

DEPARTMENT OF NATURAL RESOURCES

CONCEPT PAPER FOR SURFACE WATER AND GROUND WATER SUBCOMMITTEE

SUBJECT: Administrative Penalty Fees

May 2007

CONCEPT: Nebraska currently has laws that state that taking water without approval of the Department is a Class II misdemeanor. Each day that the water is allowed to run without authority from the department shall constitute a separate offense (§ 46-254). A class II misdemeanor carries a maximum six months imprisonment or \$1000 fine.

Several states have gone to an administrative penalty system rather than a civil penalty or a criminal penalty system as it relates to non-compliance with water administration activities. The basis for this change from the state's perspective is the unwillingness of local attorneys to prosecute (whether it is because of political reasons or that they do not see this as being of importance when compared to other issues) and the fact that many times the criminal or civil penalties are so small that it is economically sound for the user to not comply and pay a small penalty. It is also very difficult for an agency to have sufficient staff to monitor someone on a daily basis and verify actual use each day to get separate offenses.

The administrative penalties are based upon such things as knowingly violating, non-compliance after notice, and the economic gain that the violator received from such non-compliance.

Recently in a discussion with other states about how administrative penalties work, they gave the example that a farmer had a water right for 50 acres, but actually irrigated 120 acres with that water. The state determined the economic impact to the farmer of the irrigated crop on 70 acres and a fee was based on such economic gain. The administrative penalty was about \$55,000. In addition, the state then requires the farmer to pay back the water twofold. In certain instances that means the farmer cannot irrigate for two years. In some instances, the farmer purchases water from somewhere else to pay back the water. The state of Utah discussed a penalty that amounted to \$110,000.

Attached are copies of rules or information regarding such fees from two states. Laws would have to be drafted allowing for such penalties. There is also a requirement for an appeal process.

Kansas Water Appropriation Act

➤ KSA 82a-737 passed in 2001

➤ Civil Enforcement

➤ Up to \$1000 penalty per day per violation

KANSAS DEPARTMENT OF AGRICULTURE DIVISION OF WATER RESOURCES

Enforcement Notice Form

Subject: _____
Violation: _____



DATE _____
FILE NO. _____

- CATEGORY 1 \$100.00 base and up
 - Threat to divert
 - Unauthorized PUse < 10 acres
 - Excessive rate < 115%
 - Failure to maintain meter/wm device
 - Other
- CATEGORY 2 \$500.00 base - up or down
 - Unauthorized PUse > 10 acres
 - Conservation Plan failure
 - Waste of Water
 - Excessive rate > 115%
 - Failure to install meter
 - Failure to make required special reports
 - Exceeding authorized annual quantity
 - Unauthorized UMW
- CATEGORY 3 \$1000.00 base - or less
 - Meter tampering
 - Failure to timely install meter/wm device
 - Falsifying water use/other data
 - Denying access to DWR personnel
 - Violating Cease & Desist Order
 - Impeding to securing water

	Stage 1 Base Penalty	Stage 2 Prior Violations	Stage 3 Intentional Non-compliance
<input type="checkbox"/> Threat to divert	\$100.00	Add \$100.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Unauthorized PUse < 10 acres	\$100.00		
<input type="checkbox"/> Excessive rate < 115%	\$100.00		
<input type="checkbox"/> Failure to maintain meter/wm device	\$100.00		
<input type="checkbox"/> Other	\$100.00		
<input type="checkbox"/> Unauthorized PUse > 10 acres	\$500.00	Add \$200.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Conservation Plan failure	\$500.00		
<input type="checkbox"/> Waste of Water	\$500.00		
<input type="checkbox"/> Excessive rate > 115%	\$500.00		
<input type="checkbox"/> Failure to install meter	\$500.00		
<input type="checkbox"/> Failure to make required special reports	\$500.00		
<input type="checkbox"/> Exceeding authorized annual quantity	\$500.00		
<input type="checkbox"/> Unauthorized UMW	\$500.00		
<input type="checkbox"/> Meter tampering	\$1,000.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Failure to timely install meter/wm device	\$1,000.00		
<input type="checkbox"/> Falsifying water use/other data	\$1,000.00		
<input type="checkbox"/> Denying access to DWR personnel	\$1,000.00		
<input type="checkbox"/> Violating Cease & Desist Order	\$1,000.00		
<input type="checkbox"/> Impeding to securing water	\$1,000.00		

- ADJUSTMENTS TO PENALTY:
 - Minus \$100.00
 - Minus \$250.00
 - Minus \$500.00
 - Minus \$750.00
 - Add \$100.00
 - Add \$250.00
 - Add \$500.00
 - Add \$750.00

SUSPENSION
 MODIFY WATER RIGHT

JUSTIFICATION / COMMENTS: _____

Penalty: \$ _____ Signed: _____

KANSAS DEPARTMENT OF AGRICULTURE DIVISION OF WATER RESOURCES



NOTICE OF NON-COMPLIANCE

DATE _____
FILE NO. _____

Except for domestic use, the Kansas Water Appropriation Act, K.S.A. 82a-701, et seq., establishes requirements for all diversion of water within the state. Every water right of every kind includes terms and conditions with which the water user must comply. This document indicates a compliance problem may exist which needs your attention.

TO: _____

Your attention to this Notice is required. Please take corrective action by _____.

This notice may not be a complete listing of all violations which may be identified for the file number referenced above.

Any response to this notice must be submitted to:

Division of Water Resources
Field Office
Address
City, State, Zip

Telephone: (xxx) xxx-xxxx
FAX: (xxx) xxx-xxxx

By: _____

Description of Non-Compliance _____

More Information on reverse

Date Entered _____ by _____

CITATION:

K.A.R. 5-14-10 (c)(1) - CATEGORY 1

- (A) Threat to divert water without a permit
- (B) Unauthorized Place of Use < 10 acres
- (C) Excessive rate of diversion < 115%
- (D) Failure to maintain meter/wm device
- (E) Other _____

K.A.R. 5-14-10 (d)(1) - CATEGORY 2

- (A) Unauthorized Point of Diversion
- (B) Unauthorized Place of Use > 10 acres
- (C) Water Conservation Plan Failure
- (D) Waste of Water
- (E) Excessive rate of diversion > 115%
- (F) Failure to install a meter as required
- (G) Failure to make required special reports
- (H) Exceeding authorized annual quantity
 - _____ water use report
 - From Field Investigation
- (I) Unauthorized Use Made of Water

K.A.R. 5-14-10 (j)(1) - CATEGORY 3

- (A) Meter tampering
- (B) Altering meter readings
- (C) Failure to timely install meter/wm device
- (D) Falsifying water use/other data
- (E) Denying access to DWR personnel
- (F) Violating Cease & Desist Order
- (G) Impediment to securing water

Failure to comply with the Water Appropriation Act and associated regulations may result in civil penalties, suspension, and/or civil injunction.

Kansas Water Appropriation Act

> KSA 82a-737 passed in 2001

> Civil Enforcement

> Up to \$1000 penalty per day per violation

**KANSAS DEPARTMENT OF AGRICULTURE
DIVISION OF WATER RESOURCES**
Enforcement Matrix Form



DATE _____
FILE NO. _____

Subject: _____
Violation: _____

- CATEGORY 1 \$100.00 base and up**
- Threat to divert
 - Unauthorized PUse < 10 acres
 - Excessive rate < 115%
 - Failure to maintain meter/wm device
 - Other

- CATEGORY 2 \$500.00 base - up or down**
- Unauthorized P/D
 - Unauthorized PUse > 10 acres
 - Conservation Plan failure
 - Waste of Water
 - Excessive rate > 115%
 - Failure to install meter
 - Failure to make required special reports
 - Exceeding authorized annual quantity
 - Unauthorized U/W

- CATEGORY 3 \$1000.00 base - or less**
- Meter tampering
 - Failure to timely install meter/wm device
 - Falsifying water use /other data
 - Denying access to DWR personnel
 - Violating Cease & Desist Order
 - Impediment to securing water

ADJUSTMENTS TO PENALTY:

	Stage 1 Base Penalty	Stage 2 Prior Violations	Stage 3 Intentional Non-compliance
<input type="checkbox"/> (1) \$100.00	\$100.00	Add \$100.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> (2) \$500.00	\$500.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> (3) \$1,000.00	\$1,000.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> (4) Minus \$100.00			
<input type="checkbox"/> (5) Minus \$250.00			
<input type="checkbox"/> (6) Minus \$500.00			
<input type="checkbox"/> (7) Minus \$750.00			
<input type="checkbox"/> (8) Add \$100.00			
<input type="checkbox"/> (9) Add \$250.00			
<input type="checkbox"/> (10) Add \$500.00			
<input type="checkbox"/> (11) Add \$750.00			

SUSPENSION

MODIFY WATER RIGHT

JUSTIFICATION / COMMENTS: _____

Penalty: \$ _____

Signed: _____

**KANSAS DEPARTMENT OF AGRICULTURE
DIVISION OF WATER RESOURCES**



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More information on reverse

Date Entered _____ by _____

CITATION:

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- (A) Threat to divert water without a permit
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K.A.R. 5-14-10 (d)(1) - CATEGORY 2

- (A) Unauthorized Point of Diversion
- (B) Unauthorized Place of Use > 10 acres
- (C) Water Conservation Plan Failure
- (D) Waste of Water
- (E) Excessive rate of diversion > 115%
- (F) Failure to install a meter as required
- (G) Failure to make required special reports
- (H) Exceeding authorized annual quantity
 - _____ water use report
 - From Field Investigation
- (I) Unauthorized Use Made of Water

K.A.R. 5-13-10 (j)(1) - CATEGORY 3

- (A) Meter tampering
- (B) Altering meter readings
- (C) Failure to timely install meter/wm device
- (D) Falsifying water use /other data
- (E) Denying access to DWR personnel
- (F) Violating Cease & Desist Order
- (G) Impediment to securing water

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Kansas Water Appropriation Act

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> Up to \$1000 penalty per day per violation

KANSAS DEPARTMENT OF AGRICULTURE DIVISION OF WATER RESOURCES



DATE: _____
FILE NO. _____

Enforcement Matrix Form:

Subject:
Violation:

	Stage 1 Base Penalty	Stage 2 Prior Violations	Stage 3 Intentional Non-compliance
CATEGORY 1 \$100.00 base and up			
<input type="checkbox"/> Threat to divert	(1) \$100.00	Add \$100.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Unauthorized PUse < 10 acres	(2) \$100.00		
<input type="checkbox"/> Excessive rate < 115%	(3) \$100.00		
<input type="checkbox"/> Failure to maintain meter/wm device	(4) \$100.00		
<input type="checkbox"/> Other	(5) \$100.00		
CATEGORY 2 \$500.00 base - up or down			
<input type="checkbox"/> Unauthorized PD	(1) \$500.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Unauthorized PUse > 10 acres	(2) \$500.00		
<input type="checkbox"/> Conservation Plan failure	(3) \$500.00		
<input type="checkbox"/> Waste of Water	(4) \$500.00		
<input type="checkbox"/> Excessive rate > 115%	(5) \$500.00		
<input type="checkbox"/> Failure to install meter	(6) \$500.00		
<input type="checkbox"/> Failure to make required special reports	(7) \$500.00		
<input type="checkbox"/> Exceeding authorized annual quantity	(8) \$500.00		
<input type="checkbox"/> Unauthorized UMW	(9) \$500.00		
CATEGORY 3 \$1000.00 base - or less			
<input type="checkbox"/> Meter tampering	(1) \$1,000.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Failure to timely install meter/wm device	(2) \$1,000.00		
<input type="checkbox"/> Falsifying water use rother data	(3) \$1,000.00		
<input type="checkbox"/> Denying access to DWR personnel	(4) \$1,000.00		
<input type="checkbox"/> Violating Class 8 Desist Order	(5) \$1,000.00		
<input type="checkbox"/> Impediment to securing water	(6) \$1,000.00		
ADJUSTMENTS TO PENALTY:			
<input type="checkbox"/> Minus \$100.00	(1) Minus \$100.00	(1) Add \$100.00	
<input type="checkbox"/> Minus \$250.00	(2) Minus \$250.00	(2) Add \$250.00	
<input type="checkbox"/> Minus \$500.00	(3) Minus \$500.00	(3) Add \$500.00	
<input type="checkbox"/> Minus \$750.00	(4) Minus \$750.00	(4) Add \$750.00	

SUSPENSION
 MODIFY WATER RIGHT

JUSTIFICATION / COMMENTS:

Penalty: \$ _____

Signed: _____

KANSAS DEPARTMENT OF AGRICULTURE DIVISION OF WATER RESOURCES



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By:

Description of Non-Compliance

More Information on reverse

DWR 1 (Rev. 1-2011)

CITATION:

K.A.R. 5-14-10 (c)(1) - CATEGORY 1

- (A) Threat to divert water without a permit
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K.A.R. 5-14-10 (d)(1) - CATEGORY 2

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- (H) Exceeding authorized annual quantity
 - _____ water use report
 - From Field Investigation
- (I) Unauthorized Use Made of Water

K.A.R. 5-13-10 (a)(1) - CATEGORY 3

- (A) Meter Tampering
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- (C) Failure to timely install meter/wm device
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Date Entered _____ by _____

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DATE _____
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D CATEGORY 1 \$100.00 base and up

- Threat to divert
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	Stage 1 Base Penalty	Stage 2 Prior Violations	Stage 3 Intentional Non-compliance
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D CATEGORY 2 \$500.00 base - up or down			
<input type="checkbox"/> Unauthorized PD	\$500.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Unauthorized PUse > 10 acres	\$500.00		
<input type="checkbox"/> Conservation Plan failure	\$500.00		
<input type="checkbox"/> Waste of Water	\$500.00		
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<input type="checkbox"/> Failure to install meter	\$500.00		
<input type="checkbox"/> Failure to make required special reports	\$500.00		
<input type="checkbox"/> Exceeding authorized annual quantity	\$500.00		
<input type="checkbox"/> Unauthorized UMW	\$500.00		
D CATEGORY 3 \$1000.00 base - or less			
<input type="checkbox"/> Meter tampering	\$1,000.00	Add \$250.00 each offense	Add \$100.00 per day offense after notification
<input type="checkbox"/> Failure to timely install meter/wm device	\$1,000.00		
<input type="checkbox"/> Falsifying water use/other data	\$1,000.00		
<input type="checkbox"/> Denying access to DWR personnel	\$1,000.00		
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<input type="checkbox"/> Impediment to securing water	\$1,000.00		

D ADJUSTMENTS TO PENALTY:

- Minus \$100.00
- Minus \$250.00
- Minus \$500.00
- Minus \$750.00
- Add \$100.00
- Add \$250.00
- Add \$500.00
- Add \$750.00

- SUSPENSION
- MODIFY WATER RIGHT

JUSTIFICATION / COMMENTS: _____

Penalty: \$ _____

Signed: _____

KANSAS DEPARTMENT OF AGRICULTURE DIVISION OF WATER RESOURCES



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K.A.R. 5-14-10 (e)(1) - CATEGORY 3

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- (B) Altering meter readings
- (C) Failure to timely install meter/wm device
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By: _____

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Description of Non-Compliance: _____

Micro Information on reverse

Date Entered _____ by _____

(6) A respondent who fails to timely contest an IO waives any right of reconsideration of the Final Judgment and Order per Utah Admin. Code R655-14-25.

R655-14-12. Assessment of Administrative Penalties and Administrative Costs.

(1) Pursuant to Utah Code Ann. Sections 73-2-1, 73-2-25, and 26, and these rules, the Presiding Officer, may assess administrative penalties and administrative costs for any violation of the Water and Irrigation Code as set forth in Utah Code Ann. Sections 73-1-1 through 73-5a et seq. Such penalties and costs may be assessed either before or after a hearing.

(2) No penalty shall exceed the maximum penalty allowed by State law for the violation(s). The maximum administrative penalty that the Presiding Officer has authority to impose is determined by reference to the civil penalty provision of Utah Code Ann. Section 73-2-26(1) as may be amended.

(3) Each day which the violation is repeated, continued or remains in place, constitutes a separate violation. The Presiding Officer may assess an administrative penalty, not to exceed five thousand dollars (\$5,000) for each knowing violation or one thousand dollars (\$1,000) for each unknowing violation.

(4) The penalty imposed shall begin on the first day the violation occurred, and continues to accrue through and including the day the Notice of Violation, Cease and Desist Order, or Final Judgment and Order is issued until compliance is achieved.

(5) The amount of the penalty shall be calculated based on:

(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 respondent subject to fine or replacement attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(6) Administrative costs, interest, late payment charges, costs of compliance inspections, and collection costs may be assessed in addition to the administrative penalty. These include:

(a) Administrative costs: Time spent by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the each employee's hourly rate, including salary, benefits, overhead and other directly related costs.

(b) Late payment charges: due at the monthly percentage rate assessed by the Utah Division of Finance, Office of Debt Collections.

(c) Compliance inspections: based on staff time at the full cost of the hourly rate, including salary, benefits, overhead and other directly related costs.

(d) Collection costs: actual collection costs.

(7) The Division may report the total amount of administrative fines and/or administrative costs assessed to consumer reporting agencies and pursue collection as provided by Utah law.

(8) Any monies collected under Utah Code Ann. Section 73-2-26 and these rules shall be deposited into the General Fund.

R655-14-13. Replacement and Mitigation.

(1) In addition to administrative fines and costs, the Presiding Officer, in accordance with Utah Code Ann. Sections 73-2-1, 73-2-25 and 73-2-26 and these rules, may order the respondent to mitigate damages caused by the violation and/or replace up to 200 percent of the water unlawfully taken.

(2) The Presiding Officer may require actual replacement of water after:

(a) a respondent fails to request judicial review of a final order issued under Utah Code Ann. Section 73-2-25; or

(b) the completion of judicial review, including any appeals.

(3) Pursuant to Utah Code Ann. Section 73-2-26, the Presiding Officer shall consider, before ordering replacement of water, the following factors:

(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 respondent attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(4) The Presiding Officer may order the respondent to submit a mitigation plan to replace groundwater or surface water, which shall be submitted in writing and contain the following information:

(a) The name and mailing address of the respondent or persons submitting the plan;

(b) The case number the Division assigned to the IO which is the basis of the mitigation plan;

(c) Identification of the water rights or property for which the mitigation plan is proposed;

- (d) A description of the mitigation plan; and
 - (e) Any information that assists the State Engineer in evaluating whether the proposed mitigation plan is acceptable.
- (5) If the mitigation plan is submitted for the purpose of replacing water, the factors the State Engineer may consider to determine if the plan is acceptable include, but are not limited to:
- (a) Whether the mitigation plan provides for the respondent to forgo use of a vested water right owned or leased by him until water is replaced to the Presiding Officer's satisfaction;
 - (b) The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan; and
 - (c) Whether the mitigation plan provides for monitoring and adjustment as necessary to protect vested water rights.
- (6) As provided in Utah Code Ann. Section 73-2-26, water replaced shall be taken from water that the respondent subject to the order requiring replacement would be entitled to use during the replacement period.
- (7) In accordance with Utah Code Ann. Section 73-2-26(5)(a), or any other statutory authority, the Division may record any order requiring water replacement in the office of the county recorder where the place of use or water right is located. Any subsequent transferee of such property shall be responsible for complying with the requirements of said order.
- (8) If the mitigation plan is submitted for the purpose of restoring a natural stream channel altered in violation of Section 73-3-29, the factors the State Engineer may consider to determine if the plan is sufficient include, but are not limited to:
- (a) Whether the mitigation plan provides for reasonable means of replacing natural vegetation injured by the unlawful stream channel alteration;
 - (b) Whether the mitigation plan provides for a reasonable means to restore the bed and bank of the natural stream channel to its condition prior to the alteration;
 - (c) Whether the mitigation plan will not impair vested water rights;
 - (d) Whether the mitigation plan unreasonably or unnecessarily affects any recreation use or the natural stream environment;
 - (e) Whether the mitigation plan unreasonably or unnecessarily endangers aquatic wildlife;
 - (f) Whether the mitigation plan unreasonably or unnecessarily diminishes the natural channel's ability to conduct high flows; and

(g) Whether the mitigation plan uses generally accepted and appropriate engineering methods.

R655-14-14. Procedures For Determining The Amounts of Administrative Penalties, Enforcement Costs and Water Replacement.

(1) For water rights violations per Utah Code Ann. Section 73-2-25(2)(a)(i) through (v), the following procedures shall be employed:

(a) Administrative Fines: This penalty shall be based primarily on the actual economic benefit estimated to result or potentially to result from the violation. The economic benefit may come in the form of a direct economic benefit as income derived directly from the unlawful activity and it may come in the form of avoided costs that would otherwise be incurred in order to comply with a specific statute, rule, notice or order from the State Engineer. The administrative fine assessment procedure used (direct economic benefit or avoided costs) will be that which produces the greater fine. In order to implement the punitive intent of this penalty, a multiplier is to be calculated and applied to the estimated actual direct economic benefit or avoided costs.

(i) "Direct Economic Benefit" Initial Administrative Fine Calculations. The initial administrative fine shall be calculated in the following manner:

(A) The daily economic benefit is the gross income that could potentially be realized from the violation (without regard for production costs, taxes, etc.) through a full period of beneficial use, divided by the number of days in the period of beneficial use.

(B) The daily administrative fine amount is the product of the daily economic benefit and the multiplier to be calculated as described in paragraph (ii) below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation to date of the IO.

(D) The total initial administrative fine will have a maximum value of four times the direct economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(ii) The multiplier for penalties based on direct economic benefit shall be calculated utilizing the following statutory considerations. (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in the calculations of the economic "benefit" and "injury.")

(A) Whether the violation was committed knowingly or unknowingly;

- (B) The economic injury to others;
 - (C) The length of time over which the violation has occurred;
- and
- (D) The violator's efforts to comply. The multiplier is the sum of the points calculated using the following table:

TABLE
DIRECT ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Length of violation	
Three (3) or more years of violation	1.00
More than one (1), but less that three (3) years of violation	0.75
One (1) year or less of violation	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(iii) "Avoided Cost Economic Benefit" Initial Administrative Fine Calculation: Because all enforcement activities for violations under Utah Code Ann. Section 73-2-25(2)(a)(iii) through (v), must statutorily result from violation of a prior notice or order, an economic benefit will often result from an avoided cost of compliance. Statute provides for a daily administrative fine with the day following the compliance date in the notice or order being counted as the first day of violation. The economic benefit and daily administrative fine for an "avoided cost economic benefit" shall be calculated in the following manner:

- (A) The economic benefit is equal to the estimated avoided costs of failing to implement specific actions required by a notice or order from the State Engineer.

(B) The daily administrative fine is initially calculated as the product of \$100.00 or 5.00% of the economic benefit, whichever is greater, and the multiplier to be calculated as described in paragraph (iv), below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation preceding the date of the IO.

(D) The total initial administrative fine will have a maximum value of three times the economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(iv) The statutory considerations applicable to producing the multiplier for an avoided cost economic benefit are: (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in calculations of the economic "benefit" and "injury.").

(A) Whether the violation was committed knowingly or unknowingly;

(B) The economic injury to others; and

(C) The violator's efforts to comply. The penalty multiplier is the sum of the points resulting from the following table:

TABLE
AVOIDED COST ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(b) Replacement of Water: This penalty will be initially calculated as 100% of the amount unlawfully taken times the multiplier previously calculated, but not to exceed 200% of that unlawfully taken. If replacement of water unlawfully taken is deemed not feasible, this penalty will not be further considered.

(c) Reimbursement of Enforcement Costs: This penalty will be initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the IO.

(2) For violations related to unlawful natural stream channel alteration or dam safety regulations per Utah Code Ann. Section 73-2-25(1)(a)(vi) through (vii), the following procedures shall be employed:

(a) Daily Administrative Fine: All enforcement activities for unlawful natural stream alteration or dam safety violations must statutorily result from violation of a prior notice or order. Statute provides for a daily administrative fine with the day following the compliance date in the notice/order being counted as the first day of violation. The calculated daily administrative fine would apply to violations continuing beyond the compliance date set forth in the notice or order. The economic benefit and daily administrative fine shall be calculated in the following manner:

(i) For stream alteration and dam safety violations, the economic benefit is typically equal to the avoided costs deriving from:

(A) Initiating an activity without the benefit of proper permitting and/or,

(B) Failing to implement specific actions required by a notice, order or permit from the State Engineer.

(ii) The daily administrative fine is initially calculated as \$100 or 5.00% of the economic benefit, whichever is greater, times the multiplier to be calculated as described in paragraph (iii), below, but not to exceed the statutory maximum (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation).

(iii) The penalty multiplier is calculated as the sum of the points resulting from the following tables:

**TABLE
STREAM ALTERATION PENALTY MULTIPLIER**

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Natural stream environment harmed to significant levels not readily reversible by mitigation efforts	1.00
Natural stream environment harmed to moderate levels partially reversible by mitigation efforts	0.75
Natural stream environment harmed to minor levels readily reversible by mitigation efforts	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made no reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

DAM SAFETY PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) related to building, enlarging or substantially altering same without prior approval or authorization; OR	
2) addressing an existing unsafe condition	1.00
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) addressing a developing unsafe condition OR	
2) requiring monitoring or critical dam performance indicators; OR	
failure to prepare and file acceptable required operational documents, OR	
failure to comply with a notice or order for a low-hazard dam related to building, enlarging or substantially altering same without prior authorization	0.75
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam related to routine operation or maintenance activities, OR	
failure to comply with a notice or order for a low-hazard dam to address an existing or developing unsafe condition	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

(b) Reimbursement of Enforcement Costs is initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the Initial Order.

(3) Post-Initial Order penalty adjustments: Subsequent to issuance of the IO, the Presiding Officer may make adjustments to the initial administrative fine, the requirement for replacement of water unlawfully taken, requirements for mitigation

of the effects of unlawful natural stream channel alterations or violations of dam safety regulations, and/or the requirement for reimbursement of enforcement costs. Such adjustments may be based on one or more of the following considerations:

(a) Errors or Omissions in Calculation of the Initial Penalty: If the violator or Division can show by acceptable evidence or testimony that any fact used in calculation of the economic benefit or the penalty multiplier was in error, or that a significant fact or group of facts was omitted from consideration, the Presiding Officer shall recalculate the initial penalties taking consideration of the corrected or additional fact(s).

(b) Reduction in Penalty Multiplier: The penalty multiplier used in calculating the Initial Administrative Fine may be reduced according to the table shown below on the basis of the violator's efforts to comply after receiving the IO.

TABLE
PENALTY MULTIPLIER REDUCTION

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Violator's efforts to comply with the Initial Order	
Violator has made extraordinary efforts to successfully achieve full and prompt compliance with the IO.	1.00
Violator has made efforts to successfully achieve full and prompt compliance with the IO, but these efforts are not extraordinary	0.50
Violator has made efforts that achieve full compliance with the IO, but the efforts were neither extraordinary nor prompt	0.25
Violator has made no efforts to comply or has made efforts that fail to achieve full compliance with the IO	0.00

If the Presiding Officer determines that the penalty multiplier should be reduced according to the table above, the appropriate number of points will be subtracted from the penalty multiplier used in calculating the initial administrative penalty and the penalty will be re-calculated with the new multiplier.

(c) Failure to take reasonable and effective measures to achieve full and prompt compliance with the requirements of the IO will allow the daily administrative fines to continue to accrue as provided in rule at Utah Admin. Code R655-14-12(4) until full compliance is achieved.

(d) Adjustments to recovery of enforcement costs:

(ii) If the violator can show by acceptable evidence or testimony that any expense incurred by the Division and assessed for reimbursement resulted from

activities not pertinent to the violation, the Presiding Officer may reduce that portion of the initial reimbursement penalty accordingly.

(iii) Pursuit of an enforcement action after issuance of the IO will continue to require the expenditure of varying amounts of staff time and may require acquisition and analysis of special data or information. Such costs may be added to the initial reimbursement requirement, specifically including all costs incurred that are unique to the particular enforcement action under consideration.

(e) Mitigating Factors: Other factors which the Presiding Officer may consider in amendment of initial penalties for incorporation into a Final Order or Consent Order may include, as appropriate:

(i) Ability to pay: This factor will be considered only if raised by a Respondent and only if the Respondent provides all necessary information to evaluate the claim. The burden to demonstrate inability to pay rests solely on the Respondent. The Presiding Officer shall disregard this factor if a Respondent fails to provide sufficient or persuasive financial information.

If it is determined that a Respondent cannot afford the initial administrative fine or other initial penalty prescribed by this rule without suffering financial bankruptcy, or if it is determined that payment of all or a portion of the monetary fines or penalties will preclude the Respondent from achieving compliance or from carrying out remedial measures which are deemed more important than the deterrent effect of the administrative penalties, the following options may be considered by the Presiding Officer:

(A) A delayed payment schedule;

(B) An installment payment plan with a reasonable rate of interest; or

(C) A direct reduction of the initial administrative fines and/or penalties, but only as a last recourse.

R655-14-15. Procedures for Commencing an Adjudicative Enforcement Action.

(1) The procedures for water enforcement adjudicative proceedings are as follows:

(a) In proceedings initiated by a IO, the Presiding Officer shall issue a default order unless the respondent does one of the following within fourteen (14) days in response to service of the notice:

(i) Ceases the violation and pays the administrative penalty and cost in full; or,

(ii) Files with the Division a proper written response within the fourteen (14) day time period but waives a hearing and submits its case upon the record. Submission of a case without a hearing does not relieve the respondent

of the effects of unlawful natural stream channel alterations or violations of dam safety regulations, and/or the requirement for reimbursement of enforcement costs. Such adjustments may be based on one or more of the following considerations:

(a) Errors or Omissions in Calculation of the Initial Penalty: If the violator or Division can show by acceptable evidence or testimony that any fact used in calculation of the economic benefit or the penalty multiplier was in error, or that a significant fact or group of facts was omitted from consideration, the Presiding Officer shall recalculate the initial penalties taking consideration of the corrected or additional fact(s).

(b) Reduction in Penalty Multiplier: The penalty multiplier used in calculating the Initial Administrative Fine may be reduced according to the table shown below on the basis of the violator's efforts to comply after receiving the IO.

TABLE
PENALTY MULTIPLIER REDUCTION

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Violator's efforts to comply with the Initial Order	
Violator has made extraordinary efforts to successfully achieve full and prompt compliance with the IO.	1.00
Violator has made efforts to successfully achieve full and prompt compliance with the IO, but these efforts are not extraordinary	0.50
Violator has made efforts that achieve full compliance with the IO, but the efforts were neither extraordinary nor prompt	0.25
Violator has made no efforts to comply or has made efforts that fail to achieve full compliance with the IO	0.00

If the Presiding Officer determines that the penalty multiplier should be reduced according to the table above, the appropriate number of points will be subtracted from the penalty multiplier used in calculating the initial administrative penalty and the penalty will be re-calculated with the new multiplier.

(c) Failure to take reasonable and effective measures to achieve full and prompt compliance with the requirements of the IO will allow the daily administrative fines to continue to accrue as provided in rule at Utah Admin. Code R655-14-12(4) until full compliance is achieved.

(d) Adjustments to recovery of enforcement costs:

(ii) If the violator can show by acceptable evidence or testimony that any expense incurred by the Division and assessed for reimbursement resulted from

DAM SAFETY PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) related to building, enlarging or substantially altering same without prior approval or authorization; OR	
2) addressing an existing unsafe condition	1.00
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) addressing a developing unsafe condition OR	
2) requiring monitoring or critical dam performance indicators; OR	
failure to prepare and file acceptable required operational documents, OR	
failure to comply with a notice or order for a low-hazard dam related to building, enlarging or substantially altering same without prior authorization	0.75
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam related to routine operation or maintenance activities, OR	
failure to comply with a notice or order for a low-hazard dam to address an existing or developing unsafe condition	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

(b) Reimbursement of Enforcement Costs is initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the Initial Order.

(3) Post-Initial Order penalty adjustments: Subsequent to issuance of the IO, the Presiding Officer may make adjustments to the initial administrative fine, the requirement for replacement of water unlawfully taken, requirements for mitigation

**TABLE
STREAM ALTERATION PENALTY MULTIPLIER**

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Natural stream environment harmed to significant levels not readily reversible by mitigation efforts	1.00
Natural stream environment harmed to moderate levels partially reversible by mitigation efforts	0.75
Natural stream environment harmed to minor levels readily reversible by mitigation efforts	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made no reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

(b) Replacement of Water: This penalty will be initially calculated as 100% of the amount unlawfully taken times the multiplier previously calculated, but not to exceed 200% of that unlawfully taken. If replacement of water unlawfully taken is deemed not feasible, this penalty will not be further considered.

(c) Reimbursement of Enforcement Costs: This penalty will be initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the IO.

(2) For violations related to unlawful natural stream channel alteration or dam safety regulations per Utah Code Ann. Section 73-2-25(1)(a)(vi) through (vii), the following procedures shall be employed:

(a) Daily Administrative Fine: All enforcement activities for unlawful natural stream alteration or dam safety violations must statutorily result from violation of a prior notice or order. Statute provides for a daily administrative fine with the day following the compliance date in the notice/order being counted as the first day of violation. The calculated daily administrative fine would apply to violations continuing beyond the compliance date set forth in the notice or order. The economic benefit and daily administrative fine shall be calculated in the following manner:

(i) For stream alteration and dam safety violations, the economic benefit is typically equal to the avoided costs deriving from:

(A) Initiating an activity without the benefit of proper permitting and/or,

(B) Failing to implement specific actions required by a notice, order or permit from the State Engineer.

(ii) The daily administrative fine is initially calculated as \$100 or 5.00% of the economic benefit, whichever is greater, times the multiplier to be calculated as described in paragraph (iii), below, but not to exceed the statutory maximum (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation).

(iii) The penalty multiplier is calculated as the sum of the points resulting from the following tables:

(B) The daily administrative fine is initially calculated as the product of \$100.00 or 5.00% of the economic benefit, whichever is greater, and the multiplier to be calculated as described in paragraph (iv), below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation preceding the date of the IO.

(D) The total initial administrative fine will have a maximum value of three times the economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(iv) The statutory considerations applicable to producing the multiplier for an avoided cost economic benefit are: (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in calculations of the economic "benefit" and "injury.").

(A) Whether the violation was committed knowingly or unknowingly;

(B) The economic injury to others; and

(C) The violator's efforts to comply. The penalty multiplier is the sum of the points resulting from the following table:

TABLE
AVOIDED COST ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

- (B) The economic injury to others;
 - (C) The length of time over which the violation has occurred;
- and
- (D) The violator's efforts to comply. The multiplier is the sum of the points calculated using the following table:

TABLE
DIRECT ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000.	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Length of violation	
Three (3) or more years of violation	1.00
More than one (1), but less that three (3) years of violation	0.75
One (1) year or less of violation.	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(iii) "Avoided Cost Economic Benefit" Initial Administrative Fine Calculation: Because all enforcement activities for violations under Utah Code Ann. Section 73-2-25(2)(a)(iii) through (v), must statutorily result from violation of a prior notice or order, an economic benefit will often result from an avoided cost of compliance. Statute provides for a daily administrative fine with the day following the compliance date in the notice or order being counted as the first day of violation. The economic benefit and daily administrative fine for an "avoided cost economic benefit" shall be calculated in the following manner:

- (A) The economic benefit is equal to the estimated avoided costs of failing to implement specific actions required by a notice or order from the State Engineer.

(g) Whether the mitigation plan uses generally accepted and appropriate engineering methods.

R655-14-14. Procedures For Determining The Amounts of Administrative Penalties, Enforcement Costs and Water Replacement.

(1) For water rights violations per Utah Code Ann. Section 73-2-25(2)(a)(i) through (v), the following procedures shall be employed:

(a) Administrative Fines: This penalty shall be based primarily on the actual economic benefit estimated to result or potentially to result from the violation. The economic benefit may come in the form of a direct economic benefit as income derived directly from the unlawful activity and it may come in the form of avoided costs that would otherwise be incurred in order to comply with a specific statute, rule, notice or order from the State Engineer. The administrative fine assessment procedure used (direct economic benefit or avoided costs) will be that which produces the greater fine. In order to implement the punitive intent of this penalty, a multiplier is to be calculated and applied to the estimated actual direct economic benefit or avoided costs.

(i) "Direct Economic Benefit" Initial Administrative Fine Calculations. The initial administrative fine shall be calculated in the following manner:

(A) The daily economic benefit is the gross income that could potentially be realized from the violation (without regard for production costs, taxes, etc.) through a full period of beneficial use, divided by the number of days in the period of beneficial use.

(B) The daily administrative fine amount is the product of the daily economic benefit and the multiplier to be calculated as described in paragraph (ii) below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation to date of the IO.

(D) The total initial administrative fine will have a maximum value of four times the direct economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(ii) The multiplier for penalties based on direct economic benefit shall be calculated utilizing the following statutory considerations. (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in the calculations of the economic "benefit" and "injury.")

(A) Whether the violation was committed knowingly or unknowingly;

(d) A description of the mitigation plan; and

(e) Any information that assists the State Engineer in evaluating whether the proposed mitigation plan is acceptable.

(5) If the mitigation plan is submitted for the purpose of replacing water, the factors the State Engineer may consider to determine if the plan is acceptable include, but are not limited to:

(a) Whether the mitigation plan provides for the respondent to forgo use of a vested water right owned or leased by him until water is replaced to the Presiding Officer's satisfaction;

(b) The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan; and

(c) Whether the mitigation plan provides for monitoring and adjustment as necessary to protect vested water rights.

(6) As provided in Utah Code Ann. Section 73-2-26, water replaced shall be taken from water that the respondent subject to the order requiring replacement would be entitled to use during the replacement period.

(7) In accordance with Utah Code Ann. Section 73-2-26(5)(a), or any other statutory authority, the Division may record any order requiring water replacement in the office of the county recorder where the place of use or water right is located. Any subsequent transferee of such property shall be responsible for complying with the requirements of said order.

(8) If the mitigation plan is submitted for the purpose of restoring a natural stream channel altered in violation of Section 73-3-29, the factors the State Engineer may consider to determine if the plan is sufficient include, but are not limited to:

(a) Whether the mitigation plan provides for reasonable means of replacing natural vegetation injured by the unlawful stream channel alteration;

(b) Whether the mitigation plan provides for a reasonable means to restore the bed and bank of the natural stream channel to its condition prior to the alteration;

(c) Whether the mitigation plan will not impair vested water rights;

(d) Whether the mitigation plan unreasonably or unnecessarily affects any recreation use or the natural stream environment;

(e) Whether the mitigation plan unreasonably or unnecessarily endangers aquatic wildlife;

(f) Whether the mitigation plan unreasonably or unnecessarily diminishes the natural channel's ability to conduct high flows; and

(c) Compliance inspections: based on staff time at the full cost of the hourly rate, including salary, benefits, overhead and other directly related costs.

(d) Collection costs: actual collection costs.

(7) The Division may report the total amount of administrative fines and/or administrative costs assessed to consumer reporting agencies and pursue collection as provided by Utah law.

(8) Any monies collected under Utah Code Ann. Section 73-2-26 and these rules shall be deposited into the General Fund.

R655-14-13. Replacement and Mitigation.

(1) In addition to administrative fines and costs, the Presiding Officer, in accordance with Utah Code Ann. Sections 73-2-1, 73-2-25 and 73-2-26 and these rules, may order the respondent to mitigate damages caused by the violation and/or replace up to 200 percent of the water unlawfully taken.

(2) The Presiding Officer may require actual replacement of water after:

(a) a respondent fails to request judicial review of a final order issued under Utah Code Ann. Section 73-2-25; or

(b) the completion of judicial review, including any appeals.

(3) Pursuant to Utah Code Ann. Section 73-2-26, the Presiding Officer shall consider, before ordering replacement of water, the following factors:

(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 respondent attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(4) The Presiding Officer may order the respondent to submit a mitigation plan to replace groundwater or surface water, which shall be submitted in writing and contain the following information:

(a) The name and mailing address of the respondent or persons submitting the plan;

(b) The case number the Division assigned to the IO which is the basis of the mitigation plan;

(c) Identification of the water rights or property for which the mitigation plan is proposed;

(6) A respondent who fails to timely contest an IO waives any right of reconsideration of the Final Judgment and Order per Utah Admin. Code R655-14-25.

R655-14-12. Assessment of Administrative Penalties and Administrative Costs.

(1) Pursuant to Utah Code Ann. Sections 73-2-1, 73-2-25, and 26, and these rules, the Presiding Officer, may assess administrative penalties and administrative costs for any violation of the Water and Irrigation Code as set forth in Utah Code Ann. Sections 73-1-1 through 73-5a et seq. Such penalties and costs may be assessed either before or after a hearing.

(2) No penalty shall exceed the maximum penalty allowed by State law for the violation(s). The maximum administrative penalty that the Presiding Officer has authority to impose is determined by reference to the civil penalty provision of Utah Code Ann. Section 73-2-26(1) as may be amended.

(3) Each day which the violation is repeated, continued or remains in place, constitutes a separate violation. The Presiding Officer may assess an administrative penalty, not to exceed five thousand dollars (\$5,000) for each knowing violation or one thousand dollars (\$1,000) for each unknowing violation.

(4) The penalty imposed shall begin on the first day the violation occurred, and continues to accrue through and including the day the Notice of Violation, Cease and Desist Order, or Final Judgment and Order is issued until compliance is achieved.

(5) The amount of the penalty shall be calculated based on:

(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 respondent subject to fine or replacement attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(6) Administrative costs, interest, late payment charges, costs of compliance inspections, and collection costs may be assessed in addition to the administrative penalty. These include:

(a) Administrative costs: Time spent by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the each employee's hourly rate, including salary, benefits, overhead and other directly related costs.

(b) Late payment charges: due at the monthly percentage rate assessed by the Utah Division of Finance, Office of Debt Collections.

activities not pertinent to the violation, the Presiding Officer may reduce that portion of the initial reimbursement penalty accordingly.

(iii) Pursuit of an enforcement action after issuance of the IO will continue to require the expenditure of varying amounts of staff time and may require acquisition and analysis of special data or information. Such costs may be added to the initial reimbursement requirement, specifically including all costs incurred that are unique to the particular enforcement action under consideration.

(e) Mitigating Factors: Other factors which the Presiding Officer may consider in amendment of initial penalties for incorporation into a Final Order or Consent Order may include, as appropriate:

(i) Ability to pay: This factor will be considered only if raised by a Respondent and only if the Respondent provides all necessary information to evaluate the claim. The burden to demonstrate inability to pay rests solely on the Respondent. The Presiding Officer shall disregard this factor if a Respondent fails to provide sufficient or persuasive financial information.

If it is determined that a Respondent cannot afford the initial administrative fine or other initial penalty prescribed by this rule without suffering financial bankruptcy, or if it is determined that payment of all or a portion of the monetary fines or penalties will preclude the Respondent from achieving compliance or from carrying out remedial measures which are deemed more important than the deterrent effect of the administrative penalties, the following options may be considered by the Presiding Officer:

(A) A delayed payment schedule;

(B) An installment payment plan with a reasonable rate of interest; or

(C) A direct reduction of the initial administrative fines and/or penalties, but only as a last recourse.

R655-14-15. Procedures for Commencing an Adjudicative Enforcement Action.

(1) The procedures for water enforcement adjudicative proceedings are as follows:

(a) In proceedings initiated by a IO, the Presiding Officer shall issue a default order unless the respondent does one of the following within fourteen (14) days in response to service of the notice:

(i) Ceases the violation and pays the administrative penalty and cost in full; or,

(ii) Files with the Division a proper written response within the fourteen (14) day time period but waives a hearing and submits its case upon the record. Submission of a case without a hearing does not relieve the respondent

(6) A respondent who fails to timely contest an IO waives any right of reconsideration of the Final Judgment and Order per Utah Admin. Code R655-14-25.

R655-14-12. Assessment of Administrative Penalties and Administrative Costs.

(1) Pursuant to Utah Code Ann. Sections 73-2-1, 73-2-25, and 26, and these rules, the Presiding Officer, may assess administrative penalties and administrative costs for any violation of the Water and Irrigation Code as set forth in Utah Code Ann. Sections 73-1-1 through 73-5a et seq. Such penalties and costs may be assessed either before or after a hearing.

(2) No penalty shall exceed the maximum penalty allowed by State law for the violation(s). The maximum administrative penalty that the Presiding Officer has authority to impose is determined by reference to the civil penalty provision of Utah Code Ann. Section 73-2-26(1) as may be amended.

(3) Each day which the violation is repeated, continued or remains in place, constitutes a separate violation. The Presiding Officer may assess an administrative penalty, not to exceed five thousand dollars (\$5,000) for each knowing violation or one thousand dollars (\$1,000) for each unknowing violation.

(4) The penalty imposed shall begin on the first day the violation occurred, and continues to accrue through and including the day the Notice of Violation, Cease and Desist Order, or Final Judgment and Order is issued until compliance is achieved.

(5) The amount of the penalty shall be calculated based on:

(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 respondent subject to fine or replacement attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(6) Administrative costs, interest, late payment charges, costs of compliance inspections, and collection costs may be assessed in addition to the administrative penalty. These include:

(a) Administrative costs: Time spent by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the each employee's hourly rate, including salary, benefits, overhead and other directly related costs.

(b) Late payment charges: due at the monthly percentage rate assessed by the Utah Division of Finance, Office of Debt Collections.

(c) Compliance inspections: based on staff time at the full cost of the hourly rate, including salary, benefits, overhead and other directly related costs.

(d) Collection costs: actual collection costs.

(7) The Division may report the total amount of administrative fines and/or administrative costs assessed to consumer reporting agencies and pursue collection as provided by Utah law.

(8) Any monies collected under Utah Code Ann. Section 73-2-26 and these rules shall be deposited into the General Fund.

R655-14-13. Replacement and Mitigation.

(1) In addition to administrative fines and costs, the Presiding Officer, in accordance with Utah Code Ann. Sections 73-2-1, 73-2-25 and 73-2-26 and these rules, may order the respondent to mitigate damages caused by the violation and/or replace up to 200 percent of the water unlawfully taken.

(2) The Presiding Officer may require actual replacement of water after:

(a) a respondent fails to request judicial review of a final order issued under Utah Code Ann. Section 73-2-25; or

(b) the completion of judicial review, including any appeals.

(3) Pursuant to Utah Code Ann. Section 73-2-26, the Presiding Officer shall consider, before ordering replacement of water, the following factors:

(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 respondent attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(4) The Presiding Officer may order the respondent to submit a mitigation plan to replace groundwater or surface water, which shall be submitted in writing and contain the following information:

(a) The name and mailing address of the respondent or persons submitting the plan;

(b) The case number the Division assigned to the IO which is the basis of the mitigation plan;

(c) Identification of the water rights or property for which the mitigation plan is proposed;

- (d) A description of the mitigation plan; and
 - (e) Any information that assists the State Engineer in evaluating whether the proposed mitigation plan is acceptable.
- (5) If the mitigation plan is submitted for the purpose of replacing water, the factors the State Engineer may consider to determine if the plan is acceptable include, but are not limited to:
- (a) Whether the mitigation plan provides for the respondent to forgo use of a vested water right owned or leased by him until water is replaced to the Presiding Officer's satisfaction;
 - (b) The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan; and
 - (c) Whether the mitigation plan provides for monitoring and adjustment as necessary to protect vested water rights.
- (6) As provided in Utah Code Ann. Section 73-2-26, water replaced shall be taken from water that the respondent subject to the order requiring replacement would be entitled to use during the replacement period.
- (7) In accordance with Utah Code Ann. Section 73-2-26(5)(a), or any other statutory authority, the Division may record any order requiring water replacement in the office of the county recorder where the place of use or water right is located. Any subsequent transferee of such property shall be responsible for complying with the requirements of said order.
- (8) If the mitigation plan is submitted for the purpose of restoring a natural stream channel altered in violation of Section 73-3-29, the factors the State Engineer may consider to determine if the plan is sufficient include, but are not limited to:
- (a) Whether the mitigation plan provides for reasonable means of replacing natural vegetation injured by the unlawful stream channel alteration;
 - (b) Whether the mitigation plan provides for a reasonable means to restore the bed and bank of the natural stream channel to its condition prior to the alteration;
 - (c) Whether the mitigation plan will not impair vested water rights;
 - (d) Whether the mitigation plan unreasonably or unnecessarily affects any recreation use or the natural stream environment;
 - (e) Whether the mitigation plan unreasonably or unnecessarily endangers aquatic wildlife;
 - (f) Whether the mitigation plan unreasonably or unnecessarily diminishes the natural channel's ability to conduct high flows; and

(g) Whether the mitigation plan uses generally accepted and appropriate engineering methods.

R655-14-14. Procedures For Determining The Amounts of Administrative Penalties, Enforcement Costs and Water Replacement.

(1) For water rights violations per Utah Code Ann. Section 73-2-25(2)(a)(i) through (v), the following procedures shall be employed:

(a) Administrative Fines: This penalty shall be based primarily on the actual economic benefit estimated to result or potentially to result from the violation. The economic benefit may come in the form of a direct economic benefit as income derived directly from the unlawful activity and it may come in the form of avoided costs that would otherwise be incurred in order to comply with a specific statute, rule, notice or order from the State Engineer. The administrative fine assessment procedure used (direct economic benefit or avoided costs) will be that which produces the greater fine. In order to implement the punitive intent of this penalty, a multiplier is to be calculated and applied to the estimated actual direct economic benefit or avoided costs.

(i) "Direct Economic Benefit" Initial Administrative Fine Calculations. The initial administrative fine shall be calculated in the following manner:

(A) The daily economic benefit is the gross income that could potentially be realized from the violation (without regard for production costs, taxes, etc.) through a full period of beneficial use, divided by the number of days in the period of beneficial use.

(B) The daily administrative fine amount is the product of the daily economic benefit and the multiplier to be calculated as described in paragraph (ii) below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation to date of the IO.

(D) The total initial administrative fine will have a maximum value of four times the direct economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(ii) The multiplier for penalties based on direct economic benefit shall be calculated utilizing the following statutory considerations. (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in the calculations of the economic "benefit" and "injury.")

(A) Whether the violation was committed knowingly or unknowingly;

- (B) The economic injury to others;
 - (C) The length of time over which the violation has occurred;
- and
- (D) The violator's efforts to comply. The multiplier is the sum of the points calculated using the following table:

TABLE
DIRECT ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Length of violation	
Three (3) or more years of violation	1.00
More than one (1), but less than three (3) years of violation	0.75
One (1) year or less of violation	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(iii) "Avoided Cost Economic Benefit" Initial Administrative Fine Calculation: Because all enforcement activities for violations under Utah Code Ann. Section 73-2-25(2)(a)(iii) through (v), must statutorily result from violation of a prior notice or order, an economic benefit will often result from an avoided cost of compliance. Statute provides for a daily administrative fine with the day following the compliance date in the notice or order being counted as the first day of violation. The economic benefit and daily administrative fine for an "avoided cost economic benefit" shall be calculated in the following manner:

- (A) The economic benefit is equal to the estimated avoided costs of failing to implement specific actions required by a notice or order from the State Engineer.

(B) The daily administrative fine is initially calculated as the product of \$100.00 or 5.00% of the economic benefit, whichever is greater, and the multiplier to be calculated as described in paragraph (iv), below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation preceding the date of the IO.

(D) The total initial administrative fine will have a maximum value of three times the economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(iv) The statutory considerations applicable to producing the multiplier for an avoided cost economic benefit are: (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in calculations of the economic "benefit" and "injury.").

(A) Whether the violation was committed knowingly or unknowingly;

(B) The economic injury to others; and

(C) The violator's efforts to comply. The penalty multiplier is the sum of the points resulting from the following table:

TABLE
AVOIDED COST ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(b) Replacement of Water: This penalty will be initially calculated as 100% of the amount unlawfully taken times the multiplier previously calculated, but not to exceed 200% of that unlawfully taken. If replacement of water unlawfully taken is deemed not feasible, this penalty will not be further considered.

(c) Reimbursement of Enforcement Costs: This penalty will be initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the IO.

(2) For violations related to unlawful natural stream channel alteration or dam safety regulations per Utah Code Ann. Section 73-2-25(1)(a)(vi) through (vii), the following procedures shall be employed:

(a) Daily Administrative Fine: All enforcement activities for unlawful natural stream alteration or dam safety violations must statutorily result from violation of a prior notice or order. Statute provides for a daily administrative fine with the day following the compliance date in the notice/order being counted as the first day of violation. The calculated daily administrative fine would apply to violations continuing beyond the compliance date set forth in the notice or order. The economic benefit and daily administrative fine shall be calculated in the following manner:

(i) For stream alteration and dam safety violations, the economic benefit is typically equal to the avoided costs deriving from:

(A) Initiating an activity without the benefit of proper permitting and/or,

(B) Failing to implement specific actions required by a notice, order or permit from the State Engineer.

(ii) The daily administrative fine is initially calculated as \$100 or 5.00% of the economic benefit, whichever is greater, times the multiplier to be calculated as described in paragraph (iii), below, but not to exceed the statutory maximum (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation).

(iii) The penalty multiplier is calculated as the sum of the points resulting from the following tables:

TABLE
STREAM ALTERATION PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Natural stream environment harmed to significant levels not readily reversible by mitigation efforts	1.00
Natural stream environment harmed to moderate levels partially reversible by mitigation efforts	0.75
Natural stream environment harmed to minor levels readily reversible by mitigation efforts	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made no reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

DAM SAFETY PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) related to building, enlarging or substantially altering same without prior approval or authorization; OR	
2) addressing an existing unsafe condition	1.00
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) addressing a developing unsafe condition OR	
2) requiring monitoring or critical dam performance indicators; OR	
failure to prepare and file acceptable required operational documents, OR	
failure to comply with a notice or order for a low-hazard dam related to building, enlarging or substantially altering same without prior authorization	0.75
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam related to routine operation or maintenance activities, OR	
failure to comply with a notice or order for a low-hazard dam to address an existing or developing unsafe condition	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

(b) Reimbursement of Enforcement Costs is initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the Initial Order.

(3) Post-Initial Order penalty adjustments: Subsequent to issuance of the IO, the Presiding Officer may make adjustments to the initial administrative fine, the requirement for replacement of water unlawfully taken, requirements for mitigation

of the effects of unlawful natural stream channel alterations or violations of dam safety regulations, and/or the requirement for reimbursement of enforcement costs. Such adjustments may be based on one or more of the following considerations:

(a) Errors or Omissions in Calculation of the Initial Penalty: If the violator or Division can show by acceptable evidence or testimony that any fact used in calculation of the economic benefit or the penalty multiplier was in error, or that a significant fact or group of facts was omitted from consideration, the Presiding Officer shall recalculate the initial penalties taking consideration of the corrected or additional fact(s).

(b) Reduction in Penalty Multiplier: The penalty multiplier used in calculating the Initial Administrative Fine may be reduced according to the table shown below on the basis of the violator's efforts to comply after receiving the IO.

TABLE
PENALTY MULTIPLIER REDUCTION

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Violator's efforts to comply with the Initial Order	
Violator has made extraordinary efforts to successfully achieve full and prompt compliance with the IO.	1.00
Violator has made efforts to successfully achieve full and prompt compliance with the IO, but these efforts are not extraordinary	0.50
Violator has made efforts that achieve full compliance with the IO, but the efforts were neither extraordinary nor prompt	0.25
Violator has made no efforts to comply or has made efforts that fail to achieve full compliance with the IO	0.00

If the Presiding Officer determines that the penalty multiplier should be reduced according to the table above, the appropriate number of points will be subtracted from the penalty multiplier used in calculating the initial administrative penalty and the penalty will be re-calculated with the new multiplier.

(c) Failure to take reasonable and effective measures to achieve full and prompt compliance with the requirements of the IO will allow the daily administrative fines to continue to accrue as provided in rule at Utah Admin. Code R655-14-12(4) until full compliance is achieved.

(d) Adjustments to recovery of enforcement costs:

(ii) If the violator can show by acceptable evidence or testimony that any expense incurred by the Division and assessed for reimbursement resulted from

activities not pertinent to the violation, the Presiding Officer may reduce that portion of the initial reimbursement penalty accordingly.

(iii) Pursuit of an enforcement action after issuance of the IO will continue to require the expenditure of varying amounts of staff time and may require acquisition and analysis of special data or information. Such costs may be added to the initial reimbursement requirement, specifically including all costs incurred that are unique to the particular enforcement action under consideration.

(e) Mitigating Factors: Other factors which the Presiding Officer may consider in amendment of initial penalties for incorporation into a Final Order or Consent Order may include, as appropriate:

(i) Ability to pay: This factor will be considered only if raised by a Respondent and only if the Respondent provides all necessary information to evaluate the claim. The burden to demonstrate inability to pay rests solely on the Respondent. The Presiding Officer shall disregard this factor if a Respondent fails to provide sufficient or persuasive financial information.

If it is determined that a Respondent cannot afford the initial administrative fine or other initial penalty prescribed by this rule without suffering financial bankruptcy, or if it is determined that payment of all or a portion of the monetary fines or penalties will preclude the Respondent from achieving compliance or from carrying out remedial measures which are deemed more important than the deterrent effect of the administrative penalties, the following options may be considered by the Presiding Officer:

(A) A delayed payment schedule;

(B) An installment payment plan with a reasonable rate of interest; or

(C) A direct reduction of the initial administrative fines and/or penalties, but only as a last recourse.

R655-14-15. Procedures for Commencing an Adjudicative Enforcement Action.

(1) The procedures for water enforcement adjudicative proceedings are as follows:

(a) In proceedings initiated by a IO, the Presiding Officer shall issue a default order unless the respondent does one of the following within fourteen (14) days in response to service of the notice:

(i) Ceases the violation and pays the administrative penalty and cost in full; or,

(ii) Files with the Division a proper written response within the fourteen (14) day time period but waives a hearing and submits its case upon the record. Submission of a case without a hearing does not relieve the respondent

(6) A respondent who fails to timely contest an IO waives any right of reconsideration of the Final Judgment and Order per Utah Admin. Code R655-14-25.

R655-14-12. Assessment of Administrative Penalties and Administrative Costs.

(1) Pursuant to Utah Code Ann. Sections 73-2-1, 73-2-25, and 26, and these rules, the Presiding Officer, may assess administrative penalties and administrative costs for any violation of the Water and Irrigation Code as set forth in Utah Code Ann. Sections 73-1-1 through 73-5a et seq. Such penalties and costs may be assessed either before or after a hearing.

(2) No penalty shall exceed the maximum penalty allowed by State law for the violation(s). The maximum administrative penalty that the Presiding Officer has authority to impose is determined by reference to the civil penalty provision of Utah Code Ann. Section 73-2-26(1) as may be amended.

(3) Each day which the violation is repeated, continued or remains in place, constitutes a separate violation. The Presiding Officer may assess an administrative penalty, not to exceed five thousand dollars (\$5,000) for each knowing violation or one thousand dollars (\$1,000) for each unknowing violation.

(4) The penalty imposed shall begin on the first day the violation occurred, and continues to accrue through and including the day the Notice of Violation, Cease and Desist Order, or Final Judgment and Order is issued until compliance is achieved.

(5) The amount of the penalty shall be calculated based on:

(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 respondent subject to fine or replacement attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(6) Administrative costs, interest, late payment charges, costs of compliance inspections, and collection costs may be assessed in addition to the administrative penalty. These include:

(a) Administrative costs: Time spent by water enforcement staff, supervisors and the Attorney General's Office, at the full cost of the each employee's hourly rate, including salary, benefits, overhead and other directly related costs.

(b) Late payment charges: due at the monthly percentage rate assessed by the Utah Division of Finance, Office of Debt Collections.

(c) Compliance inspections: based on staff time at the full cost of the hourly rate, including salary, benefits, overhead and other directly related costs.

(d) Collection costs: actual collection costs.

(7) The Division may report the total amount of administrative fines and/or administrative costs assessed to consumer reporting agencies and pursue collection as provided by Utah law.

(8) Any monies collected under Utah Code Ann. Section 73-2-26 and these rules shall be deposited into the General Fund.

R655-14-13. Replacement and Mitigation.

(1) In addition to administrative fines and costs, the Presiding Officer, in accordance with Utah Code Ann. Sections 73-2-1, 73-2-25 and 73-2-26 and these rules, may order the respondent to mitigate damages caused by the violation and/or replace up to 200 percent of the water unlawfully taken.

(2) The Presiding Officer may require actual replacement of water after:

(a) a respondent fails to request judicial review of a final order issued under Utah Code Ann. Section 73-2-25; or

(b) the completion of judicial review, including any appeals.

(3) Pursuant to Utah Code Ann. Section 73-2-26, the Presiding Officer shall consider, before ordering replacement of water, the following factors:

(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 respondent attempted to comply with the State Engineer's orders; and

(d) The respondent's economic benefit from the violation.

(4) The Presiding Officer may order the respondent to submit a mitigation plan to replace groundwater or surface water, which shall be submitted in writing and contain the following information:

(a) The name and mailing address of the respondent or persons submitting the plan;

(b) The case number the Division assigned to the IO which is the basis of the mitigation plan;

(c) Identification of the water rights or property for which the mitigation plan is proposed;

- (d) A description of the mitigation plan; and
 - (e) Any information that assists the State Engineer in evaluating whether the proposed mitigation plan is acceptable.
- (5) If the mitigation plan is submitted for the purpose of replacing water, the factors the State Engineer may consider to determine if the plan is acceptable include, but are not limited to:
- (a) Whether the mitigation plan provides for the respondent to forgo use of a vested water right owned or leased by him until water is replaced to the Presiding Officer's satisfaction;
 - (b) The reliability of the source of replacement water over the term in which it is proposed to be used under the mitigation plan; and
 - (c) Whether the mitigation plan provides for monitoring and adjustment as necessary to protect vested water rights.
- (6) As provided in Utah Code Ann. Section 73-2-26, water replaced shall be taken from water that the respondent subject to the order requiring replacement would be entitled to use during the replacement period.
- (7) In accordance with Utah Code Ann. Section 73-2-26(5)(a), or any other statutory authority, the Division may record any order requiring water replacement in the office of the county recorder where the place of use or water right is located. Any subsequent transferee of such property shall be responsible for complying with the requirements of said order.
- (8) If the mitigation plan is submitted for the purpose of restoring a natural stream channel altered in violation of Section 73-3-29, the factors the State Engineer may consider to determine if the plan is sufficient include, but are not limited to:
- (a) Whether the mitigation plan provides for reasonable means of replacing natural vegetation injured by the unlawful stream channel alteration;
 - (b) Whether the mitigation plan provides for a reasonable means to restore the bed and bank of the natural stream channel to its condition prior to the alteration;
 - (c) Whether the mitigation plan will not impair vested water rights;
 - (d) Whether the mitigation plan unreasonably or unnecessarily affects any recreation use or the natural stream environment;
 - (e) Whether the mitigation plan unreasonably or unnecessarily endangers aquatic wildlife;
 - (f) Whether the mitigation plan unreasonably or unnecessarily diminishes the natural channel's ability to conduct high flows; and

(g) Whether the mitigation plan uses generally accepted and appropriate engineering methods.

R655-14-14. Procedures For Determining The Amounts of Administrative Penalties, Enforcement Costs and Water Replacement.

(1) For water rights violations per Utah Code Ann. Section 73-2-25(2)(a)(i) through (v), the following procedures shall be employed:

(a) Administrative Fines: This penalty shall be based primarily on the actual economic benefit estimated to result or potentially to result from the violation. The economic benefit may come in the form of a direct economic benefit as income derived directly from the unlawful activity and it may come in the form of avoided costs that would otherwise be incurred in order to comply with a specific statute, rule, notice or order from the State Engineer. The administrative fine assessment procedure used (direct economic benefit or avoided costs) will be that which produces the greater fine. In order to implement the punitive intent of this penalty, a multiplier is to be calculated and applied to the estimated actual direct economic benefit or avoided costs.

(i) "Direct Economic Benefit" Initial Administrative Fine Calculations. The initial administrative fine shall be calculated in the following manner:

(A) The daily economic benefit is the gross income that could potentially be realized from the violation (without regard for production costs, taxes, etc.) through a full period of beneficial use, divided by the number of days in the period of beneficial use.

(B) The daily administrative fine amount is the product of the daily economic benefit and the multiplier to be calculated as described in paragraph (ii) below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation to date of the IO.

(D) The total initial administrative fine will have a maximum value of four times the direct economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(ii) The multiplier for penalties based on direct economic benefit shall be calculated utilizing the following statutory considerations. (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in the calculations of the economic "benefit" and "injury.")

(A) Whether the violation was committed knowingly or unknowingly;

- (B) The economic injury to others;
 - (C) The length of time over which the violation has occurred;
- and
- (D) The violator's efforts to comply. The multiplier is the sum of the points calculated using the following table:

TABLE
DIRECT ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Length of violation	
Three (3) or more years of violation	1.00
More than one (1), but less than three (3) years of violation	0.75
One (1) year or less of violation	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(iii) "Avoided Cost Economic Benefit" Initial Administrative Fine Calculation: Because all enforcement activities for violations under Utah Code Ann. Section 73-2-25(2)(a)(iii) through (v), must statutorily result from violation of a prior notice or order, an economic benefit will often result from an avoided cost of compliance. Statute provides for a daily administrative fine with the day following the compliance date in the notice or order being counted as the first day of violation. The economic benefit and daily administrative fine for an "avoided cost economic benefit" shall be calculated in the following manner:

- (A) The economic benefit is equal to the estimated avoided costs of failing to implement specific actions required by a notice or order from the State Engineer.

(B) The daily administrative fine is initially calculated as the product of \$100.00 or 5.00% of the economic benefit, whichever is greater, and the multiplier to be calculated as described in paragraph (iv), below.

(C) The initial administrative fine shall be the product of the daily administrative fine and the number of days of continuing violation preceding the date of the IO.

(D) The total initial administrative fine will have a maximum value of three times the economic benefit or the statutory maximum fine (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation), whichever is less.

(iv) The statutory considerations applicable to producing the multiplier for an avoided cost economic benefit are: (Statutorily required considerations relative to the quantity of water taken and the gravity and impact of the violation are accommodated in calculations of the economic "benefit" and "injury.").

(A) Whether the violation was committed knowingly or unknowingly;

(B) The economic injury to others; and

(C) The violator's efforts to comply. The penalty multiplier is the sum of the points resulting from the following table:

TABLE
AVOIDED COST ECONOMIC BENEFIT PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Economic injury to others	
greater than \$15,000	1.00
\$10,000 to \$14,000	0.75
less than \$9,999 or injury is not measurable or there is no evidence others suffered economic injury	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited but ineffective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator fully complied prior to issuance of Initial Order	0.00

(b) Replacement of Water: This penalty will be initially calculated as 100% of the amount unlawfully taken times the multiplier previously calculated, but not to exceed 200% of that unlawfully taken. If replacement of water unlawfully taken is deemed not feasible, this penalty will not be further considered.

(c) Reimbursement of Enforcement Costs: This penalty will be initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the IO.

(2) For violations related to unlawful natural stream channel alteration or dam safety regulations per Utah Code Ann. Section 73-2-25(1)(a)(vi) through (vii), the following procedures shall be employed:

(a) Daily Administrative Fine: All enforcement activities for unlawful natural stream alteration or dam safety violations must statutorily result from violation of a prior notice or order. Statute provides for a daily administrative fine with the day following the compliance date in the notice/order being counted as the first day of violation. The calculated daily administrative fine would apply to violations continuing beyond the compliance date set forth in the notice or order. The economic benefit and daily administrative fine shall be calculated in the following manner:

(i) For stream alteration and dam safety violations, the economic benefit is typically equal to the avoided costs deriving from:

(A) Initiating an activity without the benefit of proper permitting and/or,

(B) Failing to implement specific actions required by a notice, order or permit from the State Engineer.

(ii) The daily administrative fine is initially calculated as \$100 or 5.00% of the economic benefit, whichever is greater, times the multiplier to be calculated as described in paragraph (iii), below, but not to exceed the statutory maximum (\$1,000 per day for an unknowing violation or \$5,000 per day for a knowing violation).

(iii) The penalty multiplier is calculated as the sum of the points resulting from the following tables:

TABLE
STREAM ALTERATION PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Natural stream environment harmed to significant levels not readily reversible by mitigation efforts	1.00
Natural stream environment harmed to moderate levels partially reversible by mitigation efforts	0.75
Natural stream environment harmed to minor levels . Readily reversible by mitigation efforts	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made no reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

DAM SAFETY PENALTY MULTIPLIER

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Knowing or unknowing violation	
Knowing	1.00
Unknowing	0.00
Gravity of violation	
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) related to building, enlarging or substantially altering same without prior approval or authorization; OR	
2) addressing an existing unsafe condition	1.00
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam:	
1) addressing a developing unsafe condition OR	
2) requiring monitoring or critical dam performance indicators; OR	
failure to prepare and file acceptable required operational documents, OR	
failure to comply with a notice or order for a low-hazard dam related to building, enlarging or substantially altering same without prior authorization	0.75
Failure to comply with a notice or order for a high-hazard or moderate-hazard dam related to routine operation or maintenance activities, OR	
failure to comply with a notice or order for a low-hazard dam to address an existing or developing unsafe condition	0.50
Violator's efforts to comply prior to Initial Order	
Violator has made no efforts to comply	1.00
Violator has made limited reasonable or effective efforts to comply	0.75
Violator has made reasonable and partially effective efforts to comply	0.50
Violator achieved full compliance prior to issuance of Initial Order	0.00

(b) Reimbursement of Enforcement Costs is initially based on a standard requiring 100% reimbursement of the State Engineer's enforcement costs to the date of the Initial Order.

(3) Post-Initial Order penalty adjustments: Subsequent to issuance of the IO, the Presiding Officer may make adjustments to the initial administrative fine, the requirement for replacement of water unlawfully taken, requirements for mitigation

of the effects of unlawful natural stream channel alterations or violations of dam safety regulations, and/or the requirement for reimbursement of enforcement costs. Such adjustments may be based on one or more of the following considerations:

(a) Errors or Omissions in Calculation of the Initial Penalty: If the violator or Division can show by acceptable evidence or testimony that any fact used in calculation of the economic benefit or the penalty multiplier was in error, or that a significant fact or group of facts was omitted from consideration, the Presiding Officer shall recalculate the initial penalties taking consideration of the corrected or additional fact(s).

(b) Reduction in Penalty Multiplier: The penalty multiplier used in calculating the Initial Administrative Fine may be reduced according to the table shown below on the basis of the violator's efforts to comply after receiving the IO.

TABLE
PENALTY MULTIPLIER REDUCTION

<u>CONSIDERATION / CRITERIA</u>	<u>MULTIPLIER POINTS</u>
Violator's efforts to comply with the Initial Order	
Violator has made extraordinary efforts to successfully achieve full and prompt compliance with the IO.	1.00
Violator has made efforts to successfully achieve full and prompt compliance with the IO, but these efforts are not extraordinary	0.50
Violator has made efforts that achieve full compliance with the IO, but the efforts were neither extraordinary nor prompt	0.25
Violator has made no efforts to comply or has made efforts that fail to achieve full compliance with the IO	0.00

If the Presiding Officer determines that the penalty multiplier should be reduced according to the table above, the appropriate number of points will be subtracted from the penalty multiplier used in calculating the initial administrative penalty and the penalty will be re-calculated with the new multiplier.

(c) Failure to take reasonable and effective measures to achieve full and prompt compliance with the requirements of the IO will allow the daily administrative fines to continue to accrue as provided in rule at Utah Admin. Code R655-14-12(4) until full compliance is achieved.

(d) Adjustments to recovery of enforcement costs:

(ii) If the violator can show by acceptable evidence or testimony that any expense incurred by the Division and assessed for reimbursement resulted from

activities not pertinent to the violation, the Presiding Officer may reduce that portion of the initial reimbursement penalty accordingly.

(iii) Pursuit of an enforcement action after issuance of the IO will continue to require the expenditure of varying amounts of staff time and may require acquisition and analysis of special data or information. Such costs may be added to the initial reimbursement requirement, specifically including all costs incurred that are unique to the particular enforcement action under consideration.

(e) Mitigating Factors: Other factors which the Presiding Officer may consider in amendment of initial penalties for incorporation into a Final Order or Consent Order may include, as appropriate:

(i) Ability to pay: This factor will be considered only if raised by a Respondent and only if the Respondent provides all necessary information to evaluate the claim. The burden to demonstrate inability to pay rests solely on the Respondent. The Presiding Officer shall disregard this factor if a Respondent fails to provide sufficient or persuasive financial information.

If it is determined that a Respondent cannot afford the initial administrative fine or other initial penalty prescribed by this rule without suffering financial bankruptcy, or if it is determined that payment of all or a portion of the monetary fines or penalties will preclude the Respondent from achieving compliance or from carrying out remedial measures which are deemed more important than the deterrent effect of the administrative penalties, the following options may be considered by the Presiding Officer:

(A) A delayed payment schedule;

(B) An installment payment plan with a reasonable rate of interest; or

(C) A direct reduction of the initial administrative fines and/or penalties, but only as a last recourse.

R655-14-15. Procedures for Commencing an Adjudicative Enforcement Action.

(1) The procedures for water enforcement adjudicative proceedings are as follows:

(a) In proceedings initiated by a IO, the Presiding Officer shall issue a default order unless the respondent does one of the following within fourteen (14) days in response to service of the notice:

(i) Ceases the violation and pays the administrative penalty and cost in full; or,

(ii) Files with the Division a proper written response within the fourteen (14) day time period but waives a hearing and submits its case upon the record. Submission of a case without a hearing does not relieve the respondent