43 | 96,761.51 |
| CASH BALANCE AS OF 04-15-05 | | | 103,224.07 |

APPENDIX C
PAGE TWO

BEAR RIVER COMMISSION

DETAILS OF EXPENDITURES

FOR PERIOD ENDING NOV 15, 2004

| | | |
|-----|-------------------------------|-----------|
| 609 | JACK BARNETT | 8,429.50 |
| 610 | JACK BARNETT | 4,647.32 |
| 611 | JACK BARNETT | 5,250.80 |
| 612 | JACK BARNETT | 4,771.76 |
| 613 | LOST IN MAIL | |
| 614 | USGS | 51,100.00 |
| 615 | JACK BARNETT | 4,806.47 |
| | BANK SERVICE FEE | 60.00 |
| | TRANSFER TO BRC WATER QUALITY | 100.00 |
| 616 | JACK BARNETT | 4,550.92 |
| | STOP PAYMENT FEE | 25.00 |
| 617 | JACK BARNETT | 4,242.16 |
| 618 | JACK BARNETT | 4,299.06 |
| 619 | VOID | |
| 620 | CAN SURETY | 100.00 |
| 621 | JACK BARNETT | 4,378.58 |

| | |
|---------------|-----------|
| TOTAL EXPENSE | 96,761.57 |
|---------------|-----------|

BANK RECONCILIATION

| | |
|---|------------|
| Cash in Bank per Statement 04-15-05 | 8,272.57 |
| Plus: Intransit Deposits | |
| Less: Outstanding Checks | |
| Total Cash in Bank | 8,272.57 |
| Plus: Savings Account-Utah State Treasurer | 94,951.50 |
| TOTAL CASH IN SAVINGS AND IN CHECKING ACCOUNT | 103,224.07 |

BEAR RIVER COMMISSION

APPROVED BUDGET FOR FY 2005, AND PROPOSED BUDGETS FOR FY2006 AND FY2007

| | FY 2005 APPROVED BUDGET | FY 2006 PROPOSED BUDGET | FY 2007 PROPOSED BUDGET |
|-----------------------------------|----------------------------|----------------------------|----------------------------|
| | | - INCOME - | |
| BEGINNING BALANCE | 80,445.86 | 84,868.86 | 80,093.86 |
| IDAHO | 35,000.00 | 35,000.00 | 35,000.00 |
| UTAH | 35,000.00 | 35,000.00 | 35,000.00 |
| WYOMING | 35,000.00 | 35,000.00 | 35,000.00 |
| USF&WS | 12,400.00 | 6,400.00 | 6,500.00 |
| INTEREST ON SAVINGS | 1,500.00 | 1,500.00 | 1,500.00 |
| TOTAL INCOME | 199,345.86 | 197,768.86 | 193,093.86 |
| | | - EXPENDITURES - | |
| STREAM GAGING-U.S.G.S. (a) | 51,100.00 | 52,825.00 | 53,750.00 |
| PERSONAL SERVICES CONTRACT-BARNET | 50,577.00 | 52,050.00 | 53,350.00 |
| TRAVEL | 1,200.00 | 1,200.00 | 1,200.00 |
| OFFICE EXPENSES | 1,600.00 | 1,600.00 | 1,600.00 |
| BIENNIAL REPORT | 2,000.00 | 2,000.00 | 1,000.00 |
| TREASURER'S BOND & AUDIT | 1,400.00 | 1,400.00 | 1,400.00 |
| PRINTING | 1,600.00 | 1,600.00 | 1,600.00 |
| CONTINGENCY | 5,000.00 | 5,000.00 | 5,000.00 |
| TOTAL EXPENDITURES | 114,477.00 | 117,675.00 | 118,900.00 |
| UNEXPENDED CASH BALANCE | 84,868.86 | 80,093.86 | 74,193.86 |

NOTES: a) We received both FY04 & FY05 payments from USF&W in FY05

Report to the Bear River Commission
Regarding
Water Distribution Issues
April 19, 2005

1. Simmonds case

Hearing held on March 15
Agreed to stipulate

2. Water rights enforcement legislation

HB 29 – State Engineer's Powers and Duties
HB 38 – Water Law Criminal Penalties
HB157 – Water Enforcement Procedures and Penalties
Notice of violation / Cease and desist order
Clock starts the date the notice is issued
Each day is a separate violation
If act is knowing - \$5,000, if not knowing - \$1,000 (Not to exceed)
Replacement water

3. River commissioner for the Lower Bear River

Terry Gnehm – River commissioner
Jim Watterson – Deputy river commissioner

4. Project to install water-measuring devices on the Lower Bear River

Supplemental appropriation \$100,000 (FY 05)
Real time measuring devices, 5 repeater stations and base station at Logan office

Survey forms regarding measuring devices sent out to water users on March 4
Recommended an ultrasonic device
Install an on/off device if they chose not to install a meter (\$300)
A \$300 credit if 110v power provided
Very good cooperation from the water users
Target date – July 1, 2005

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STATE ENGINEER'S POWERS AND DUTIES

AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: David Clark

Senate Sponsor: Peter C. Knudson

LONG TITLE

General Description:

This bill amends the powers and duties provisions of the state engineer.

Highlighted Provisions:

This bill:

- specifies rule making authority of the state engineer consistent with provisions of this title; and
- clarifies provisions relating to suits in court, to also include the prevention of theft of water.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

73-2-1, as last amended by Chapter 90, Laws of Utah 2001

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:

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- (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.

~~[(b)]~~ (4) The state engineer shall ~~[have the power to]~~ make rules, in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, consistent with the purposes and provisions of this title, regarding:

- ~~[(i) make and publish rules necessary to carry out the duties of his office;]~~
- ~~[(ii) secure the equitable apportionment and distribution of the water according to the respective rights of appropriators; and]~~

(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) geothermal resource conservation; and

(g) enforcement orders and the imposition of fines and penalties.

(5) The state engineer may make rules, in accordance with Title 63, Chapter 46a, 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;

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(d) the determination of water rights; and

(e) the form and content of applications and related documents, maps, and reports.

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

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

~~[(B)]~~ (b) prevent theft, waste, loss, or pollution of those waters; ~~[and]~~

~~[(C)]~~ (c) enable him to carry out the duties of his office~~[-]; and~~

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

~~[(e)]~~ (7) The state engineer ~~[shall]~~ may:

~~[(f)]~~ (a) upon request from the board of trustees of an irrigation district under Title 17A, Chapter 2, Part 7, Irrigation ~~[Districts]~~ District Act, or a local district under Title 17B, Chapter 2, Local Districts, 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

~~[(ii)]~~ (b) upon completion of the survey and allotment under Subsection ~~[(3)(c)(i)]~~ (7)(a), file with the district board a return of the survey and report of the allotment.

~~[(4)]~~ (8) (a) The state engineer may establish water ~~[districts]~~ distribution systems and define their boundaries.

(b) The water ~~[districts]~~ 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.

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WATER LAW - CRIMINAL PENALTIES

AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ben C. Ferry

Senate Sponsor: Beverly Ann Evans

LONG TITLE

General Description:

This bill modifies the criminal penalties for violations of various provisions of Title 73, Water and Irrigation, and Title 76, Chapter 10, Offenses against Public Health, Safety, Welfare, and Morals.

Highlighted Provisions:

This bill:

- removes criminal penalties from certain provisions requiring reports to the state engineer;
- clarifies applicable standards of criminal intent for violations;
- provides for graduated criminal penalties for violations of various criminal provisions pertaining to the regulation and distribution of water; and
- makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

73-1-14, Utah Code Annotated 1953

73-1-15, as last amended by Chapter 156, Laws of Utah 1965

73-2-20, Utah Code Annotated 1953

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73-3-3, as last amended by Chapter 136, Laws of Utah 2001

73-3-22, as last amended by Chapter 25, Laws of Utah 1987

73-3-26, as last amended by Chapter 178, Laws of Utah 1986

73-3-29, as last amended by Chapter 61, Laws of Utah 1992

73-5-8, Utah Code Annotated 1953

73-5-9, Utah Code Annotated 1953

76-10-201, as enacted by Chapter 196, Laws of Utah 1973

76-10-202, as enacted by Chapter 196, Laws of Utah 1973

76-10-203, as enacted by Chapter 196, Laws of Utah 1973

ENACTS:

73-2-27, Utah Code Annotated 1953

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

Section 1. Section 73-1-14 is amended to read:

73-1-14. Interfering with waterworks or with apportioning official -- Penalty and liability.

(1) Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or other appliance for the diversion, apportionment, measurement or regulation of water, or who interferes with any person authorized to apportion water while in the discharge of his duties, is guilty of a ~~[misdemeanor, and]~~ crime punishable under Section 73-2-27.

(2) Any person who commits an act defined as a crime under this section is also liable [in] in a civil action for damages or other relief to any person injured by [such unlawful act] that act.

(3) (a) A civil action under this section may be brought independent of a criminal action.

(b) Proof of the elements of a civil action under this section need only be made by a preponderance of the evidence.

Section 2. Section 73-1-15 is amended to read:

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73-1-15. Obstructing canals or other watercourses -- Penalties.

(1) Whenever any person~~[, partnership, company or corporation]~~ has a right-of-way of any established type or title for any canal or other watercourse it shall be unlawful for any person~~[, persons or governmental agencies]~~ to place or maintain in place any obstruction, or change of the water flow by fence or otherwise, along or across or in such canal or watercourse, except as where said watercourse inflicts damage to private property, without first receiving written permission for the change and providing gates sufficient for the passage of the owner or owners of such canal or watercourse. That the vested rights in the established canals and watercourse shall be protected against all encroachments. That indemnifying agreements may be entered as may be just and proper by governmental agencies.

(2) Any person~~[, partnership, company or corporation]~~ violating ~~[the provisions of]~~ this section is guilty of a ~~[misdemeanor and is subject to damages and costs]~~ crime punishable under Section 73-2-27.

(3) Any person who commits an act defined as a crime under this section is also liable for damages or other relief and costs in a civil action to any person injured by that act.

(4) (a) A civil action under this section may be brought independent of a criminal action.

(b) Proof of the elements of a civil action under this section need only be made by a preponderance of the evidence.

Section 3. Section **73-2-20** is amended to read:

73-2-20. Employees authorized to enter and cross lands -- Injuring monuments a crime.

(1) In order to carry out the purposes of this ~~[act]~~ title any person ~~[or persons]~~ properly employed hereunder ~~[are]~~ is authorized to enter and cross all lands within the state~~[; provided; that in so doing]~~ if no damage is done to private property.

(2) It ~~[shall be]~~ is a ~~[misdemeanor]~~ crime punishable under Section 73-2-27 for any person ~~[or persons willfully and maliciously]~~ to knowingly or intentionally remove or injure any equipment, permanent marks, or monuments made or installed ~~[for the purpose of carrying on these investigations]~~ by any person properly employed under this title.

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Section 4. Section **73-2-27** is enacted to read:

73-2-27. Criminal penalties.

(1) This section applies to offenses committed under:

(a) Section 73-1-14;

(b) Section 73-1-15;

(c) Section 73-2-20;

(d) Subsection 73-3-3(9);

(e) Section 73-3-26;

(f) Section 73-3-29;

(g) Section 73-5-9;

(h) Section 76-10-201;

(i) Section 76-10-202; and

(j) Section 76-10-203.

(2) Under circumstances not amounting to an offense with a greater penalty under Subsection 76-6-106(2)(b)(ii) or Section 76-6-404, violation of a provision listed in Subsection (1) is punishable:

(a) as a felony of the third degree if:

(i) the value of the water diverted or property damaged or taken is \$2,500 or greater; and

(ii) the person violating the provision has previously been convicted of violating the same provision;

(b) as a class A misdemeanor if:

(i) the value of the water diverted or property damaged or taken is \$2,500 or greater; or

(ii) the person violating the provision has previously been convicted of violating the same provision; or

(c) as a class B misdemeanor if Subsection (2)(a) or (b) do not apply.

Section 5. Section **73-3-3** is amended to read:

73-3-3. Permanent or temporary changes in point of diversion, place of use, or purpose of use.

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(1) For purposes of this section:

(a) "Permanent changes" means changes for an indefinite length of time with an intent to relinquish the original point of diversion, place of use, or purpose of use.

(b) "Temporary changes" means changes for fixed periods not exceeding one year.

(2) (a) Any person entitled to the use of water may make permanent or temporary changes in the:

(i) point of diversion;

(ii) place of use; or

(iii) purpose of use for which the water was originally appropriated.

(b) A change may not be made if it impairs any vested right without just compensation.

(3) Both permanent and temporary changes of point of diversion, place of use, or purpose of use of water, including water involved in general adjudication or other suits, shall be made in the manner provided in this section.

(4) (a) A change may not be made unless the change application is approved by the state engineer.

(b) Applications shall be made upon forms furnished by the state engineer and shall set forth:

(i) the name of the applicant;

(ii) a description of the water right;

(iii) the quantity of water;

(iv) the stream or source;

(v) the point on the stream or source where the water is diverted;

(vi) the point to which it is proposed to change the diversion of the water;

(vii) the place, purpose, and extent of the present use;

(viii) the place, purpose, and extent of the proposed use; and

(ix) any other information that the state engineer requires.

(5) (a) The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place of

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use, or purpose of use shall be the same, as provided in this title for applications to appropriate water.

(b) The state engineer may, in connection with applications for permanent change involving only a change in point of diversion of 660 feet or less, waive the necessity for publishing a notice of application.

(6) (a) The state engineer shall investigate all temporary change applications.

(b) If the state engineer finds that the temporary change will not impair any vested rights of others, he shall issue an order authorizing the change.

(c) If the state engineer finds that the change sought might impair vested rights, before authorizing the change, he shall give notice of the application to any person whose rights may be affected by the change.

(d) Before making an investigation or giving notice, the state engineer may require the applicant to deposit a sum of money sufficient to pay the expenses of the investigation and publication of notice.

(7) (a) The state engineer may not reject applications for either permanent or temporary changes for the sole reason that the change would impair the vested rights of others.

(b) If otherwise proper, permanent or temporary changes may be approved for part of the water involved or upon the condition that conflicting rights are acquired.

(8) (a) Any person holding an approved application for the appropriation of water may either permanently or temporarily change the point of diversion, place of use, or purpose of use.

(b) A change of an approved application does not:

(i) affect the priority of the original application; or

(ii) extend the time period within which the construction of work is to begin or be completed.

(9) Any person who changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section:

(a) obtains no right; [and]

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(b) is guilty of a ~~[class B misdemeanor,]~~ crime punishable under Section 73-2-27 if the change or attempted change is made knowingly or intentionally; and

(c) is guilty of a separately punishable offense for each day of the unlawful change [constituting a separate offense, separately punishable].

(10) (a) This section does not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion of the existing well.

(b) Any replacement well must be drilled in accordance with the requirements of Section 73-3-28.

(11) (a) In accordance with the requirements of this section, the Division of Wildlife Resources or Division of Parks and Recreation may file applications for permanent or temporary changes for the purpose of providing water for instream flows, within a designated section of a natural stream channel or altered natural stream channel, necessary within the state ~~[of Utah]~~ for:

- (i) the propagation of fish;
- (ii) public recreation; or
- (iii) the reasonable preservation or enhancement of the natural stream environment.

(b) Applications may be filed for changes on:

- (i) perfected water rights presently owned by the respective division;
- (ii) perfected water rights purchased by the respective division for the purpose of providing water for instream flows, through funding provided for that purpose by legislative appropriation or acquired by lease, agreement, gift, exchange, or contribution; or
- (iii) appurtenant water rights acquired with the acquisition of real property by either division.

(c) A physical structure or physical diversion from the stream is not required to implement a change for instream flow use.

(d) This Subsection (11) does not allow enlargement of the water right sought to be changed nor may the change impair any vested water right.

(e) In addition to the other requirements of this section, an application filed by either division shall:

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(i) set forth the legal description of the points on the stream between which the necessary instream flows will be provided by the change; and

(ii) include appropriate studies, reports, or other information required by the state engineer that demonstrate the necessity for the instream flows in the specified section of the stream and the projected benefits to the public that will result from the change.

(f) The Division of Wildlife Resources and Division of Parks and Recreation may:

(i) purchase water rights for the purposes provided in Subsection (11)(a) only with funds specifically appropriated by the Legislature for water rights purchases; or

(ii) accept a donated water right without legislative approval.

(g) This Subsection (11) does not authorize either division to:

(i) appropriate unappropriated water under Section 73-3-2 for the purpose of providing instream flows; or

(ii) acquire water rights by eminent domain for instream flows or for any other purpose.

(h) This Subsection (11) applies only to change applications filed on or after April 28, 1986.

(12) (a) Sixty days before the date on which proof of change for instream flows under Subsection (11) is due, the state engineer shall notify the applicant by registered mail or by any form of electronic communication through which receipt is verifiable of the date when proof of change is due.

(b) Before the date when proof of change is due, the applicant must either:

(i) file a verified statement with the state engineer that the instream flow uses have been perfected, which shall set forth:

(A) the legal description of the points on the natural stream channel or altered natural stream channel between which the necessary instream flows have been provided;

(B) detailed measurements of the flow of water in second feet changed;

(C) the period of use; and

(D) any additional information required by the state engineer; or

(ii) apply for a further extension of time as provided for in Section 73-3-12.

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(c) Upon approval of the verified statement required under Subsection (12)(b)(i), the state engineer shall issue a certificate of change for instream flow use.

Section 6. Section **73-3-22** is amended to read:

73-3-22. Underground water -- Report of well and tunnel drillers.

~~[(1)]~~ Any person constructing a well or tunnel for the purpose of utilizing or monitoring underground waters shall, within 30 days after the completion or abandonment of the construction, report to the state engineer data relating to each well or tunnel. The report shall be made on forms furnished by the state engineer and shall contain information required by the state engineer.

~~[(2) Any person who fails to comply with the provisions of this section is guilty of a class B misdemeanor.]~~

Section 7. Section **73-3-26** is amended to read:

73-3-26. Violations -- Penalty.

(1) Any person~~[- firm, copartnership, association, or corporation]~~ drilling a well or wells in the state or who advertises or holds himself ~~[or itself]~~ out as a well driller, or who follows such business, without first having obtained a ~~[permit]~~ license as provided by this act or who drills a well or wells after revocation or expiration of his ~~[permit]~~ license theretofore issued, ~~[or who drills a well or wells in violation of the rules and regulations]~~ is guilty of a ~~[class B misdemeanor]~~ crime punishable under Section 73-2-27.

(2) Each day that a violation under Subsection (1) continues is a separate offense.

Section 8. Section **73-3-29** is amended to read:

73-3-29. Relocation of natural streams -- Written permit required -- Emergency work -- Violations.

(1) Except as provided in Subsection (2), a state agency, county, city, corporation, or person may not relocate any natural stream channel or alter the beds and banks of any natural stream without first obtaining the written approval of the state engineer.

(2) (a) The state engineer may issue an emergency permit or order to relocate a natural stream channel or alter the beds and banks of a natural stream as provided by this Subsection (2)

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and Section 63-46b-20.

(b) If an emergency situation arises which involves immediate or actual flooding and threatens injury or damage to persons or property, steps reasonably necessary to alleviate or mitigate the threat may be taken before a written permit is issued subject to the requirements of this section.

(c) (i) If the threat occurs during normal working hours, the state engineer or his representative must be notified immediately of the threat. After receiving notification of the threat, the state engineer or his representative may orally approve action to alleviate or mitigate the threat.

(ii) If the threat does not occur during normal working hours, action may be taken to alleviate or mitigate the threat and the state engineer or his representative shall be notified of the action taken on the first working day following the work.

(d) A written application outlining the action taken or the action proposed to be taken to alleviate or mitigate the threat shall be submitted to the state engineer within two working days following notification of the threat to the state engineer or his representative.

(e) (i) The state engineer shall inspect in a timely manner the site where the emergency action was taken.

(ii) After inspection, additional requirements, including mitigation measures, may be imposed.

(f) Adjudicative proceedings following the emergency work shall be informal unless otherwise designated by the state engineer.

(3) An application to relocate any natural stream channel or alter the beds and banks of any natural stream shall be in writing and shall contain the following:

- (a) the name and address of the applicant;
- (b) a complete and detailed statement of the location, nature, and type of relocation or alteration;
- (c) the methods to be employed;
- (d) the purposes of the application; and

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(e) any additional information that the state engineer considers necessary, including, but not limited to, plans and specifications of the proposed construction of works.

(4) (a) The state engineer shall, without undue delay, conduct investigations that may be reasonably necessary to determine whether the proposed relocation or alteration will:

- (i) impair vested water rights;
- (ii) unreasonably or unnecessarily affect any recreational use or the natural stream environment;
- (iii) unreasonably or unnecessarily endanger aquatic wildlife; or
- (iv) unreasonably or unnecessarily diminish the natural channel's ability to conduct high flows.

(b) The application shall be approved unless the proposed relocation or alteration will:

- (i) impair vested water rights;
- (ii) unreasonably or unnecessarily adversely affect any public recreational use or the natural stream environment;
- (iii) unreasonably or unnecessarily endanger aquatic wildlife; or
- (iv) unreasonably or unnecessarily diminish the natural channel's ability to conduct high flows.

(c) The state engineer may approve the application, in whole or in part, with any reasonable terms to protect vested water rights, any public recreational use, the natural stream environment, or aquatic wildlife.

(5) No cost incurred by the applicant, including any cost incurred to comply with the terms imposed by the state engineer, is reimbursable by the Division of Water Rights.

~~[(6) Any officer or employee of any state agency, county, city, or corporation, or any other person who violates the provisions of this section is guilty of a class B misdemeanor.]~~

(6) Except as provided in Subsection (2), a person who knowingly or intentionally relocates any natural stream channel, or alters the bed or bank of any natural stream channel without first obtaining the written approval of the state engineer is guilty of a crime punishable under Section 73-2-27.

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Section 9. Section **73-5-8** is amended to read:

73-5-8. Reports by users to engineer.

Every person using water from any river system or water source, when requested by the state engineer ~~[for any season]~~, shall within ~~[thirty]~~ 30 days after such request report to the state engineer in writing:

- (1) the nature of the use of any such water~~;~~;
 - (2) the area on which used ~~[and]~~;
 - (3) the kind of crops to be grown; and ~~[he shall likewise, upon such request, furnish statements of]~~
 - (4) water elevations on wells or tunnels and quantity of underground water used.
- ~~[Failure to comply with the provisions of this section shall constitute a misdemeanor.]~~

Section 10. Section **73-5-9** is amended to read:

73-5-9. Powers of state engineer as to waste, pollution, or contamination of waters.

(1) To prevent waste, loss, pollution, or contamination of any waters whether above or below the ground, the state engineer may require the repair or construction of head gates or other devices on ditches or canals, and the repair or installation of caps, valves, or casings on any well or tunnel or the plugging or filling thereof to accomplish the purposes of this section.

(2) Any requirement made by the state engineer in accordance with this section shall be executed by and at the cost and expense of the owner, lessee or person having control of such diverting works affected.

(3) If within ten days after notice of such requirement as provided in this section, the owner, lessee or person having control of the water affected, has not commenced to carry out such requirement, or if he has commenced to comply therewith but shall not thereafter proceed diligently to complete the work, the state engineer may forbid the use of water from such source until the user thereof shall comply with such requirement.

(4) Failure to comply with any requirement made by the state engineer ~~[in accordance with the provisions of]~~ under this section ~~[shall constitute a misdemeanor]~~ is a crime punishable under Section 73-2-27 if the failure to comply is knowing or intentional.

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(5) Each day that such violation is permitted to continue shall constitute a separate offense.

Section 11. Section 76-10-201 is amended to read:

76-10-201. Interference with water flow.

Every person who ~~[in any way]~~ knowingly or intentionally interferes with or alters the flow of water in any stream, ditch, or lateral while under the control or management of any water commissioner is guilty of a ~~[class B misdemeanor]~~ crime punishable under Section 73-2-27.

Section 12. Section 76-10-202 is amended to read:

76-10-202. Taking water out of turn or excess amount -- Damaging facilities.

(1) ~~[Every person who]~~ No person may, in violation of any right of any other person~~;~~ willfully turns or uses knowingly or intentionally:

(a) turn or use the water, or any part thereof, of any canal, ditch, pipeline, or reservoir, except at a time when the use of the water has been duly distributed to the person~~;~~ or willfully uses;

(b) use any greater quantity of the water than has been duly distributed to him~~;~~ or;

(c) in any way ~~[changes]~~ change the flow of water when lawfully distributed for irrigation or other useful purposes, except when duly authorized to make the change~~;~~ or ~~[willfully and maliciously breaks or injures]~~

(d) break or injure any dam, canal, pipeline, watergate, ditch, or other means of diverting or conveying water for irrigation or other useful purposes~~;~~ or.

(2) Subsection (1) applies to violations of any right to the use of water, including:

(a) a water right; or

(b) authorization of a person's use of water by:

(i) a water company, as defined in Subsection 73-3-3.5(1)(b); or

(ii) an entity having a valid water right under Utah law.

(3) Any person who violates this section is guilty of a ~~[class B misdemeanor]~~ crime punishable under Section 73-2-27.

Section 13. Section 76-10-203 is amended to read:

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76-10-203. Obstruction of watergates.

Every person who rafts or floats logs, timber, or wood down any river or stream and allows the logs, timber, or wood to accumulate at or obstruct the watergates owned by any person or irrigation company taking or diverting the water of the river or stream for irrigation or manufacturing purposes is guilty of a [~~class B misdemeanor~~] crime punishable under Section 73-2-27.

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**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

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- ▶ 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

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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

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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;

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(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.

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(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

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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

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(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.

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(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:

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(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.

SUMMARY OF BEAR LAKE/BEAR RIVER OPERATION FOR 2004 AND 2005 ALLOCATION AND ANTICIPATED OPERATION

2004 Bear Lake Operation

| | | |
|----------------------------------|-----------------------|----------------------|
| Low elevation (fall of 2003) | 5904.10 | November 10, 2003 |
| High elevation | 5905.72 | May 16, 2004 |
| Low elevation | 5903.09 | October 27, 2004 |
| Bear Lake Irrigation Allocation | 85,000 Ac. Ft. | |
| Apr. 1 runoff forecast | 17,000 Ac. Ft. (7%) | – April through July |
| Rainbow Inlet Canal (April-July) | 15,356 Ac. Ft. | |
| Outlet Canal-period of release | May 18 to September 2 | |
| Outlet Canal total release^ | 99,508 Ac. Ft. | |
| Outlet Canal storage release* | 77,049 Ac. Ft. | |
| Storage Saved | 7,951 Ac. Ft. | |

* As computed by PacifiCorp (note that the difference between the total release and the storage release is natural flow per Dietrich Decree for Mud Lake and Bear Lake Tributaries plus Rainbow Canal inflows)

Dietrich Decree Natural Flow from Lake and Bear Lake Tributaries:

April 20th to July 1st 50 CFS; July 1st to July 15th 35 CFS; July 16th to Aug 1st 25 CFS;
Aug. 1st to Sept. 15th 15 CFS

“System Loss” volume^ 10,866 Ac. Ft.

^ Due to uncontrolled flow from (welcome) rain events. Whenever water flows below Cutler during the irrigation season any storage water in the system at Cutler is the first water out. Natural flow goes to irrigators.

2005 Bear Lake Operations and Allocation

Bear Lake elevation April 17, 2004 5905.38

Lake increase since Fall low 2.29 Ft.

Bear River at Stewart Dam April – July Forecast Volume 133,000 AF (57% of average)

Estimated High Elevation 5907.0 Ft.

Irrigation Allocation 141,000 Ac. Ft. (61% of full allocation)

Anticipated Outlet Canal Operation: Storage releases beginning mid-June to mid-July

**COMPARISON OF SNOWPACK,
RUNOFF & LAKE ELEVATIONS
2005, 1980 and 1993
(Based on April 18 Conditions)**

| | <u>2005</u> | <u>1980</u> | <u>1993</u> |
|--------------------------|-------------|-------------|-------------|
| Trial Lake | 30.6 | 38.9 | 30.2 |
| Tony Grove | 43.3 | 43.2 | 39.1 |
| Kelly Ranger Station | 17.7 | n.a. | 19.6 |
| Rainbow Canal | | 344,000 | 285,000 |
| Outlet Canal | | 285,000* | 84,000 |
| Begin Irrigation Release | | July 2nd | July 11th |
| Irrigation Release total | | 97,000 | 84,000 |
| Lake High Elevation | | 5922.86 | 5911.00 |
| Increase (After April 1) | | 4.76 | 4.47 |
| Increase w/adjustment | | 7.46 | |

*188,000 Ac. Ft. Release for flood control

Bear Lake Levels

| | |
|---|----------------|
| Bear Lake level - April 1 st | 5904.63 |
| Projected High Level - 1980 conditions | 5911.90 |
| Projected High Level - 1993 conditions | 5908.90 |
| Allocation based on 1980 conditions | 215,000 |
| Allocation based on 1993 conditions | 181,000 |
| PacifiCorp allocation - 2005 | 141,000 (5907) |
| Based on April 1 Forecast | |
| 133,000 Ac. Ft. (57%) | |

| Organization | url | paths | features |
|------------------------------|---|---------------------------------------|---------------------|
| National Weather Service | http://www.cbrfc.noaa.gov | >snow>(click on site) | SNOTEL |
| NRCS | http://www.ut.nrcs.usda.gov/snow/climate/ | (Enter site Name) | Soil Moisture |
| Bear Lake Watch | http://www.bearlakewatch.com/ | >Lake Level | lake level data |
| Stonefly | http://www.bearriverbasin.org/ | >Rivers | real-time flow data |
| Watershed Information System | http://www.bearriverinfo.org/ | | every thing! |
| USGS | http://water.usgs.gov/waterwatch/ | (click on map)> mouse_over | stream flow |
| PacifiCorp | http://www.pacificorp.com/ | news&info>Water Release>Bear River | flow rates |
| Water Quality Task Force | http://www.brwqtf.org | | under construction |
| Ut Div Water Rights | http://nrwr1.nr.state.ut.us/techinfo/bearrivc/history.html | | compact history |
| State of Wyoming | http://legisweb.state.wy.us/statutes/titles/title41/c12a01.htm | | compact 1978 |
| State of Idaho | http://www.idwr.idaho.gov/hydrologic/projects/gwma | /orders/br_gwma-order_create_plan.pdf | Ground Water Plan |
| Idaho DEQ | http://www.deq.state.id.us/water/index.cfm | | |
| State of Utah | http://waterquality.utah.gov/ | | |
| Utah Div. Water Rights | http://www.waterrights.utah.gov/ | | |
| State of Wyoming | http://seo.state.wy.us/ | | |
| State of Wyoming | http://deq.state.wy.us/ | | |
| EPA | http://epa.gov/region8/water/watershed/wshedbea.htm | | old stuff |
| U.S. Fish & Wildlife | http://mountain-prairie.fws.gov.htm | >utah>Partners for Wildlife in Utah | Riparian Project |
| Idaho Rivers United | http://www.idahorivers.org/hydrobear.html | | citizen's view |
| | http://www.justaskjack.org | | |